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THE  
FEDERAL REPORTER.

VOLUME 72.

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CASES ARGUED AND DETERMINED  
IN THE  
CIRCUIT COURTS OF APPEALS AND CIRCUIT  
AND DISTRICT COURTS OF THE  
UNITED STATES.

PERMANENT EDITION.

MARCH—MAY, 1896.



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FEDERAL REPORTER, VOLUME 72.

JUDGES

OF THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE  
CIRCUIT AND DISTRICT COURTS.

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<sup>1</sup>Commissioned Dec. 9, 1895.

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HON. WILLIAM B. GILBERT, CIRCUIT JUDGE.

<sup>2</sup>Commissioned January 21, 1895.

<sup>3</sup>Commissioned March 1, 1895.

<sup>4</sup>Commissioned May 17, 1895. Confirmed and re-commissioned December 9, 1895.

<sup>5</sup>Commissioned February 4, 1896.

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HON. JAMES H. BEATTY, DISTRICT JUDGE, IDAHO.

HON. ARTHUR K. DELANEY, DISTRICT JUDGE, ALASKA.<sup>7</sup>

<sup>6</sup>Commissioned March 1, 1895.

<sup>7</sup>Commissioned Nov. 8, 1895. Confirmed and re-commissioned January 15, 1896.

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# CASES

## ARGUED AND DETERMINED

IN THE

### UNITED STATES CIRCUIT COURTS OF APPEALS AND THE CIRCUIT AND DISTRICT COURTS.

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LOUISVILLE TRUST CO. v. STOCKTON.

(Circuit Court of Appeals, Fifth Circuit. January 21, 1896.)

No. 445.

**1. ERROR TO CIRCUIT COURT OF APPEALS—TIME OF SUING OUT WRIT.**

The six months within which a writ of error to the circuit court of appeals must be sued out does not begin to run while a motion for a new trial is pending. *Railway Co. v. Murphy*, 4 Sup. Ct. 497, 111 U. S. 488, applied.

**2. SAME—ALLOWANCE OF WRIT.**

A formal petition for the allowance of a writ of error is not requisite to the vesting of jurisdiction in the circuit court of appeals. Therefore, where the writ was issued by the clerk of a circuit court without the filing of any petition therefor, or the allowance thereof by any judge, but the judge subsequently, and within the time limited, signed a bill of exceptions and a citation, *held*, that this was sufficient to give jurisdiction to the appellate court.

In Error to the Circuit Court of the United States for the Southern District of Florida.

H. Bisbee and C. D. Rhinehart, for plaintiff in error.

A. W. Cockrell, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and BOARMAN, District Judge.

PARDEE, Circuit Judge. The defendant in error moves to dismiss the writ of error in this case upon the following grounds: (1) No petition for a writ of error was made or filed herein. (2) No writ of error was allowed herein, on petition or otherwise. (3) The writ of error was issued by the clerk of the circuit court in which judgment sought to be reviewed was rendered, without a petition filed therefor, and without an allowance thereof by a judge of said circuit court, or by a judge of the circuit court of appeals of the Fifth circuit, authorized by law to allow such writ of error. (4) The only action taken in respect of, or in reference to, the appeal based on the said writ of error herein, by a judge authorized by law to allow

writs of error, was the signing of the bill of exceptions herein, on the 14th day of November, 1895, and the signing of citation herein, by Hon. James W. Locke, a judge of the said circuit court of the Southern district of Florida, on the 9th day of November, 1895, more than six months after the entry of the judgment herein sought to be reviewed, which said judgment was entered on the 1st day of May, 1895.

We have examined the record and considered the argument of counsel. The judgment in the court below was rendered on the 1st day of May, 1895, and thereupon a motion for a new trial was entered, which was overruled on the 2d day of June, 1895. The citation directing the defendant in error to answer in this court was signed and issued on the 9th day of November, 1895, more than six months after the entry of the judgment sought to be reviewed, but within six months from the date when the motion for a new trial was overruled. The time limited for suing out a writ of error does not begin to run while there is a motion for a new trial pending. *Railway Co. v. Murphy*, 111 U. S. 488, 4 Sup. Ct. 497. A formal petition for the allowance of a writ of error, in order to vest the appellate court with jurisdiction, is not necessary. *Davidson v. Lanier*, 4 Wall. 447; *Ex parte Virginia Com'rs*, 112 U. S. 177, 5 Sup. Ct. 421. Even in case of appeal, the approval of the bond and signing of citation has been held to be a sufficient allowance of the appeal. *Brandies v. Cochrane*, 105 U. S. 262, and cases there cited. In the instant case, the judge of the circuit court signed the citation, and accepted the bond tendered. It seems very clear that the motion to dismiss this writ of error on the grounds stated should be overruled, and it is so ordered.

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GOLDEN v. BRUNING et al.

(Circuit Court, D. Indiana. February 12, 1896.)

No. 9,280.

REMOVAL OF CAUSES—SEPARABLE CONTROVERSY.

G., as administrator of J. F. B., deceased, brought a suit in a court of the state of Indiana against W. H. B., a citizen of New York, and C., a citizen of Indiana, for an accounting of the affairs of a partnership composed of J. F. B. and W. H. B., the assets of which were alleged to consist in part of real estate purchased for partnership purposes. It was averred that such real estate was originally conveyed to C., who held it in trust for the firm for a time, and then conveyed it to her mother, who held it in trust for the firm until she died, intestate, leaving C., J. F. B., and W. H. B. as her heirs; and that, after her death, C. and J. F. B. conveyed their interests to W. H. B., in trust for the firm; but that both C. and W. H. B., respectively, claimed the land as their individual property, C. claiming that the deeds made by her were procured by the fraud of W. H. B. Held, that C. was a necessary party to the suit, and there was no separable controversy between the plaintiff and W. H. B. which could be removed to the federal court.

McCullough & Spaan, for complainant.

Smith & Korbly and Miller, Winter & Elam, for defendants.

BAKER, District Judge. On June 27, 1895, the complainant, John M. Golden, administrator of the estate of John F. Bruning, deceased, filed his bill in equity in the circuit court of the county of Jefferson, in the state of Indiana, for an accounting and settlement of the affairs of a partnership alleged to have existed between the decedent, in his lifetime, and William H. Bruning, under the firm name and style of John F. Bruning & Co. Clara Copeland and her husband, William M. Copeland, are made parties defendant with William H. Bruning, to reach the entire assets of the firm, and to have a full and final accounting of the partnership affairs. The complaint avers that, at the time of the death of John F. Bruning, the firm, which had been engaged in the mercantile business, was the owner of a large amount of assets consisting of personal property and choses in action, of the value of \$150,000, and of two certain parcels of real estate, of the aggregate value of \$30,000. It is further averred that one parcel of the real estate, of the value of \$20,000, was purchased by the firm with partnership assets for the use of the firm in the conduct of its business, and that it was so used from the time of its purchase until the termination of the partnership, and has continued to be so used by William H. Bruning, as surviving partner, ever since; that, at the time said real estate was so purchased, it was conveyed to Clara Copeland, in trust for the use and benefit of the firm; that she continued to hold the title thereto in trust as aforesaid until February 26, 1885, when, by deed, she conveyed the same to her mother, Catherine A. Bruning, who held the same in trust for the firm until November 21, 1889, when she died intestate, at Jefferson county, Ind., leaving, as her only heirs, John F. Bruning, since deceased, William H. Bruning, and Clara Copeland; that, since her death, John F. Bruning and Clara Copeland have, respectively, conveyed any interest they might have in said real estate to William H. Bruning, in trust to hold the same for the use and benefit of the partnership; that Clara Copeland claims she is the individual owner in fee simple of said real estate, under the deed executed to her therefor, as sole grantee therein, and that, by the fraud and coercion of William H. Bruning, the conveyance from her to her mother was procured, and that likewise, by his fraud and coercion, the respective deeds from her and her father were procured, and therefore Clara Copeland and her husband are made parties defendant, that she may answer as to her interest in said real estate. It is further averred that William H. Bruning claims to be the sole owner of all of said partnership assets and property, and has converted the same to his own use. The defendant William H. Bruning, who is a citizen of the state of New York, filed his petition in the state court to procure the removal of the suit into this court, on the ground that Clara Copeland, who is a citizen of the state of Indiana, was joined as a party defendant in bad faith, and to prevent a removal, and on the further ground that the cause of action is separable, and can be fully tried and determined without her presence as a party defendant. The cause having been removed, the complainant now moves the court to remand the same to the circuit court of Jefferson county, Ind.

The averments in the petition that Clara Copeland was wrongfully joined as a defendant, to avoid a removal, can be of no avail in this court, upon a motion to remand, until they are proved; and, so far as the record before me discloses, the proof to support such claim is wholly insufficient, and, besides, it is clearly contradicted by opposing proof. The removal, therefore, cannot be supported on the ground that she was wrongfully made a defendant to retain the case in the state court.

It is not easy to deduce from the decisions a general rule on the subject of parties in equity which is concise, and yet sufficiently comprehensive to meet every case. While courts of law require no more than that the persons directly and immediately interested in the subject-matter of the action, and whose interests are of a strictly legal nature, should be parties to it, "it is a general rule in equity that all persons materially interested, either legally or beneficially, in the subject-matter of a suit, are to be made parties to it, either as plaintiffs or as defendants, so that there may be a complete decree which shall bind them all." Story, Eq. Pl. (10th Ed.) § 72; Gregory v. Stetson, 133 U. S. 586, 10 Sup. Ct. 422; Sedgwick v. Cleveland, 7 Paige, 287. "The general rule, undoubtedly, is that all persons materially interested in the result of a suit ought to be made parties, so that the court may finally determine the entire controversy, and do complete justice by adjudging all the rights involved in it." Vetterlein v. Barnes, 124 U. S. 169, 171, 172, 8 Sup. Ct. 441; Story v. Livingston, 13 Pet. 359, 375; Shields v. Barrow, 17 How. 130, 139. It is not indispensable that all the parties should have an interest in all the matters contained in the suit; it will be sufficient if each party has an interest in some material matters in the suit, and they are connected with the others. Brown v. Safe-Deposit Co., 128 U. S. 403, 412, 9 Sup. Ct. 127; Addison v. Walker, 4 Younge & C. Exch. 442; Parr v. Attorney General, 8 Clark & F. 409, 435; Worthy v. Johnson, 8 Ga. 236. It is at once apparent that the only way in which the complainant, as administrator of the estate of the decedent, can reach all of the partnership assets and have a complete and final accounting and settlement thereof, is by a suit in equity to which all persons claiming an adverse interest in any material part of such partnership assets are made parties defendant. In a suit to which William H. Bruning alone was made a party defendant, the question whether the real estate claimed by him as well as by Clara Copeland is partnership assets could not be finally and completely determined. In reference to this real estate, the claim of the complainant against each of the defendants is the same, and that claim is that the real estate in question constitutes a part of the partnership assets of the late firm of John F. Bruning & Co. That question cannot be fully and finally determined in a suit to which William H. Bruning alone is a party defendant. That part of the controversy involved in the suit in which Clara Copeland asserts that the real estate in question is not partnership assets, but is her individual property, would be left wholly undetermined, and its settlement would require a suit between her and the complainant, involving the same question as that involved in the suit

between William H. Bruning and the complainant, namely, is said real estate partnership property?

In *Torrence v. Shedd*, 144 U. S. 527, 530, 12 Sup. Ct. 726, the supreme court said:

"But, in order to justify such removal on the ground of a separate controversy between citizens of different states, there must, by the very terms of the statute, be a controversy which can be fully determined as between them; and, by the settled construction of this section, the whole subject-matter of the suit must be capable of being finally determined as between them, and complete relief afforded as to the separate cause of action, without the presence of others originally made parties to the suit."

And the court further said:

"A defendant has no right to say that an action shall be several which a plaintiff elects to be joint. A separate defense may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his own suit to final determination in his own way. The cause of action is the subject-matter of the controversy, and that is for all the purposes of the suit, whatever the plaintiff declares it to be in his pleadings."

One of the material matters in controversy is whether or not the real estate in question is a partnership asset, as alleged in the complainant's bill of complaint. It is averred that both defendants deny this, and this denial presents a controversy which the complainant cannot have fully determined without the presence of both of these adverse claimants, although they controvert his right thereto on different grounds. When the statute speaks of a separate controversy between citizens of different states which can be fully determined as between them, it must mean that the whole cause of action disclosed in the pleadings of the plaintiff can be fully determined as between him and the removing party, without the presence of other parties. It does not contemplate the splitting up into different parts of a cause of action which the plaintiff is entitled to prosecute as a single suit, simply because a part of the cause might be fully determined as between the parties before the court, leaving the other part to be determined in another independent suit. In *re Jarnecke Ditch*, 69 Fed. 161, and cases there cited.

Testing the complaint by these principles, it follows that a material part of the subject-matter in controversy involves only a single cause of action against both defendants. The case of *Shainwald v. Lewis*, 108 U. S. 158, 2 Sup. Ct. 385, is much in point.

Remanded, at the cost of the petitioner.

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COPELAND v. BRUNING.

(Circuit Court, D. Indiana. February 12, 1896.)

No. 9.043.

**FEDERAL COURTS—JURISDICTION—SUIT TO DETERMINE VALIDITY OF WILL.**

The federal courts have no jurisdiction, either original or upon removal from a state court, of a suit instituted to determine the validity of a will, as a preliminary step in determining whether its probate should be granted or denied.



McCullough & Spaan, for complainant.

Smith & Korbly and Miller, Winter & Elam, for defendant.

BAKER, District Judge. The petitioner for removal, William H. Bruning, presented for probate in the office of the clerk of the circuit court of Jefferson county, Ind., as provided for in the statutes of this state, the alleged last will and testament of John F. Bruning, who died in said county, testate. Rev. St. 1894, §§ 2754-2758, inclusive (Rev. St. 1881, §§ 2584-2588). Objection to the probate of the will was filed by Clara Copeland, one of the two children and heirs at law of the decedent, as provided for in section 2765, Rev. St. 1894 (section 2595, Rev. St. 1881). Thereafter she filed a complaint to contest the validity of her father's will, as provided for in sections 2766-2768, Rev. St. 1894 (sections 2596-2598, Rev. St. 1881), making William H. Bruning, who is one of the two children and heirs at law of the decedent, and who is a devisee under the will which he had previously propounded for probate, the sole party defendant. The complaint sets forth the statutory grounds of contest. Process was issued upon this complaint against William H. Bruning, and service was had by copy. He thereupon entered a special appearance in the circuit court of Jefferson county, Ind., and filed his petition, accompanied by a proper bond, praying for the removal of said cause from the state court into this court. The state court refused to order the removal. The defendant thereupon procured a transcript of the record, and filed the same in this court at the proper time. The plaintiff, Clara Copeland, has interposed a motion to remand the cause to the state court, upon two grounds: First, because Nicholas Horuff, a citizen of Indiana, is shown by the complaint to be a necessary party defendant thereto, although not named as such; and, secondly, because a proceeding to contest the validity of a will which has not been admitted to probate is not a suit at common law or in equity, but is a proceeding to determine whether the will is valid, and entitled to probate, and therefore it is not removable. The view which the court entertains in respect to the second question renders any expression of opinion upon the first immaterial.

The question for decision is this: When a will has been propounded for probate, and a caveat has been put in against it, and a contestatio litis has been raised, and a controversy touching the validity of the will has been instituted inter partes, does the act of congress of 1887, as amended in 1888, authorize the removal of the cause for trial into a federal court, where the parties plaintiff and defendant are citizens of different states? The act of congress authorizes the removal from a state court into a federal court of such causes only as might have been originally brought in the latter court. In this respect it differs from the acts of 1866 and 1875. The present suit can settle nothing but the validity or invalidity of the will as a preliminary step in determining whether its probate should be granted or denied. A federal

court cannot admit it to probate, nor can it take upon itself the administration of the testator's estate. In my opinion, the federal courts have no jurisdiction to try a suit which is prosecuted solely for contesting the validity of a will. This view seems to be sustained by the authorities.

The case of *Gaines v. Fuentes*, 92 U. S. 10, is in point on the question. In that case a suit had been brought in the district court for the parish of Orleans to settle the title to lands. The will sought to be set aside was relied upon as a muniment of title, and, as it had been admitted to probate, it could only be assailed by a suit to set aside the probate and to declare the will invalid. In the prevailing opinion, the court said:

"The action cannot be treated as properly instituted for the revocation of the probate, but must be treated as brought against the devisee by strangers to the estate to annul the will as a muniment of title, and to restrain the enforcement of the decree by which its validity was established, so far as it affects their property. It is, in fact, an action between parties; and the question for determination is whether the federal court can take jurisdiction of an action brought for the object mentioned between citizens of different states, upon its removal from a state court."

The grounds upon which the revocation of the will and the annulment of the decree of probate were asked were the falsity and insufficiency of the testimony on which the will was admitted to probate, and the status of the plaintiff in error incapacitating her to inherit or take by last will from the decedent. This case simply decides that strangers to the estate may dispute the validity of a will and its probate on the grounds of fraud and the incapacity of the devisee to take by will, whenever in a suit, *inter partes*, involving the title to land, such will and its probate are claimed as muniments of title. Such a suit is an ordinary proceeding in equity, whereby a stranger to a deed or a judgment seeks to impeach it as a muniment of title, on the ground that it casts a cloud upon his title or endangers his estate. Such a suit is not a proceeding to establish a will.

As was further said in the prevailing opinion:

"The suit in the parish court is not a proceeding to establish a will, but to annul it as a muniment of title, and to limit the operation of the decree admitting it to probate. It is, in all essential particulars, a suit for equitable relief,—to cancel an instrument alleged to be void, and to restrain the enforcement of a decree alleged to have been obtained upon false and insufficient testimony."

The court conceded that the courts of the United States possessed no probate jurisdiction, and had no authority to determine a cause for the establishment of a will. It said:

"There are, it is true, in several decisions of this court, expressions of opinion that the federal courts have no probate jurisdiction, referring particularly to the establishment of wills; and such is, undoubtedly, the case under the existing legislation of congress."

This case, in my opinion, is an authority against the right of removal, instead of supporting that right, as contended for by counsel for the petitioner; and such is the view taken of it by Mr. Justice Swayne, who participated in the decision of that case.

In *Re Frazer*, Fed. Cas. No. 5,068, which was a motion to remand to the circuit court of the state a case appealed to it from the probate court, in proceedings to probate a will, Mr. Justice Swavne, presiding in the circuit court for the Eastern district of Michigan, said:

"A federal court has no jurisdiction in cases of proceedings to establish a will. In *Gaines v. Fuentes*, 92 U. S. 10, the supreme court said: 'There are, it is true, in several of the decisions of this court, expressions of opinion that federal courts have no probate jurisdiction, referring particularly to the establishment of wills; and such is, undoubtedly, the case under the existing legislation of congress.' By this ruling I am bound, and it is conclusive of the case. See, also, *Broderick's Will*, 21 Wall. 504; *Du Vivier v. Hopkins*, 116 Mass. 125; *Youley v. Lavender*, 21 Wall. 276; *Tarver v. Tarver*, 9 Pet. 174; *Fouvergne v. New Orleans*, 18 How. 470; *Adams v. Preston*, 22 How. 473, 478."

The case of *Ellis v. Davis*, 109 U. S. 485, 497, 3 Sup. Ct. 327, was a suit in equity by the appellants, as heirs at law and next of kin, to recover possession of real estate, part of which was devised to the appellee by Sarah Ann Dorsey, by will duly probated in the state of Louisiana, and part of which was situated in Mississippi, and was given to him by Mrs. Dorsey in her lifetime; and to set aside the will as made under undue influence, and the conveyance as obtained by the exercise of undue and improper influence, and to have an accounting of rents and profits. A demurrer to the bill was sustained, and the bill dismissed; and, on appeal, the decree of the court below was affirmed. The facts of this case did not present for decision the question whether or not the federal courts have original jurisdiction of proceedings to establish a will upon a contest to determine its validity, and whether or not it ought to be admitted to probate. The court, however, said:

"The original probate, of course, is mere matter of state regulation, and depends entirely upon local law; for it is that law which confers the power of making wills, and prescribes the conditions upon which they may take effect; and as, by the law in almost all the states, no instrument can be effective as a will until proved, no rights in relation to it, capable of being contested between parties, can arise until preliminary probate has been first made. Jurisdiction as to wills, and their probate as such, is neither included in nor excepted out of the grant of judicial power to the courts of the United States."

But, if jurisdiction as to wills and their probate as such is not included in the grant of judicial power to the courts of the United States, clearly those courts have no jurisdiction as to wills and their probate as such, because they have no jurisdiction except such only as has been expressly conferred upon them. The validity of a will may, undoubtedly, be drawn in question, and require adjudication in courts of law as well as in courts of equity. *Devisavit vel non* is an issue frequently tried at law, and directed in equity; and there are special cases, also, where the validity of a will may be investigated in equity, as shown in *Case of Broderick's Will*, 21 Wall. 504. But that is a very different thing from hearing and determining the question of *testamentum vel non*, when that question comes directly in litigation. This question belongs to courts having special modes of procedure, and is subject to rules having their origin in the ecclesiastical laws. Certainly, it cannot be seriously contended that, if the courts of the

United States have no original jurisdiction of the probate of wills, they, nevertheless, have jurisdiction of a contest to determine whether or not a will should be admitted to probate. That would be to assume jurisdiction over the whole subject of probating wills.

The case of *Reed v. Reed*, 31 Fed. 49, contains a well-considered opinion, holding that the courts of the United States have no jurisdiction to try a controversy to contest the validity of a will by an original bill brought for that purpose. In the course of the opinion it is said:

"This question of jurisdiction is not a new one in this court. At the April term, 1878, this court had the same question before it in the case of *Howe v. Nesbit* (not reported); and the court then decided, after full argument (Judges Baxter and Welker sitting together), that the court had no jurisdiction to try a controversy brought under the Ohio statute to contest the validity of a will, by an original bill filed for that purpose, and sustained a demurrer to such bill for want of such jurisdiction, and dismissed the case for that ground of demurrer. In that case the will had been probated in the probate court of Lorain county, and the petition was filed as the one in this case was filed, making the heirs at law of the testatrix defendants, and asking that the cause be submitted to a jury to determine whether the said instrument was the valid last will and testament of said Catherine Nesbit, and that the same might be declared null and void. I see now, after a careful examination of the authorities cited by counsel in this case, no reason to change that ruling."

The case of *In re Cilley*, 58 Fed. 977, contains an elaborate discussion of the question by Judge Aldrich, whose opinion is concurred in by Judge Colt. In that case it was held that the right of removal is restricted by section 2 of the Acts of 1887-88 to the classes of cases in which original jurisdiction is given by section 1; that the right of removal on the ground of diverse citizenship is limited to suits of a civil nature at common law or in equity; and that a proceeding to establish and probate a will is not a suit at common law or in equity, and therefore is not removable under the Acts of 1887-88.

In the case of *Oakley v. Taylor*, 64 Fed. 245, it is held that the courts of the United States have no jurisdiction of an original suit brought in such courts to contest the validity of a will, and to procure a decree for its cancellation.

If this court should assume jurisdiction of the contest, the power conferred upon it is not adequate to carry its judgment into execution. It has no power to cause a will, if found to be a valid testament, to be entered on the records of the state court having probate jurisdiction. The will must still be proved and recorded in the state court to make it effective. The records of the court having probate jurisdiction ought, in conformity with the requirements of the statutes of this state, to exhibit the will and its probate; and it would prove highly inconvenient if the records of this court should have to be examined to determine whether or not a will was valid and entitled to probate. Besides, the state court has refused to surrender jurisdiction of this contest; and should this court assume jurisdiction, and enter a judgment either in favor of or against the validity of the will, and recognition of its judgment was refused by the court of the state, an unseemly contest would arise. If this court should establish the validity of the will, and the state court should refuse to recognize such judgment, could this court seize upon and administer

the testator's estate? It clearly possesses no such power. I entertain no doubt that this court has no jurisdiction of a suit, either brought here originally or by removal, for contesting the validity of a will; but, if I entertained doubts, it would be my duty to resolve them in favor of the jurisdiction of the state court, and against the right of removal here.

The motion to remand is therefore sustained, at the cost of the petitioner for removal.

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### HUNTINGTON v. SAUNDERS.

(Circuit Court of Appeals, First Circuit. February 3, 1896.)

No. 142.

#### CIRCUIT COURT OF APPEALS—JURISDICTION—BANKRUPTCY.

The circuit court of appeals has no jurisdiction to review the decisions of the circuit court in bankruptcy proceedings.

Appeal from the Circuit Court for the District of Massachusetts.

James Huntington (appellant), pro se.

William B. Durant, for appellee.

Before COLT, Circuit Judge, and WEBB and CARPENTER, District Judges.

CARPENTER, District Judge. This is an appeal from a decree of the circuit court for the district of Massachusetts (64 Fed. 476) dismissing a petition for review of the proceedings of the district court in a matter arising under the bankruptcy law of 1867. Rev. St. tit. 61. We are of opinion that this court has no jurisdiction of the appeal. The act by which this court is established gives general jurisdiction to review final decisions of the circuit courts "unless otherwise provided by law." 26 Stat. 828, c. 517, § 6. In the act repealing the bankruptcy law it is provided that the law shall continue in force until all proceedings thereunder "shall be fully disposed of, in the same manner as if said act had not been repealed." 20 Stat. 99, c. 160. Under the provisions of the act thus continued in force, there was no appeal from the decree of the circuit court under the supervisory power vested in that court. *Wiswall v. Campbell*, 93 U. S. 347. This case therefore falls within the exception in the clause giving jurisdiction to this court, and it follows that the appeal must be dismissed.

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### BIDWELL et al. v. TOLEDO CONSOL. ST. RY. CO.

(Circuit Court, N. D. Ohio, W. D. February 20, 1896.)

#### PARTIES—NONRESIDENT CORPORATION—VOLUNTARY APPEARANCE—WHAT CONSTITUTES.

A nonresident corporation which cannot be served, and which does not intend to become a party, is not to be considered as making a voluntary appearance, so as to justify the court in making it a party to the record, merely because it assumes the defense of the suit for the actual defendant, pursuant to previous contract, and conducts the same

by its own attorneys, and in part by witnesses who are under salary from it at the time of testifying. *Manufacturing Co. v. Miller*, 41 Fed. 851, distinguished.

This was a bill by Benson Bidwell and others against the Toledo Consolidated Street-Railway Company for alleged infringement of a patent. The cause was heard upon an application by complainants for leave to amend their bill by making the General Electric Company a party defendant.

Frank H. Hurd and Orville S. Brumback, for complainants.

Frederick A. Betts, J. E. Hinton Hyde, and Smith & Baker, for defendant.

RICKS, District Judge. The complainants have made application to this court for leave to amend their bill by making the General Electric Company, a nonresident corporation, a party defendant to this suit. It is not claimed that said proposed defendant is within the jurisdiction of the court, and amenable to its process, or that it can be brought in by original subpoena. It is sought to hold it as a defendant in this case because it is alleged the counsel who are preparing and conducting the defense for the Toledo Consolidated Street-Railway Company are the general counsel for said proposed defendant. It is further contended that because said counsel have so assumed the defense of this case; have furnished witnesses in the employ of the General Electric Company to testify on behalf of the defendant; that such witnesses, while so testifying, have been under salary from the General Electric Company; and that the latter has in fact agreed to protect the said the Toledo Consolidated Street-Railway Company in the use of the appliances which it is claimed are an infringement of complainants' patent, and that it will conduct any defense which the said railway company may be called upon to make in court by reason of the use of such appliances,—that by such conduct it has, in legal effect, entered its appearance in the suit.

The court passed upon an application of a somewhat similar character, made in this case, some time ago. From a statement of the facts as above made, it will be observed that the court is now asked to declare that the General Electric Company, by assuming the defense of this suit, as alleged, on behalf of the Toledo Consolidated Street-Railway Company, has in fact entered its general appearance, and made itself a defendant in this case, and is to be bound by the decree, if one should be made in favor of the complainants and against the defendant. It is not claimed that there was any intention on the part of the General Electric Company to become a party to this case, or that there is any such desire on its part. It is sought to make the decree in this case binding upon that corporation because of the acts before stated.

Is it possible for a court to make any orders in this case, under these facts, which would make said corporation a party defendant in this suit against its wish? Counsel insist that the court has authority to make such an order, and that it should be made to

promote justice. It is urgently contended that the plaintiff is now in fact prosecuting this case against both the Toledo Consolidated Street-Railway Company and the General Electric Company; that the latter is giving to its vendee and the user of its electrical appliances the benefit of its great corporate wealth and influence, and the benefit of the experience and ability of its counsel; and that if, as the result of such a contest, the complainants should prevail, they should have the benefit of their victory by securing a decree which would be binding and conclusive upon the General Electric Company in any subsequent litigation that may occur between the parties.

In support of this contention, counsel cite the case of *Manufacturing Co. v. Miller*, 41 Fed. 351. That was a case in which the complainant filed a bill against the defendants to maintain the validity of the letters patent which it was claimed the defendants had infringed by the use of certain agricultural implements. The defendants were agents for the manufacturing concern of Mast & Co., a corporation created under the laws of the state of Ohio, which made and sold the infringing machines. Mast & Co., as its interests required, conducted the defense for its agents; and, when the decree was entered in the case in favor of the complainants, the court said:

"It is made clear that Mast & Co. is the principal party in interest, being the manufacturer of the machine sold by the defendants Miller, and bound by contract with them to protect them against any consequences of infringement. It has had notice of the pendency of this suit, and, in fact, has assumed the control and management of the defense; and therefore, under the doctrine of the cases just cited [*Lovejoy v. Murray*, 3 Wall. 1; *Robbins v. Chicago*, 4 Wall. 657], the decree herein will, in fact, be binding upon the corporation. No good reason is perceived why, by apt statement in the decree, it may not be made to appear upon the face of the decree that in fact the Mast & Co. Company is bound by the results reached in the progress of the litigation in which it has been actively engaged; for that, in effect, is only stating in set phrase the force which the decree would in fact have as against the corporation."

In that case the defendants had filed an amendment to the original bill making the Mast & Co. Company a party defendant, but no subpoena was issued or served upon the corporation, and the company never answered the bill, nor in its own name did it enter its appearance in the case. But the case cited comes very far from sustaining the contention now made by the complainant in this case. It will be observed that, in the case cited, Mast & Co. was not in fact made defendant. The decree upon its face did not profess to run against Mast & Co., or to be binding in its terms upon it. All that Judge Shiras intended to accomplish by that decree was to so state the facts as to make it an estoppel against Mast & Co. in any subsequent litigation in which the same subject-matter might be involved. That was as far as that decree was intended to go, because the cases cited only supported him to that extent.

In the case of *Lovejoy v. Murray*, 3 Wall. 1, the court decided that, when a plaintiff in an attachment suit gives a bond of indemnity to an officer to protect him for acts done in executing the writ

of attachment, such plaintiff becomes a joint trespasser with the officer, and that when thereafter the attaching officer is sued, and when the party who has indemnified the officer takes upon himself the defense of the suit, such party is concluded by the judgment against the officer when such indemnifying party is afterwards sued for the same trespass. In other words, the supreme court held in that case that the party who indemnified the attaching officer became so related by his own act with the defense of the suit brought against the attaching officer that, in subsequent litigation, he was estopped from claiming that he had no connection with such suit, and that he was in fact concluded by the judgment against the officer.

In the other case cited by Judge Shiras, to wit, *Robbins v. City of Chicago*, 4 Wall. 657, the court applied the same doctrine that was declared to be the law in the case of *Lovejoy v. Murray*. Robbins was the owner of a lot in the city of Chicago, upon which he had wrongfully "dug, opened, and made" an area in the sidewalk adjoining, and left it so unguarded that one Woodbury fell into it, and was severely injured. Woodbury instituted suit against the city, and recovered for his injuries \$15,000 damages, which sum the city paid. Thereafter the city sued Robbins, the owner of the lot, to reimburse it for the amount of damages so paid by it. In this latter suit it appeared that Robbins had had notice from the city solicitor of Chicago of the pendency of the Woodbury suit, of the court in which it was instituted, and when it was to be tried, and that he had assisted in securing evidence in behalf of the defense. When sued by the city, Robbins was held to be bound by the recovery granted in the former suit of Woodbury against the city, and to be concluded thereby, although not a formal party of record in that case.

These are the cases relied upon by Judge Shiras to support his decree in the case cited by complainants' counsel. They could not have been cited as authority to support the construction which counsel in this case now seek to put upon the decision made by Judge Shiras in the case to which reference has been made. As before stated, Mast & Co. were not made parties to the suit before Judge Shiras, and the decree did not undertake to bind them as a party defendant, but simply undertook to show such a state of facts as would tend to estop them in subsequent litigation from again controverting the issues made in the suit of which they had notice, and in which they were interested, and in which they participated in the manner stated.

It may be that, on the final hearing of this case, the evidence may disclose such conduct on the part of the General Electric Company—such a participation in the actual defense of this case—as will justify the court in making a statement of such facts on the face of the decree, to the end that, in subsequent litigation involving the same issues or the same interests, the complainants may have a right to contend that the General Electric Company is estopped from further defending against the same. That is as far



as the court went in the case cited in 41 Fed. 351. It is significant to remark, in connection with that case; that, when it came for hearing in the supreme court (see 151 U. S. 186, 14 Sup. Ct. 310), no reference whatever is made in the opinion of that court to the question decided by Judge Shiras. It is true that it became unimportant, because the supreme court ordered the bill dismissed, and found that there was no infringement; but nowhere in the statement of the case or in the opinion of the court is any allusion made to the question we have been considering.

I am therefore of the opinion that as the General Electric Company is a nonresident corporation, and cannot be brought into this court by original subpoena, leave cannot be given to amend the bill to make it a party against its will, by reason of the facts hereinbefore stated.

In view of the conclusion reached, it is not necessary to consider the proposition contended for by complainants' counsel that the General Electric Company might waive the question of citizenship, and that it has so waived it by the acts hereinbefore stated.

The question of whether it has so identified itself with this case as that it may be hereafter estopped in subsequent litigation from again defending as to the issues or interests now involved is a question, as I have before said, which can only be passed upon at the final hearing, and in the final decree. This is certainly as far as the court, under any circumstances, would have authority to act. I can find no authority for the proposition that by such action as the General Electric Company has taken with reference to this case, as hereinbefore stated, it has made itself (being a nonresident corporation), against its own intention and wish, a party defendant in this case, and thereby conferred upon the court authority to make a decree binding and conclusive upon it as a party defendant. It may have put itself in a position to estop it in subsequent litigation, as heretofore stated. It will be proper to determine that question when it arises.

The motion is overruled.

I have waited some 10 days for the brief of counsel for the General Electric Company upon the question herein decided, but having fully investigated it in the light of complainants' brief, and having reached a conclusion which is entirely satisfactory to me, I have not deemed it necessary to wait for respondent's brief.

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Ex parte BUSKIRK.

(Circuit Court of Appeals, Fourth Circuit. February 4, 1896.)

No. 142.

1. CONTEMPT OF COURT—JURISDICTION OF FEDERAL COURTS.

The act of March 2, 1831, now embodied in Rev. St. § 725, is a limitation on the power of the federal courts to punish for contempt, and restricts their jurisdiction to cases of misbehavior of any person in the presence of the court, or so near thereto as to obstruct the administration of justice; to misbehavior of any officer of the court in his official

transactions; and to cases of disobedience or resistance to any lawful writ, process, order, rule, decree, or command of the court.

2. SAME—VIOLATION OF STIPULATIONS.

A federal court has no jurisdiction to punish, as a contempt, an act of disobedience to an order which the court intended to make, but which in fact was never entered; or an act which is a violation of a mere oral stipulation made in open court between the attorneys of the parties. Nor can the court make so punishable an act not forbidden by any order or decree at the time it was committed, by afterwards entering a nunc pro tunc order forbidding such act.

3. PRACTICE IN CIVIL CASES—NUNC PRO TUNC ORDERS.

The courts may, by nunc pro tunc orders, supply omissions in the record of what was actually done, but which was not entered on the record, by reason of mistake or neglect; but they cannot thereby modify orders previously made, or make an order which they in fact intended to make at a previous time, but did not in fact make, so as to bind the parties as of the date to which the order relates; and especially is this so in matters relating to criminal proceedings.

4. HABEAS CORPUS—ACTS IN EXCESS OF JURISDICTION—CONTEMPT PROCEEDINGS.

A federal court may discharge on habeas corpus a person imprisoned for an alleged contempt in committing an act which was not forbidden by any order of the court existing at the time, but which the court afterwards attempted, in excess of its jurisdiction, to forbid as of a prior date, by an order nunc pro tunc.

This was a petition by Uriah B. Buskirk for a writ of habeas corpus.

John A. Hutchinson, for petitioner.

Maynard F. Stiles and E. L. Buttrick, for respondents.

Before GOFF and SIMONTON, Circuit Judges, and BRAWLEY, District Judge.

GOFF, Circuit Judge. Uriah B. Buskirk, the petitioner, was one of the defendants to an action of ejectment pending in the circuit court of the United States for the district of West Virginia, in which Henry C. King was plaintiff. The land in controversy was situated in the state of West Virginia, and it was claimed that Buskirk, with one Mullins, was in the possession of a part thereof. King, on the 31st day of May, 1895, tendered his bill on the equity side of said court, in which he charged that Buskirk and Mullins were preparing to cut and remove large quantities of timber from the land in controversy. The court, at Charleston, on the 31st day of May, 1895, ordered that the bill be filed, which was done, and it appears from the record that no further proceedings were had in said matter, of which an entry was made at the time on the court's records, until on the 12th day of June, 1895, at Charleston, when the following order was made, viz.:

"Henry C. King, Complainant, v. U. B. Buskirk et al., Defendants.

"This day came the complainant by his counsel, and presented the affidavit of Maynard F. Stiles, charging the said defendants with a violation of a stipulation heretofore made in this cause, and asked a rule against defendants. And the defendants, by counsel, presented their affidavit in reply thereto, and thereupon the said matter came on to be heard. Whereupon it is ordered that the said affidavits be filed, and that the said matter be continued with leave to each party to file further affidavits, and for complainant, upon reasonable notice to defendants or their counsel, to

renew his motion herein for said rule. And it is further ordered that in the event the complainant decides to renew his application for a rule to show cause why the defendants should not be fined and attached, that before doing so he serve the defendant or his counsel of record with eight days' notice of the time and place of the application."

The next order made in said proceedings was on the 27th day of June, 1895, as follows, viz.:

"Henry C. King, Complainant, v. Uriah B. Buskirk and M. B. Mullins, Defendants. In Equity.

"This cause came on to be heard upon the 20th day of June, 1895, by consent of counsel for the respective parties upon the application and motion of complainant made on the 12th day of June, 1895, for a rule against defendants to show cause why they should not be attached and fined for contempt in violating certain orders and decrees of this court made in this cause, which said order of June 12th is as follows."

Here follows a copy of the order as given above. At the same time a large number of affidavits made by various parties, and having reference to the cutting of timber on said land by defendants, were tendered and filed. They thus became a part of the record, and were considered by the court below, but in the view that we take of this case it will not be necessary for us to again refer to them.

The defendant Buskirk, on the 27th day of June, 1895, appeared, and filed his answer to the motion for a rule, which was in the following words, viz.:

"Plea and Motion of Defendant Buskirk.

"Henry C. King vs. M. B. Mullins et al. In Equity.

"The defendant U. B. Buskirk comes and says that this court ought not to take any further cognizance of the motion and proceedings for an alleged contempt against him upon the following grounds and for the reasons following: First. No order was ever made in said equity case by way of injunction or otherwise against this defendant, which he has in any wise violated. Second. The so-called 'stipulation' on which the affidavit of M. F. Stiles was filed in this cause against the defendant Buskirk was not in writing, never signed, and that the court never made any order thereon. No order exists of record in said cause in relation thereto. Third. The only evidence of any promise, agreement, or stipulation of the purport alleged in the affidavit of M. F. Stiles, filed in this cause, as a foundation for a rule against said Buskirk, is what was stated in open court, as said Buskirk understands, by his counsel and the counsel of the plaintiff, Henry C. King, as to which, and the scope and extent thereof, the said plaintiff's counsel, M. F. Stiles, and his agent, V. A. Wilder, disagree with the counsel of the said Buskirk himself, as shown by the written affidavits filed before this honorable court; so that in fact the basis of the proceedings against the said Buskirk is upon an oral proposition acceded to by all parties, which was never reduced to writing and signed, and depends upon the memory of the persons present at the time the said proposition was made and agreed to in court. Fourth. The proceedings against respondent herein upon said motion for a rule therefore depend, not upon a violation of any order of the court, but upon an alleged violation of a promise or understanding, never reduced to writing, between the parties by their counsel. Fifth. It is respectfully submitted that, in the absence of an order of the court in writing, which must exist as the basis of any action in the proceeding for contempt, it would be wholly unjust and contrary to the rules and practice of a court of equity and to the principles governing proceedings of a criminal nature in the courts of the United States to proceed further with the proceedings herein against the said Buskirk as if he were on trial for an alleged contempt of the orders of the court.

Sixth. It is respectfully objected that no order of injunction ever was in fact granted in said chancery cause; that, while there was a verbal understanding between the counsel before the court, there was in fact no order of injunction granted by the court. Seventh. In the absence of an order of injunction granted by the court, not of record in the cause, according to court's practice in such case, any action of the court so taken would not be a bar to any proper proceeding or any other proceeding which might be jurisdictional. Eighth. According to the law of the land there can be no such thing as a verbal decree or order of injunction as a part of the record of a court of chancery. Ninth. The affidavit filed by the said Buskirk fully and completely exonerates him from any alleged contempt even of any verbal order in said cause, and fully and distinctly explains each and every fact, circumstance, or thing tending to charge him with any violation of the alleged verbal order or understanding. Tenth. The said Buskirk respectfully moves the court to dismiss said proceedings upon the grounds alleged, and also for the reason that no rule has been issued and no issue has been made up, and no steps have been taken properly in the proceedings now pending against him according to the law of the land and the practice of this honorable court, and nothing done herein will be a bar to any future action the court might take according to the regular course."

On the 28th day of June, 1895, the following order was made and entered of record, to-wit:

"In the Circuit Court of the United States for the District of West Virginia, at Charleston, June 3rd, 1895.

"Henry C. King vs. Uriah B. Buskirk and M. B. Mullins. In Equity.

"This day this cause came on to be heard upon the bill of complaint of the said complainant, filed by him on the 31st day of May, praying an injunction to restrain the defendants and each of them from cutting, hauling, selling, or in any manner trafficking in the timber upon the land claimed by the complainant and described in said bill of complaint. The counsel for both complainant and defendants being present in open court, and here agreeing and stipulating that the further hearing of this cause be had at Parkersburg on the 20th day of June, and that meanwhile the said defendants will cut no timber upon the lands described in said bill and the exhibit filed therewith and made part thereof, from the cutting of which the said complainant asks that they be restrained, it is ordered that this motion for an injunction be sent down for hearing at Parkersburg on the 20th of June, and in the meanwhile, and until the further order of this court, the defendants be inhibited and restrained from cutting any timber upon the land claimed by the complainant and set out in his said bill and the exhibit made a part thereof."

This order was prepared on the 28th day of June, and then entered as a nunc pro tunc order. And on the same day, to wit, on the 28th day of June, 1895, the following order was made and entered of record, to wit:

"H. C. King vs. U. B. Buskirk and M. B. Mullins. In Equity.

"This day came the defendants, U. B. Buskirk and M. B. Mullins, and tendered their answer to the plaintiff's bill, and the same is ordered to be filed, to which the complainant replies generally."

On the said 28th day of June the court below awarded the rule against Buskirk, to which he appeared and filed his answer on the same day, which was in substance to the same effect as the answer he had filed the day before to the motion for a rule, and which we do not deem it necessary to again set forth. And at another day, to wit, on the 29th day of June, 1895, the following order was made and entered of record in said cause, viz.:

**"Henry C. King vs. Uriah B. Buskirk.**

"Upon a rule to show cause why the defendant should not be fined and attached for his contempt in violating an order of injunction heretofore awarded in the cause of Henry C. King against Uriah B. Buskirk and M. B. Mullins. In Equity.

"This cause came on this day to be heard upon the motion of the plaintiff, upon the affidavits filed and the oral testimony taken in said cause on behalf the plaintiff, upon the answer of the defendant filed to the rule in this cause, upon the affidavits of the defendant and others, and the oral testimony taken in said cause on behalf the defendant and in support of said answer, and it appearing to the court that since the order was made in that cause on the 3d day of June, 1895, the defendant has cut down and felled a large number of trees on the land in controversy in the action of ejectment between the plaintiff, Henry C. King, and the defendant, he is adjudged guilty of contempt in violating the order made on the 3d day of June, 1895, in the case of H. C. King v. U. B. Buskirk and M. B. Mullins, pending in this court. It is therefore ordered that the defendant be assessed and fined the sum of three hundred dollars for having violated the order of injunction heretofore issued in the case hereinabove referred to, and that the same be paid into the registry of this court. And it is further ordered that all the costs arising upon the prosecution of this rule for contempt be paid by the said defendant, Buskirk, including attorney's fees, and that he stand committed to the custody of the marshal, to be by him confined in the jail of Wood county until the fine herein assessed is paid and discharged."

On the 15th day of July, 1895, the following order was made in said contempt proceedings, to wit:

"And now on this day the defendant, U. B. Buskirk, appearing in open court, and refusing to pay the fine and costs so assessed against him, it is therefore ordered that he be committed to the jail of Wood county, West Virginia, until he pays the aforesaid fine and costs imposed against him, or until he is otherwise legally discharged from custody. And a copy of this order, delivered to the marshal of this district, shall be his warrant of authority to commit the defendant, U. B. Buskirk, to the jail of Wood county."

Relative to the questions arising on said rule for contempt as to the directions given by the court for the preparation and entering of an order on the 3d day of June, 1895, in pursuance of the stipulations entered into between counsel for the plaintiff and the defendants to said chancery cause, there appears in the record a statement signed by the Hon. J. J. Jackson, the judge who presided during all the time that such proceedings were had, which said statement was filed by him on the 5th day of August, 1895, and which will not be set forth herein, nor considered by us, for the reasons that will be hereafter stated.

On the 16th day of July, 1895, said Buskirk, by counsel, presented to this court his petition, alleging that he was unlawfully deprived and restrained of his liberty by virtue of said orders of the circuit court for the district of West Virginia, and praying a writ of habeas corpus ad subjiciendum, that his said illegal detention and imprisonment might be inquired into; and also praying that a writ of certiorari might be awarded requiring the clerk of said court to certify and send to the circuit court of appeals for the Fourth circuit a transcript of the record of said proceedings in contempt; whereupon it was ordered that said petition be filed in the clerk's office

of this court, and that a rule issue from said office directed to A. D. Garden, marshal of the district of West Virginia, James R. Mehen, his deputy, and to the jailer of Wood county, West Virginia, requiring them and each of them to appear before this court, at Richmond, Virginia, on the first day of the November term thereof, 1895, to show cause, if any they can, why the writ of habeas corpus as prayed for in said petition should not issue. It was further ordered that the writ of certiorari issue as prayed for, and that said Buskirk be allowed to give bail before one of the commissioners of the circuit court of the United States for the district of West Virginia in the sum of \$1,000, with good security, conditional that he make his personal appearance before this court on the first day of said November term, 1895, and submit to such order and judgment as this court should then make in the premises. The writ of certiorari was duly issued, and the transcript of the record of said proceedings was made and filed in this court as therein required. Due return was made to said rule by the marshal, his deputy, and the said jailer, by which it appears that said Buskirk had been taken into custody and held by them by virtue of said order of commitment and said judgment of the circuit court of the United States for the district of West Virginia, and that he was then at large under bail in pursuance of the order authorizing it, issued by this court.

That the court below had jurisdiction of the suit in equity from which the proceedings in contempt originated is clear, and is not controverted by the petitioner. But it does not, therefore, necessarily follow that it had jurisdiction of the contempt proceedings. To us it seems equally as clear that the court below, in entertaining said proceedings, acted in excess of its jurisdiction. The authority of the courts of the United States to punish for contempt is defined by section 725, Rev. St., which is a limitation upon the manner in which the power to punish for contempt shall be exercised. The section reads as follows, viz.:

"The said courts shall have the power to impose and administer all necessary oaths, and to punish, by fine or imprisonment at the discretion of the court, contempts of their authority; provided, that such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereunto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness or other person, to any lawful writ, process, order, rule, decree, or command of the said courts."

This statute evidently limits the power of the courts of the United States—a power inherent in all courts, and required for the preservation of order in their proceedings, and necessary to the enforcement of their judgments—to punish for contempts. The power they at one time had quoad such matters was much greater than that they now have. By the seventeenth section of the judiciary act of 1789 they had power to punish by fine or imprisonment, at the discretion of said courts, "all contempts of authority in any cause or hearing before the same." This power was exercised until the passage of the act of March 2, 1831, entitled "An act declaratory of the law concerning contempts of court," which is now section 725, to

which reference has been made. The supreme court of the United States, in *Ex parte Robinson*, 19 Wall. 505, 511, in construing this legislation, says:

"It limits the power of these courts in this respect to three classes of cases: (1) Where there has been misbehavior of a person in the presence of the courts, or so near thereto as to obstruct the administration of justice; (2) where there has been misbehavior of any officer of the courts in his official transactions; and (3) where there has been disobedience or resistance by any officer, party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the courts. As thus seen, the power of these courts in the punishment of contempts can only be exercised to insure order and decorum in their presence, to secure faithfulness on the part of their officers in their official transactions, and to enforce obedience to their lawful orders, judgments, and processes."

Testing the record of this case in the court below by the rules so established, it will be found that said court had no jurisdiction of the proceeding against Buskirk for contempt. At the time the same was instituted there had not been issued by the court any writ, process, order, rule, decree, or command in the said chancery cause of *King v. Buskirk and Mullins*, to which the petitioner had or could have shown any disobedience or resistance whatever, as the record clearly shows. Indeed, the charge as first made seems to recognize this as true, and the affidavit first filed and the order first entered sets up the violation of a "stipulation" made in open court as the foundation of the proceedings for contempt. However reprehensible such conduct on the part of Buskirk may have been,—proceeding upon the theory that the charge was true, which he, however, denied in his answer,—it nevertheless did not constitute a contempt to the court or its orders, and did not authorize any proceedings for a contempt under the provisions of the law as it then existed. A careful examination of the record shows that Buskirk had not been ordered to do or decreed not to do any act or thing in said chancery suit prior to the time he was proceeded against, fined, and committed for contempt. Such being the case, the court had no jurisdiction of said contempt proceedings, and the rule should not have been granted. The court below, it is proper to say, acted upon the theory that the order made by it on the 28th day of June, 1895,—in which it is recited that the court, on the 3d day of June, 1895, directed that in substance a restraining order issue as prayed for by the plaintiff, but which order in fact was not entered, not even prepared,—had the effect, as a *nunc pro tunc* order, to make valid and binding on the defendants that which the court had intended to do or had ordered done on said 3d day of June. In this, we think, the court below was in error. The rule is now well established that *nunc pro tunc* orders cannot operate to modify orders theretofore made or to take the place of orders intended to be made but omitted. The courts can by such orders supply omissions in the record of what was actually done in the cause at a former time when it was under consideration, and by mistake or neglect not entered in the clerk's minutes or the court's records; but where the court has omitted to make an order which it could have made, and in fact intended to make, it cannot subsequently make the same *nunc pro tunc*, so as

to make it binding upon the parties to the suit from the date when it was so intended to have been entered; and especially is this so in matters relating to criminal proceedings and those involving rules for contempt. *Hyde v. Curling*, 10 Mo. 359; *State v. Clark*, 18 Mo. 432; 1 Bish. Cr. Proc. § 1160; *Bank v. Dudley*, 2 Pet. 522; *In re Wight*, 134 U. S. 136, 10 Sup. Ct. 487; *Bullitt Co. v. Washer*, 130 U. S. 142, 9 Sup. Ct. 499; *Brignardello v. Gray*, 1 Wall. 627; *Nabers v. Meredith*, 67 Ala. 333; *In re Limerick*, 18 Me. 183; *Smith v. Hood*, 25 Pa. St. 218. In our opinion, the statement filed by Judge Jackson, to which reference has been made, is not part of the record of the contempt proceedings, and therefore cannot be considered by us on the hearing of this petition. The rule granted by this court on the petition for habeas corpus, as well as its order for the writ of certiorari, was awarded on the 16th day of July, 1895, while the certificate of the judge, relating to the facts concerning the question whether the court directed an order to be prepared and entered on the 3d day of June, 1895, in pursuance of the stipulation entered into by counsel in said chancery cause, was not filed therein until the 5th day of August, 1895. This was some time after the petitioner had been adjudged guilty of contempt, and 20 days after the said proceedings had been directed certified to this court. Surely the proceedings had in said chancery cause, after the rendition of the judgment against petitioner, cannot be used as part of the record to his prejudice, on the hearing of the petition which involves the correctness and validity of that judgment. After a cause has been removed by appeal, writ of error, or certiorari, to this court, it is beyond the control of the court or of any judge thereof from which it was so removed, until it has been duly heard and remitted to the jurisdiction from whence it came.

In the case of *Generes v. Bonnemer*, 7 Wall. 564, Mr. Justice Miller, delivering the opinion of the court, said:

"To permit the judge to make a statement of the facts on which the case shall be heard here, after the case is removed to this court by the service of the writ of error, or even after it is issued, would place the rights of parties who have judgments of record entirely in the power of the judge, without hearing and without remedy. The statement of facts, filed without consent of the parties, must be treated as a nullity."

See, also, *Flanders v. Tweed*, 9 Wall. 425; *Muller v. Ehlers*, 91 U. S. 249.

In the light of recent decisions of the supreme court of the United States, it is no longer an open question that, if the court whose action is complained of had no authority to pass the sentence imposed, the same is therefore void for the reason that the court acted without jurisdiction; and, further, that in such cases the party seeking relief may be discharged on habeas corpus. *Ex parte Terry*, 128 U. S. 289, 9 Sup. Ct. 77; *In re Coy*, 127 U. S. 731, 8 Sup. Ct. 1263; *Ex parte Harding*, 120 U. S. 782, 7 Sup. Ct. 780; *In re Ayers*, 123 U. S. 443, 8 Sup. Ct. 164; *In re Swan*, 150 U. S. 637, 14 Sup. Ct. 225. The proceedings of a court which has acted in excess of its jurisdiction, are void,—as much so as are the proceedings of a court which has acted without jurisdiction. In either case its order of commit-



ment is a nullity, and the party prejudiced may be discharged upon a writ of habeas corpus. *Ex parte Reed*, 100 U. S. 13; *Ex parte Clarke*, Id. 399; *Ex parte Rowland*, 104 U. S. 604; *Ex parte Curtis*, 106 U. S. 371, 1 Sup. Ct. 381; *Ex parte Fisk*, 113 U. S. 713, 5 Sup. Ct. 724; *Ex parte Wilson*, 114 U. S. 417, 5 Sup. Ct. 935. This in no wise conflicts with the well established and universally recognized rule that the writ of habeas corpus cannot be made to serve the purpose of an appeal or writ of error. *Ex parte Watkins*, 3 Pet. 191; *Ex parte Parks*, 93 U. S. 18; *Ex parte Yarbrough*, 110 U. S. 651, 4 Sup. Ct. 152; *In re Swan*, *supra*. In cases where no writ of error lies, or where an appeal is not permitted, and the petitioner is in custody under a void judgment, an appellate court, or any judge thereof, may award the writ of habeas corpus, and the party should be discharged. *Ex parte Parks*, *supra*; *Lau Ow Bew v. U. S.*, 144 U. S. 47, 12 Sup. Ct. 517; *In re Tyler*, 149 U. S. 180, 13 Sup. Ct. 785. There can be no question as to the power of this court to issue the writ of habeas corpus, and of its duty, in cases like the one we now consider, to do so. *Ex parte Yerger*, 8 Wall. 95; *In re Boyd*, 1 C. C. A. 156, 49 Fed. 48, and 4 U. S. App. 73; Act March 3, 1891 (26 Stat. 829, § 12).

It follows from what we have said that the judgment for contempt rendered against the petitioner is void, that he should be discharged from the commitment by virtue of which he is held, and that the writ of habeas corpus should issue; and it is so ordered.

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### BUSKIRK et al. v. KING.

(Circuit Court of Appeals, Fourth Circuit. February 4, 1896.)

No. 144.

#### 1. APPEAL—INJUNCTION—RESTRAINING WASTE PENDING EJECTMENT.

Pending an ejectment, suit was brought to enjoin the defendant from cutting timber. The answer to the bill averred that defendant expected, on the trial in ejectment, to rely on a forfeiture of plaintiff's title for nonpayment of taxes, and to show outstanding title in the state; but it made no allegations properly presenting the question of forfeiture to the equity court, there being no statement for what years the land was not entered for taxation, or for what years, or in what counties, it was delinquent and forfeited. *Held* that, as the question of forfeiture was not properly presented, and was evidently not considered by the court below before granting the injunction, it would not be considered on an appeal.

#### 2. ISSUANCE OF INJUNCTION.

Where an injunction is sought merely to preserve the status quo pending an action of ejectment by restraining defendant from cutting timber, complainant is not required to make out such a case as will entitle him to a decree on final hearing, and it may happen that an injunction is properly granted, although the ultimate relief sought is finally denied.

#### 3. SAME.

If the mischief complained of is irremediable, and destroys the substance of the property, as in the case of cutting of timber and extracting ores, an injunction will issue in order that the property may be preserved from destruction during such time as may be necessary to try the title at law.

Appeal from the Circuit Court of the United States for the District of West Virginia.

John A. Hutchinson and W. P. Hubbard (Z. T. Vinson, on the brief), for appellants.

Maynard F. Stiles and E. L. Buttrick, for appellee.

Before GOFF and SIMONTON, Circuit Judges, and BRAWLEY, District Judge.

GOFF, Circuit Judge. This is an appeal from an interlocutory decree by which an injunction was granted. The appellee, Henry C. King, claiming to be the owner of a tract of 500,000 acres of land, a part of which was said to be located in the state of West Virginia, instituted his action of ejectment in the circuit court of the United States for the district of West Virginia against U. B. Buskirk and M. B. Mullins, who, it was charged, were in possession of a certain portion of said land. The action of ejectment was pending and undetermined when King tendered to the court his bill of complaint against Buskirk and Mullins, in which he claimed that he was entitled to the protection of the court on its equity side during the pendency of said action at law, and in which he charged that said parties were in possession of the land, and were preparing to cut and remove large quantities of valuable timber from the same; the prayer of the bill being that they be restrained by injunction from committing waste, or doing any act which would make the land less valuable, until the trial of the action of ejectment. The bill sets out the title of King to the tract of land mentioned, alleging that by patent dated June 23, 1795, the commonwealth of Virginia granted the same to one Robert Morris, and that by subsequent conveyances—all of which are set forth with particularity, but it is not deemed necessary to describe them here—the title to said land was regularly and duly vested in him. It is set forth in the bill that the part of such land claimed and held by the defendants is heavily timbered; that because thereof it was purchased by the plaintiff, who had expended large sums of money in acquiring it, and in preparations for utilizing and marketing the timber, which, it is alleged, constitutes its chief value, and which defendants were then cutting and removing against the remonstrance of King, of whose title to the said land they were fully advised. The motion for an injunction was passed upon by the court below on the 3d day of July, 1895, the court considering the bill and exhibits, the answer and exhibits, the affidavits filed by the plaintiff, and the affidavits and depositions taken and filed by the defendants. The answer denied plaintiff's title, set up that the land claimed by and in possession of the defendants was not located within the boundaries of the grant to Morris, and alleged in general terms the forfeiture of the plaintiff's title, and an outstanding title in the state of West Virginia on account of such forfeiture. It also claimed title to said land in Mullins by conveyance from one L. D. Chambers and otherwise, not required to be now set forth, admitted the cutting and removing of the timber, and insisted on defendants' right to do so; the defendant Buskirk alleging that he was the owner of the timber by purchase from Mullins. The court below granted the in-

junction as prayed for by the plaintiff, and from such decree the defendants appealed.

In disposing of the questions raised by the assignments of error, we do not think it proper to decide in this suit, at least on this appeal, those presented by counsel for appellants relating to the identity and forfeiture of the land in controversy. The record, as made below, does not fully present them; nor were they, if we may judge from the pleadings and testimony, relied upon by counsel when the motion for the injunction was under consideration, and the court below evidently intended that they should be examined into and decided during the trial of the ejectment. The exhibits filed with the bill and answer show, as to the matter of identity, a contention about which there is an evident conflict in the testimony, which makes it peculiarly fit that all questions connected therewith should be submitted to the decision of a jury. While we think that the court to which an application for an injunction is made in cases similar to this, in which the plaintiff's title is drawn in question, should consider the matter of forfeiture when the same is properly pleaded, and refuse the restraining order when it appears that the title under which the plaintiff claims has been in fact forfeited, and while we do not intend to say that this court will not, on a record fairly presenting it, determine that question, still we are compelled to rule that the case as made below did not authorize that court to pass upon, and will not justify us in now deciding, the questions relating to the forfeiture of the plaintiff's title. The defendants, in their answer, say that they expect to rely on, plead, and prove the forfeiture of the plaintiff's title, and show the outstanding title in the state of West Virginia, upon the trial of the action of ejectment. While the matter was thus referred to, it is evident that it was not intended to be fully presented at that time, and that it was not considered nor disposed of by the court below. The fact is that there is no such allegation in the answer, bearing upon said question, properly presenting it as a matter of defense for the consideration of the court, it not being stated for what years the land was not entered for taxation, nor for what years, or in what counties, it was delinquent and forfeited. This was likely owing to the fact that all of said matters were to be fully presented and decided at the trial of the action at law, which was expected to take place, as is shown by the order of the court then made, within a few days after the answer was filed. Before leaving this question, we deem it proper to say that if the plaintiff's title was forfeited at the time he filed his bill and made the motion for an injunction, he then had not even a *prima facie* case, and would not have been entitled to the relief for which he prayed; and we have no doubt but that the court below, under such circumstances,—the forfeiture having been properly pleaded and proved,—would have refused it.

We now come to consider the assignment of error that, in substance, the court below erred in granting the injunction, independent of the questions we have just referred to. In doing this we must keep in mind that courts of equity are not to be regarded as in any

manner forestalling the final action of courts of law on the questions involved when they grant the temporary relief afforded by interlocutory injunctions. In doing so they simply adjudge that the plaintiff presents such a case as justifies the court in preserving the status quo until a court of law has had an opportunity, with all the facts before it, and with the assistance of a jury, of determining the real merits of the controversy. In such matters the plaintiff is not required to make out such a case as will entitle him to a decree in his favor on final hearing, and it sometimes happens that he ultimately fails to secure the relief asked for, while, nevertheless, the granting of the preliminary injunction was eminently proper. The legal rights of the parties are not decided by the courts of equity, but the property in issue is guarded until those rights have been ascertained by the tribunal established for that purpose. And this is particularly so in cases where the value of the property in dispute consists of timber standing on the land, or in minerals under it. In such instances, where both or several different parties claim title to the property in controversy, it is not uncommon to restrain them all from the cutting of timber or the removal of minerals, for the reason that, if it is permitted, it will result in injury to the rights and interests of the true owner. Like bills of quia timet, injunctions in such cases are in the nature of writs of prevention, intended to accomplish the ends of precautionary justice. While it is true that under the ancient rules of courts of equity parties were left to their legal remedies in cases of trespass, it is equally true that at this time the practice prevails of allowing injunctions in such cases where the injury is irreparable. The true foundation of this jurisdiction is the probability of permanent injury to the property in dispute, the inadequacy of pecuniary compensation, and the prevention of a multiplicity of suits. If the mischief complained of is irremediable, and destroys the substance of the property, such as the cutting of timber, the mining of minerals, and the extracting of ores, an injunction restraining such acts will issue, in order that the property may be preserved from destruction during such time as may be necessary to try the title at law. This practice is now well established in the courts of the United States, as also in those of a number of the states. As showing the rule and the necessity for it, as also the reasons for applying it to cases like the one now before us, the following authorities are cited, viz.: *U. S. v. Gear*, 3 How. 120; *Erhardt v. Boaro*, 113 U. S. 537, 5 Sup. Ct. 565; *Burnley v. Cook*, 13 Tex. 586; *Jerome v. Ross*, 7 Johns. Ch. 315; *Bonaparte v. Railroad Co.*, 1 Baldw. 231, Fed. Cas. No. 1,617; *Hanson v. Gardiner*, 7 Ves. (Sumn. Ed.) 305; *Attorney General v. Norwood*, 1 Bland, 581; *Ingraham v. Dunnell*, 5 Metc. (Mass.) 126; *Story*, Eq. Jur. §§ 863, 925, 926, 929, 948, 956; *Bracken v. Preston*, 1 Pin. 584; *Bird v. Railroad Co.*, 8 Rich. Eq. 46; *Kane v. Vandenburg*, 1 Johns. Ch. 11; *Wood v. Braxton*, 54 Fed. 1005; *Mining Co. v. Fremont*, 7 Cal. 317; *Kinsler v. Clarke*, 2 Hill, Eq. 618; *Livingston v. Livingston*, 6 Johns. Ch. 499; *High*, Inj. § 671.

It follows that the decree appealed from must be affirmed, and it is so ordered.

**FARMERS' LOAN & TRUST CO. v. NORTHERN PAC. R. CO. et al.**

(Circuit Courts, E. D. Wisconsin, W. D. Wisconsin, N. D. Illinois, S. D. New York, D. Minnesota, D. North Dakota, D. Montana, D. Idaho, D. Washington, D. Oregon. January 26, 1896.)

**RAILROAD RECEIVERS—ANCILLARY APPOINTMENT—COURT OF PRIMARY JURISDICTION—COMITY.**

A creditors' bill, by the Farmers' Loan & Trust Company and other creditors, was filed against the Northern Pacific Railroad Company in the circuit court of the United States for the Eastern district of Wisconsin. The bill alleged that the railroad company had property in that district, and at the time it was operating the Wisconsin Central Lines within that district, which lines were subject to the Northern Pacific mortgages. That court appointed receivers, as prayed by said bill, and the appointment was consented to by the railroad company. Immediately afterwards similar bills were filed in other United States circuit courts in which the Northern Pacific Railroad Company had property. All these other courts, under the rule of comity, appointed the same receivers, as ancillary to the appointment in the Eastern district of Wisconsin. After the receivers had operated the Northern Pacific road, including leased lines in Wisconsin, about a month, the lease was canceled by the lessor, for nonpayment of rent, and the leased lines turned back to the Wisconsin Central Company. Shortly afterwards the Farmers' Loan & Trust Company filed in the same court a bill to foreclose mortgages on the Northern Pacific Railroad, and this suit was consolidated with the first suit, and the same receivers appointed. Like foreclosure suits were brought in each of the other circuit courts, on ancillary bills of foreclosure, and the same receivers appointed in each court. The administration of the property continued for about two years under the circuit court for the Eastern district of Wisconsin, and with the consent of all parties to the suit. The jurisdiction of that court had never been objected to or challenged in that court. In August, 1895, the railroad company filed an affidavit in the ancillary suit pending in the circuit court for the district of Washington, and asked to have the order appointing receivers made in that court vacated. The ground alleged was that the railroad company had no railroad or property situated in the Eastern district of Wisconsin, and it was therefore claimed that the latter court had no jurisdiction, and other courts were not bound, under the rule of comity, to recognize its primacy and administer the estate as ancillary courts. It was held, after argument, in the circuit court for the district of Washington, that the said circuit court for the Eastern district of Wisconsin had no jurisdiction, and the court in Washington was bound to administer that part of the property lying within its territory in an independent manner. The circuit court for Washington therefore appointed its own receiver, and removed the receivers theretofore acting. Similar orders were made in the United States circuit courts for Oregon, Idaho, and Montana, each of these courts appointing its own independent receivers. *Held*,—overruling *Farmers' Loan & Trust Co. v. Northern Pac. R. Co.* (Cir. Ct. Wash.) 69 Fed. 871,—that the circuit court for the Eastern district of Wisconsin should be regarded as the court of primary jurisdiction, and that the proceedings in all other courts should be ancillary in character, and in aid of the proceedings in the court of primary administration.

This action being pending in the following circuit courts of the United States, to wit, for the Eastern district of Wisconsin, the Western district of Wisconsin, the Northern district of Illinois, the Southern district of New York, the district of Minnesota, the district of North Dakota, the district of Montana, the district of Idaho, the dis-

trict of Washington, and the district of Oregon, to foreclose certain mortgages on property of the Northern Pacific Railroad Company, in each of which districts the company had property, the following petition was filed in each of said courts, viz.:

To the Honorable, the Judges of said Court: The joint petition of the Farmers' Loan & Trust Company and the Northern Pacific Railroad Company respectfully shows:

(1) The Northern Pacific Railroad Company is a corporation duly organized and existing under the act of congress approved July 2, 1864, to which reference is hereby made, and which defendant, pursuant to due authority in that behalf, on August 15, 1893, had constructed, and did then own and operate, a line of railroad from Ashland, Wisconsin, to Portland, Oregon, and Tacoma, Washington, more than 2,000 miles in length, with branches in the states of Minnesota, North Dakota, Montana, Idaho, Washington, and Oregon, aggregating, also, more than 2,000 miles in length. The land grant of said company, of which it yet holds about 38,400,000 acres, is situated in the states last above named. On April 1, 1890, said Northern Pacific Railroad Company leased the lines of railroad of the Wisconsin Central Railroad Company and the Wisconsin Central Company, hereinafter called the "Wisconsin Lines," extending from a point of connection with its lines at St. Paul and Ashland to Milwaukee and Chicago, and on August 15, 1893, operated said lines under said lease.

(2) On August 15, 1893, the Northern Pacific Railroad was insolvent, and P. B. Winston and others filed a creditors' bill against the said company in the circuit court of the United States for the Eastern district of Wisconsin; and thereupon Henry C. Payne, Thomas F. Oakes, and Henry C. Rouse were appointed receivers of all of the property of the said company by that court, and immediately thereafter the same persons were likewise appointed such receivers in the various judicial districts through which the railroad extends, and in which it had property, and in the following order in point of time, to wit: On the 15th day of August, 1893, and after the court for the Eastern district of Wisconsin had made such appointment as aforesaid, in the circuit courts for the Southern district of New York and for the districts of Minnesota and North Dakota; on the 17th day of August, 1893, in the circuit courts for the districts of Montana, Oregon, Western Wisconsin, and Washington; on the 18th day of August, 1893, in the circuit court for the district of Idaho; and on the 24th day of August, 1893, in the circuit court for the Western district of Michigan.

(3) The bill filed in the Eastern district of Wisconsin averred, *inter alia*, "that part of the Northern Pacific Railroad is located in the district embraced within the jurisdiction of this court"; and the bills filed in all other districts averred, *inter alia*, "that part of the Northern Pacific Railroad is located within the Eastern district of Wisconsin." Said bills also averred the fact that Messrs. Oakes, Rouse, and Payne had been appointed receivers of the Northern Pacific Railroad Company by the circuit court of the United States for the Eastern district of Wisconsin. Upon the filing of said bills in the said several districts, respectively, the United States circuit courts thereof appointed said Oakes, Rouse, and Payne receivers of all the property of the Northern Pacific Railroad Company, by orders exactly similar to the order made by the circuit court of the United States for the Eastern district of Wisconsin; and each and all of said orders were, in form, original orders, and each contained direction to the said Oakes, Rouse, and Payne, receivers thereby appointed, to report and account to the court making the same, and each was made on consent of defendant railroad company.

(4) Thereafter, and upon September 26, 1893, after due proceedings had, the circuit court of the United States for the Eastern district of Wisconsin ordered the said receivers to surrender to the companies owning the same the Wisconsin Lines above mentioned, and the same were, at midnight of that day, in fact so surrendered; the court, by its order, reserving authority over the same as in said order expressed, reference to which is hereby made.

(5) On October 18, 1893, the Farmers' Loan & Trust Company, the trustee named in mortgages made to it by the said Northern Pacific Railroad

Company, to wit, the general second mortgage, dated November 20, 1883, the general third mortgage, dated December 1, 1887, and the consolidated mortgage, dated December 2, 1889, filed in the circuit court of the United States for the Eastern district of Wisconsin a bill to foreclose those mortgages, and thereupon said circuit court for the Eastern district of Wisconsin, by its order, extended the appointment of said receivers to the said foreclosure suit, and consolidated the said suit with the cause then pending under the creditors' bill filed August 15, 1893, as aforesaid.

(6) Like foreclosure bills, containing the same allegations, were forthwith filed in the United States circuit courts for the following named districts, and on the following dates, respectively, each court appointing the same receivers, namely: On the 25th day of October, 1893, in the United States circuit courts for the districts of North Dakota, Western Wisconsin, and Western Michigan; on the 28th day of October, 1893, in the United States circuit court for the district of Oregon; on the 30th day of October, 1893, in the United States circuit courts for the districts of Montana and Washington; and on the 1st day of November, 1893, in the United States circuit court for the district of Idaho. A like foreclosure bill was filed in the United States circuit court for the district of Minnesota, November 14, 1893, and said court made the order appointing the same receivers, but denied the motion to consolidate, and dismissed the creditors' bill. In the United States circuit court for the Southern district of New York, such foreclosure bill was filed August 5, 1895. All said foreclosure bills averred the jurisdiction of the circuit court of the United States for the Eastern district of Wisconsin, and the fact of appointment of said Oakes, Rouse, and Payne as receivers by said court, and said receivers were made defendants therein.

(7) The Northern Pacific Railroad Company appeared in said cause, and demurred to said foreclosure bill, and thereafter the cause was so proceeded in that all direction and advice was applied for, by said receivers, to the circuit court of the United States for the Eastern district of Wisconsin, and they filed their accounts with it, and all orders with respect to the administration of said trust were made by that court; and said circuit court of the United States for the Eastern District of Wisconsin was in fact treated by the courts and the parties as the court of original and primary jurisdiction in the cause, and the proceedings in the other courts respecting the same, as ancillary proceedings, until about August 7, 1895, as hereinafter stated.

(8) On or about August 7, 1895, the Northern Pacific Railroad Company filed in the circuit court of the United States for the district of Washington a motion to vacate the appointment of said receivers, and for the appointment of others in their places, and in support thereof filed an affidavit, copy of the first, second, and third paragraphs whereof are hereto appended. Said affidavit also contained certain charges against said receivers, in respect to the method of their appointment and their administration of their trust, not necessary to be now considered. Petitioners pray that said affidavit may be taken as part hereof, as though herein set out at length.

(9) Upon the filing of the said motion and affidavit, and on the motion of said Oakes, Rouse, and Payne, receivers as aforesaid, the United States circuit court of Washington made an order permitting them to plead, answer, or demur to said motion and affidavit in respect to the question of the jurisdiction only, and thereafter said receivers filed an answer, copy whereof is hereto appended. Petitioners pray that said answer may be taken as part hereof, as though herein set out at length.

(10) Said motion, affidavit, and answer came on to be heard before Hon. William B. Gilbert, Circuit Judge, and Hon. C. H. Hanford, District Judge, in the circuit court of the United States for the district of Washington, at Seattle, on August 22, 23, and 24, and was argued by counsel, and thereafter opinions were, by said judges, filed, copies whereof are hereto appended; and on September 2, 1895, an order was made by said court that said Oakes, Rouse, and Payne, receivers as aforesaid, on or before October 2, 1895, plead, answer, or demur to the charges in said affidavit contained, and file their accounts in said court, and enter bond, with sureties, as receivers therein.

(11) Thereafter said Thomas F. Oakes, Henry C. Rouse, and Henry C. Payne, receivers as aforesaid, filed their resignations as such receivers with

the circuit court of the United States for the Eastern district of Wisconsin, and on September 27, 1895, that court accepted the same, and appointed Edward H. McHenry and Frank G. Bigelow receivers of the Northern Pacific Railroad Company; and such persons have since been appointed such receivers by the circuit courts of the United States for the Eastern district of Wisconsin, the Northern district of Illinois, the district of Minnesota, and the district of North Dakota, with direction to report and account to the United States circuit court for the Eastern district of Wisconsin.

(12) On October 2, 1895, the day by which the said receivers had been ordered to answer, give bond to, and file accounts with the circuit court of the United States for the district of Washington, that court removed said receivers, for noncompliance with said order, and appointed Andrew F. Burleigh receiver of said Northern Pacific Railroad Company; and since that time the United States circuit courts for the districts of Oregon and Idaho have also accepted the resignations of said Oakes, Rouse, and Payne, and appointed said Andrew F. Burleigh receiver as aforesaid, with direction to report and account to the United States circuit court for the district of Washington. On October 7, 1895, the circuit court of the United States for the district of Montana appointed said Andrew F. Burleigh, Edward L. Bonner, and James H. Mills receivers of the Northern Pacific Railroad Company, with direction to account and report to that court.

(13) On or about October 2, 1895, the resignations of the said Oakes, Rouse, and Payne were filed with the circuit court of the United States for the Southern district of New York, and motion made for the acceptance thereof, and the appointment of others in their places, which motion has been from time to time adjourned, the court expressing a desire to await a unity of action in the other circuits. Thus said Oakes, Rouse, and Payne continue to be such receivers in said district.

(14) Your petitioner the Farmers' Loan & Trust Company, trustee, for the purpose of obtaining a unity of receivership of the whole system, has, by its president and counsel, recently visited Judge Jenkins, at Chicago, Judge Sanborn, at St. Paul, Judge Thomas, at Fargo, Judge Knowles, at Helena, Judge Hanford, at Walla Walla, and Judge Gilbert, at Portland; and counsel for the company and counsel for the reorganization committee, representing a large number of second, third, and consolidated mortgage bonds, have also, for the same purpose, recently visited Judge Jenkins and Judges Sanborn and Gilbert; and counsel for your petitioner the trust company has also, since said visit, sought to obtain a conference of Judges Jenkins, Sanborn, and Gilbert, for the same purpose, but has determined that such conference is not practicable; and such personal application, as aforesaid, on the part of the trustee and of the said various counsel, has not produced the result desired.

(15) Your petitioners pray that, all and singular, the bills, orders, opinions, and proceedings hereinbefore recited or mentioned, and all of which have been printed, and are in possession of counsel concerned in this cause, shall be deemed and taken as part of this petition, as though fully and at length set forth herein.

Wherefore, and further showing unto your honors that the Northern Pacific Railroad Company was chartered, and the construction thereof aided, by congress of the United States, as and for a continuous line of railroad for the transportation of freight and passengers from Lake Superior to Puget Sound, and that the purposes for which it was so chartered and aided, the welfare of the large population dependent upon it for means of transportation, the security of its creditors, and the rights of its shareholders, require that it should be operated as an entirety, and that such operation is impossible under the four sets of receivers now having custody, each, of part of its railroad and property.

Your petitioners pray (1) That your honorable court will be pleased to make such order in the premises as will secure the operation as an entirety of the property of the Northern Pacific Railroad Company covered by the mortgages under which your petitioner the Farmers' Loan & Trust Company is trustee. (2) That your honorable court will make such further order in the premises as to your honors may seem meet.



The facts of the case, and the relief requested, are sufficiently stated in the foregoing petition. Under a written stipulation signed by each party to the suit, these petitions were heard before Associate Justices Field, Harlan, Brewer, and Brown, of the supreme court, sitting as circuit justices, and being assigned, by order of the supreme court, to the Ninth, Seventh, Eighth, and Second circuits, respectively. For convenience of the judges and counsel, and on written stipulation of all the parties in the suit, the petitions were heard before all the said justices, sitting together, in Washington, and were argued by counsel.

After considering the case the justices signed and filed in the circuit courts of each circuit the following order:

The Farmers' Loan & Trust Co. vs. Northern Pacific Railroad Company. District of \_\_\_\_\_.

It is ordered that, in respect to the proceedings now being carried on for the foreclosure of mortgages on the Northern Pacific Railroad Company, the circuit court for the Eastern district of Wisconsin be regarded as the court of primary administration, and that the proceedings in this court will be ancillary in their character, and in aid of the proceedings in the court of primary administration. But this court reserves the right at any time, upon the application of any person or persons interested, or upon its own motion, to make such orders and decrees as to it shall seem just for the protection of the creditors of the railroad company residing within its jurisdiction.

Herbert B. Turner, John C. Spooner, and Joseph H. Choate, for complainant Farmers' Loan & Trust Co.

Silas W. Pettit, for defendant Northern Pac. R. Co.

Mr. Cardozo, for second mortgage bondholders' committee.

Before FIELD, HARLAN, BREWER, and BROWN, Circuit Justices.

At the same time the justices filed the following opinions:

The parties in the above causes, namely, the Farmers' Loan & Trust Company, the Northern Pacific Railroad Company, the second mortgage bondholders, represented by Johnston Livingston, chairman, and the reorganization committee of bondholders, represented by E. D. Adams, chairman, have presented to us a petition setting forth the general history of these causes, and asking that such order be made in the respective circuits to which we are assigned as will secure the operation as an entirety of the property of the railroad company covered by the mortgages in which the Farmers' Loan & Trust Company is trustee, and such other orders in the premises as to us shall seem meet. And said application has been heard by us in chambers of the city of Washington, under an agreement in writing between said parties that we should do so.

We are of opinion that proceedings to foreclose a mortgage placed by a railroad company upon its lines extending through more than

one district should, to the end that the mortgaged property may be effectively administered, be commenced in the circuit court of the district in which the principal operating offices are situated, and in which there is some material part of the railroad embraced by the mortgage; that such court should be the court of primary jurisdiction and of principal decree, and the administration of the property in the circuit courts of other districts should be ancillary thereto. But in view of what has transpired in these foreclosure proceedings,—especially in view of the fact that a portion of the line of road owned by the Northern Pacific Railroad Company was and is within the state of Wisconsin, and that at the time of the filing of the creditors' bill (in which the trustee in the mortgage was a complainant) the Northern Pacific Railroad Company was operating its road through the Eastern district of Wisconsin, although that part of its line so operated belonged to another company, and was under lease to the Northern Pacific Railroad Company for ninety-nine years,—and in view of the further fact that the railroad company entered its appearance, and assented to the act of the circuit court for the Eastern district of Wisconsin in taking jurisdiction, and as such exercise of jurisdiction has been recognized by the circuit court in every district along the line of the Northern Pacific Railroad, and by all parties, for the space of about two years, during which time many orders in the course of administration have been entered, we are of opinion that the circuit court for the Eastern district of Wisconsin has jurisdiction to proceed to a decree of foreclosure which will bind the mortgagor company and the mortgaged property, and ought, therefore, to be recognized by the circuit courts of every district along the line of the road as the court of primary jurisdiction; and that proceedings in the latter court, while protecting the rights of local creditors, should be ancillary in their character, and subordinate to the proceedings in the court of primary jurisdiction. In expressing these views, we are not to be understood as passing upon the proposition advanced in argument, but not necessary to be here considered, that it is competent for a circuit court of the United States, by consent of parties, to foreclose the mortgage of a railroad, no part of which is within the territorial jurisdiction of such court.

BROWN, Circuit Justice. In view of the doubts suggested regarding the jurisdiction of the circuit court of the United States for the Eastern district of Wisconsin to foreclose the mortgage in this case, and of the further fact that the business offices of this company have been, and still are, at St. Paul, I think the circuit court for the district of Minnesota should be treated as the court of primary jurisdiction, and that we should also assume the appointment of receivers. But, as the whole object of the hearing before the justices assigned to the four circuits in which the property of the road is located is to secure harmony of action, I have concluded to waive my personal views, in deference to the opinion of my brethren, and to accede to the recognition of the circuit court for the Eastern district of Wisconsin as the court of primary jurisdiction.

## MOONEY et al. v. BUFORD &amp; GEORGE MANUF'G CO. et al.

(Circuit Court of Appeals, Seventh Circuit. February 8, 1896.)

No. 250.

## 1. FOREIGN INSURANCE COMPANIES—SERVICE OF PROCESS—JURISDICTION.

The Indiana statute of 1883 makes it unlawful for any foreign insurance company to do business in that state until it has filed with the auditor of state a copy of a resolution of its directors consenting that, "in any suit against the company," process may be served on any of its agents in the state, "with like effect as if such company was chartered, organized or incorporated in the state," and further agreeing that such service may be made "while any liability remains outstanding against such company in the state." Burns' Rev. St. Ind. 1894, § 4916. *Held*, that a foreign insurance company which has complied with these requirements may be validly served, in the manner above prescribed, not only in suits upon obligations arising out of business done within the state, but in suits upon contracts of insurance made and payable in other states. *Rehm v. Saving Inst.*, 25 N. E. 173, 125 Ind. 135, distinguished.

## 2. GARNISHMENT PROCESS—JURISDICTION.

In garnishment proceedings against a debtor of a defendant who cannot be personally served, because he resides out of the state, the jurisdiction of the court does not depend upon the situs of the debt, but upon the control which is obtained over the debtor by means of due process, duly served.

## 3. SAME.

Where the principal debtor is a citizen of another state, a valid judgment may, by garnishment proceedings, be obtained against a foreign insurance company indebted to him, when, by the laws of the state and by its own consent, such company has become subject to service of process in the state "with like effect" as if it had been incorporated therein.

## In Error to the Circuit Court of the United States for the District of Indiana.

This is an action of attachment and garnishment, commenced in the superior court of Marion county, and transferred thence to the court below upon the petition of the Buford Manufacturing Company, the alleged debtor in the case. The plaintiffs in error, who brought the action, are residents and citizens of Indiana, doing business under the firm name of W. W. Mooney & Sons. They alleged, as their cause of action, a contract liability of the Buford & George Manufacturing Company, a corporation of Missouri, located and doing business at Kansas City, and that the London Assurance Corporation and the Queen Insurance Company, each of which is a foreign corporation authorized to do and doing business in Indiana, are each indebted to the Buford & George Manufacturing Company in a sum exceeding their demand. No question is made of the sufficiency of the complaint, or of the affidavit in attachment and garnishment. A summons in the ordinary form was issued and served, as shown by affidavit, upon the Buford & George Manufacturing Company by delivering a copy, and by reading the same, to the secretary and president of the company, at Kansas City, on the 8th of August, 1894. The ordinary process in garnishment was issued and served July 26, 1894, upon the London Assurance Corporation, by reading to its agents, named, and upon the Queen Insurance Company by reading to a solicitor, named, of its agents, named, in Marion county, Ind. After the transfer of the case, the service upon the Queen Insurance Company was set aside, on motion. The other defendants, the Buford & George Manufacturing Company and the London Assurance Corporation, each filed a plea to the jurisdiction, to the effect that the liability of the latter company to the

former grew out of insurance written by the latter in Missouri upon property of the former in Missouri, and in no sense out of any transaction had or contract made in Indiana. The court overruled demurrers to these pleas, and, the plaintiff choosing to abide the ruling, ordered the cause abated and stricken from the docket. Error is assigned upon each ruling.

The following statutory provisions bear more or less directly upon the question; the numbers given of sections referring to Burns' Indiana Statutes, Revision of 1894, and, in parenthesis, to the Revision of 1881: Section 310 (309): "When a corporation, company, or individual has an office or agency in any county for the transaction of business, any action growing out of, or connected with the business of such office may be brought in the county where the office or agency is located, at the option of the plaintiff, as though the principal resided therein; and service upon any agent or clerk employed in the office or agency shall be sufficient," etc. This has been held to be applicable when the defendants are nonresidents of the state. *Rauber v. Whitney*, 125 Ind. 216, 25 N. E. 186. Section 318 (316) provides that process against a domestic or foreign corporation may be served upon certain officers or agents: "Provided, however, that process shall not be served upon any such person, officer, or agent when he is plaintiff in the suit; but in such case process shall be served upon some other such person, officer, or agent of the corporation than such plaintiff; and in case the defendant be a foreign corporation, having no such person, officer, or agent, resident in the state, service may be made in the same manner as against other non-residents." Section 320 (318) provides for notice by publication in a variety of cases, and, among them, "where the defendant is a non-resident of the state and \* \* \* the object of the action is \* \* \* to enforce the collection of any demand by proceedings in garnishment or attachment." Section 321 (319): "When the defendant is a non-resident, personal service of the summons out of the state is equivalent to publication." Sections 970 (958), 971 (959), and 972 (960) protect personal earnings or wages, in certain cases, from seizure in any action of attachment, garnishment, or supplementary proceedings. By sections 3453 (3022) and 3454 (3023), enacted in 1852, agents of foreign corporations were required, before entering upon the duties of their agency in this state, to deposit in the clerk's office of the county where they proposed doing business an order or resolution "authorizing citizens or residents of this state having a claim or demand against such corporation arising out of any transaction in this state with such agents, to sue for and maintain an action in respect to the same in any court of this state of competent jurisdiction, and further authorizing service of process in such action on such agent to be valid service on such corporation, and that such service shall authorize judgment and all other proceedings against such corporation." By the act of 1877, § 4915 (3765), it is required that authority be given the agent of a foreign insurance company "to acknowledge service of process for and in behalf of such company, consenting that service of process upon such agent shall be taken and held to be as valid as if served upon the company according to the laws of this state, and waiving all claim of error by reason of such service." The last enactment on the subject, passed in 1883, provides: 4916 (1): "That it shall not be lawful for any insurance company chartered, organized or incorporated in any other state or nation to do business in the state of Indiana, until such company shall file with the auditor of state a certified copy of a vote or resolution of the board of directors of such company consenting that service of process in any suit against such company may be served upon any authorized agent of such company in the state of Indiana, with like effect as if such company was chartered, organized or incorporated in the state of Indiana, and agreeing that any process served upon such agent shall be of the same legal force and validity as if served upon said company, and agreeing that such service may be so made, with such effect, while any liability remains outstanding against such company in this state, and agreeing, further, that if at any time there shall be no authorized agent of such company in the county where any suit shall be brought, service may thereafter be made upon the auditor of the state of Indiana, with such effect as if made upon an authorized agent of such company."

4917 (2): "Service of process in any action against any insurance company not having an agent in that county where any suit shall be brought, shall be made upon the auditor of state by duplicate copy, and such service shall be deemed in all respects the same as if such company was chartered, organized or incorporated in the state of Indiana."

The argument for the defendants in error is based upon three propositions, and authorities cited in support of them, as follows: (1) "Both the defendant and the insurance company, the garnishee, were nonresidents of Indiana, and the court had no jurisdiction of the person of the defendant; and the debt from the insurance company to defendant was not contracted or payable in Indiana. Under this state of facts, the debt to defendant was not attached in Indiana, and therefore the court acquired no jurisdiction." *Everett v. Walker* (Colo. App.) 36 Pac. 616; *Railroad Co. v. Maggard* (Colo. App.) 39 Pac. 985; *Williams v. Ingersoll*, 89 N. Y. 508; *Douglass v. Insurance Co.*, 138 N. Y. 209, 33 N. E. 938; *Renier v. Hurlbut*, 81 Wis. 24, 50 N. W. 783; *Railway Co. v. Sharitt*, 43 Kan. 375, 23 Pac. 430; *Bowen v. Pope*, 125 Ill. 28, 17 N. E. 64; *Haggerty v. Ward*, 25 Tex. 144; *Insurance Co. v. Hetler* (Neb.) 56 N. W. 711; *Railroad Co. v. Dooley*, 78 Ala. 524; *Lawrence v. Smith*, 45 N. H. 533; *Sawyer v. Thompson*, 24 N. H. 510; *Green v. Bank*, 25 Conn. 452; *Myer v. Insurance Co.*, 40 Md. 595; *Straus v. Glycerine Co.*, 46 Hun, 216; *Central Trust Co. v. Chattanooga, R. & C. R. Co.*, 68 Fed. 685. (2) "There is no statute of Indiana authorizing the service of process upon foreign insurance companies, except in transactions arising out of the business of such companies had with its agents in that state." *Rev. St. 1894*, §§ 310, 315, 3453, 4915, 4916 (*Rev. St. 1881*, §§ 309, 313, 3022, 3765); *Insurance Co. v. Black*, 80 Ind. 513; *Finch v. Insurance Co.*, 87 Ind. 302; *Rehm v. Saving Inst.*, 125 Ind. 138, 25 N. E. 173; *Milwaukee Bridge & Iron Works v. Wayne County Circuit Judge*, 73 Mich. 155, 41 N. W. 215; *St. Clair v. Cox*, 106 U. S. 350, 1 Sup. Ct. 354. (3) "The defendant could not have maintained a suit against the insurance company on the policy of insurance in the courts of Indiana." 2 *Beach, Priv. Corp.* § 896; 2 *Mor. Priv. Corp.* §§ 976, 977; *Insurance Co. v. French*, 18 How. 404; *Smith v. Insurance Co.*, 14 Allen, 336; *Central Railroad & Banking Co. v. Georgia Const. & Invest. Co.*, 32 S. C. 319, 11 S. E. 192; *Insurance Co. v. Black*, 80 Ind. 513.

Per contra, the plaintiffs in error have cited, with others, the following: 8 *Am. & Eng. Enc. Law*, p. 1131; *Neufelder v. Insurance Co.* (Wash.) 33 Pac. 870; *Dittenhoefer v. Clothing Co.* (Wash.) 30 Pac. 660; *Harvey v. Railway Co.* (Minn.) 52 N. W. 905; *Glover v. Wells*, 40 Ill. App. 350; *Railroad Co. v. Crane*, 102 Ill. 249; *McAllister v. Insurance Co.*, 28 Mo. 214; *Connor v. Insurance Co.*, 28 Fed. 549; *Newland v. Circuit Judge*, 85 Mich. 151, 48 N. W. 544; *Carson v. Railway Co.*, 88 Tenn. 646, 13 S. W. 588; *Moshassuck Felt Mill v. Blanding*, 17 R. I. 297, 21 Atl. 538; *Railroad Co. v. Tyson*, 48 Ga. 351; *Bank v. Huntington*, 129 Mass. 444; *Cousens v. Lovejoy*, 81 Me. 467, 17 Atl. 495; *Roche v. Association*, 2 Ill. App. 360; *German-American Ins. Co. v. Chippewa Circuit Judge* (Mich.) 63 N. W. 531; *Burns v. Railroad Co.*, 113 Ind. 169, 15 N. E. 230; *Railroad Co. v. McMullen*, 117 Ind. 439, 20 N. E. 287; *Dennick v. Railroad Co.*, 103 U. S. 11; *Mohr & Mohr Distilling Co. v. Insurance Cos.*, 12 Fed. 474; *Handy v. Insurance Co.*, 37 Ohio St. 366; *Knott v. Insurance Co.*, 2 Woods, 479, Fed. Cas. No. 7,894; *Runkle v. Insurance Co.*, 2 Fed. 9; *Moch v. Insurance Co.*, 10 Fed. 696; *Carstairs v. Insurance Co.*, 13 Fed. 823; *Youmans v. Trust Co.*, 67 Fed. 283; *Railroad Co. v. Estill*, 147 U. S. 591, 13 Sup. Ct. 444; *Insurance Co. v. Woodworth*, 111 U. S. 138, 4 Sup. Ct. 364; *Reyer v. Association* (Mass.) 32 N. E. 469; *Insurance Co. v. McLimans*, 28 Neb. 653, 44 N. W. 991; *McKenna v. Fisk*, 1 How. 241; *Bryant v. McClure*, 44 Mo. App. 553; *Johnston v. Insurance Co.*, 132 Mass. 432; *Farmer v. Association* (Sup.) 21 N. Y. Supp. 1056; *South Pub. Co. v. Fire Ass'n of Philadelphia*, Id. 675; *Insurance Co. v. Chambers* (N. J. Ch.) 32 Atl. 663.

F. M. Finch and John A. Finch, for plaintiffs in error.

H. O. McDougal and Frank P. Sebree, for defendants in error.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge, after making the foregoing statement, delivered the opinion of the court.

The first inquiry, in logical order, is whether, upon its obligation incurred in Missouri, the defendant in garnishment was suable in any form of action in Indiana. It is contended by the defendants in error that the statutes of Indiana authorize suits against foreign corporations, including insurance companies, only upon obligations arising out of business authorized to be done, and done, in that state; and, for support of the proposition, reference is made to *Insurance Co. v. Black*, 80 Ind. 513; *Finch v. Insurance Co.*, 87 Ind. 302; and *Rehm v. Saving Inst.*, 125 Ind. 135, 25 N. E. 173. The last case only need be considered, since the others were decided under the earlier statutes, without reference to the acts of 1877 and 1883. That suit, which was against the German Insurance Company, a corporation of Illinois, was brought in the superior court of Marion county, Ind., by parties residing there, who had been appointed the agents of the company for the state, and upon whom the company, in full compliance with the act of 1883 had consented that "process in any suit against such company" might be served "with like effect as if such company was chartered, organized or incorporated in the state of Indiana." The process in the case was served upon the auditor of state, and was, on motion, set aside. The court, after declaring that the statutory provisions which relate to foreign corporations in general, including section 316, Rev. St. 1881 (section 318, Rev. St. 1894) supra, "do not enter into the construction to be given to the act of 1883," and "have no application to such corporations as are under special regulations," says, among other things, "that the appellants were not deprived of the benefit of the provision in the act of 1883 authorizing service of process upon the auditor of state because they happened to be the agents of the appellee when they instituted their action, but their cause of action did not arise out of any business transaction within the purview of the statute. The business contemplated is such as an insurance company is authorized to transact after it has complied with the conditions imposed by the statute, and which is forbidden until such compliance. The business contemplated is that of insurance. That is the subject to which the statute relates. The statute contemplates a company having agents in the state, and relates to such business as they may do after the company has complied with its conditions. A compliance with the requirements of the statute, and the appointment of agents, are preliminary conditions to the business contemplated." The decision of the court—that, in the particular case, the nonresident company was not subject to process in the state—was, beyond question, correct, though it might better, as we think, have been put upon the ground that service upon the auditor was unauthorized, because, by the terms of the act of 1883, service may be so obtained only "if at any time there shall be no authorized agent in the county where any suit shall be brought." The plaintiffs were themselves such agents of the company, clothed with all the authority required by the statute, but, in their own suit against the

company, they could not have the summons served upon themselves; and it follows, as the court declared, that the action was "controlled by the rules of the common law, and could only be maintained in a forum within the place of the appellee's domicile." Upon the conditions shown, there was no authority for process, in the particular case, out of any other forum. But, if the decision be interpreted strictly according to the terms of the opinion delivered in support of it, it need not be construed to mean that foreign insurance companies, under the act of 1883, can be sued in Indiana only upon contracts made in Indiana by their agents located there. Such a construction would be too narrow to include all contracts of insurance with citizens of the state, and contracts executed out of the state and payable in the state. The expressions quoted from the opinion, even if they ought not to be restricted to the case before the court, mean, necessarily, no more than that an action against such a company can be brought in the state only upon a contract or liability for insurance. If, for the words "such" and "as," in the portion of the opinion quoted, the words "the" and "which" were substituted, it would be clear, perhaps, that such companies were intended to be subjected to the service of process in the state only in suits upon contracts of insurance made in the state. But that was certainly not the legislative purpose, and, for all that is to be found in this opinion, should not be attributed to the supreme court of the state. The earlier provisions quoted from the Indiana Code and statutes expressly limit the right to process against foreign corporations to suits arising out of transactions had in the state, and, from the mere omission of that limitation in the later enactments, there would arise a just inference that an enlargement of jurisdiction in this particular was intended; but the broad terms employed in the act of 1883, "process in any suit against such company may be served," etc., need not to be helped out by inference. The word "suit," as used in the twenty-fifth section of the judiciary act of 1789, was declared by Chief Justice Marshall, in *Weston v. City Council*, 2 Pet. 449, 464, to be "very comprehensive," and "understood to apply to any proceeding in a court of justice by which an individual pursues that remedy in a court of justice which the law affords him. The modes of proceeding may be various, but, if a right is litigated between parties in a court of justice, the proceeding by which the decision of the court is sought is a suit." There is no reason to be found in the context, or in the course of previous legislation in the state, or in considerations of policy, for believing that in the enactment before us the word was intended to be used in a more restricted sense. The process provided for in the act of 1877 is declared to be "as valid" as if served upon the company itself, but in order, apparently, to remove a remaining possibility of doubt, the more explicit and comprehensive terms of the act of 1883 were employed. Under a similar statute of Massachusetts, enacted in 1878, and of which the Indiana provision may be said to be a re-enactment with the construction which had been put upon it, it was held, in *Johnston v. Insurance Co.*, 132 Mass. 432 (decided

as early as March, 1882), that a nonresident might maintain in the courts of the commonwealth an action against a foreign insurance company doing business in the state, upon a contract made, and the subject-matter of which was situated in, another state, although the only service of process was upon the insurance commissioner, as provided by the statute. We quote from the opinion:

"Whatever may be the limitations of this statute in respect to foreign insurance companies, after they have appeared in court in obedience to lawful process there can be no doubt that if they do business in this state, and have complied with the provisions of the statute, they are within the jurisdiction of our courts, and can be held to answer in suits upon contracts which are transitory in their nature, and which ordinarily may be enforced wherever the defendant may be found. The statute simply provides for service of process, which shall, by the consent of the company, have the same force and validity as if made on the company itself; and when the service is actually made the jurisdiction of the court is complete, as to the defendant. It relates merely to the service of process. It contains no restrictions on the company after it comes into court, and does not preclude it from removing the action to the United States courts. \* \* \* The only question here is whether the law and practice of our courts, which enable a nonresident to sue, upon a debt contracted elsewhere, another nonresident, who may be found here, and on whom summons has been actually served, applies to this case. In other words, having summoned the defendant, a foreign insurance company, according to the provisions of the statute, will this court decline to take jurisdiction of an action to recover a sum of money alleged to be due the plaintiff, because the plaintiff is not a resident of this state, and the contract was made, and the property to which it relates is situated, in another state? It is true, the statute does not, in express terms, provide for the maintenance of such an action; nor does it prohibit its maintenance. The statute was not framed for that purpose. Its object is simply to provide for serving upon such companies 'all lawful processes in any action or proceeding' against them. The words, 'all lawful processes in any action or proceeding,' must be held to include all actions which might lawfully be brought against a company thus having a domicile of business in this commonwealth. It is also true that the main purpose of the statute is to secure to our own citizens the benefit of our laws and tribunal in regard to contracts made with foreign insurance companies who do business in this state, and it contains particular provisions which clearly indicate this general purpose. But it is true of all our statutes, applicable to our own citizens, that their primary object is the benefit of our own citizens and the security and protection of their rights. We have, however, always extended the privileges of our laws to nonresidents, and opened our courts to their litigation, if the defendant can be found here. *Anc. Chart.* 91, 192. And it was said by Chief Justice Chapman, in delivering the judgment in *Roberts v. Knights*, 7 Allen, 449, 'It is consonant to natural right and justice that the courts of every civilized country should be open to hear the causes of all parties who may be resident for the time being within its limits.' While, under our decisions, this plaintiff would be entitled to maintain an action of a transitory nature, upon a contract made in another state, against an alien temporarily residing here, we cannot deny to him a like privilege against a foreign corporation doing business here, and which has complied with those express provisions of law whereby all lawful processes may be served upon it with the same effect as if the company existed in this commonwealth."

And in *Wilson v. Fire-Alarm Co.*, 149 Mass. 24, 20 N. E. 318, it is said:

"There is no doubt, under the agreement made by the corporation, in accordance with this statute, for the purpose of enabling it to do business within the commonwealth, that, 'so long as any liability remains outstanding against the company in this commonwealth,' the service made in this



cause is sufficient to enable the court to render a personal judgment against the company, which would be held valid in other jurisdictions as well as in this. *Insurance Co. v. French*, 18 How. 404; *Ex Parte Schollenberger*, 96 U. S. 369; *St. Clair v. Cox*, 106 U. S. 350, 1 Sup. Ct. 354; *Bank v. Huntington*, 129 Mass. 444; *Johnston v. Insurance Co.*, 132 Mass. 432."

The clause in the Indiana statute, "while any liability remains outstanding against such company in this state," like the corresponding phrase in the statute of Massachusetts, is a limitation only of the time within which the company may be bound by service upon its agents in the state, and not a restriction upon the character of suits in which process against it may be issued.

It follows, in the case before us, that the defendant in garnishment was not exempt from suit in Indiana upon the particular obligation in question. The Buford & George Manufacturing Company, if it had seen fit, might have gone into the Marion superior court to enforce payment of the policy; and equally, if not a fortiori, the plaintiffs in error, who are citizens of that state, were entitled to summon the debtor company to that court, unless, as asserted in the first proposition of the defendants in error, the proceedings being in garnishment, the court acquired, and could acquire, no jurisdiction. That proposition we consider unsound. The decisions cited to sustain it proceed upon the assumption—which we think clearly erroneous—that jurisdiction in garnishment against a debtor of the principal defendant, who cannot be personally served with process, depends, when tangible property has not been attached, upon the situs of the debt. The assumption makes garnishment impossible in cases of foreign attachment, whether the debtor sought to be reached is a resident or a nonresident. Escape is sought from this result by saying, as in *Douglass v. Insurance Co.*, supra, "that the laws of a state, for the purposes of attachment proceedings, may fix the situs of a debt at the domicile of the debtor." That is a sheer fiction, which, if resorted to at all, may just as well be enlarged so as to include foreign corporations wherever they are doing business under agreement that process may be served upon their agents as if upon themselves. But, manifestly, the essentials of jurisdiction cannot rest upon a fiction, and if, in this class of cases, the situs of a debt or chose in action is essential, it must be the real situs. It is not in the power of the legislature of a state to affect the rights of nonresidents, against their consent, by declaring that, of two things which are not identical, one shall be deemed to be the equivalent of the other,—certainly not by declaring that something out of the state shall be deemed to be within it. No such fiction, however, is necessary, because the jurisdiction in such a case does not depend upon the situs of the debt, but upon control over the debtor, obtained by means of due process, duly served. Even if, as in cases of domestic attachment, the creditor and the situs of the debt be within the state, effective jurisdiction in garnishment can be acquired only by the service of process upon the debtor. It is notice to the debtor that gives the plaintiff in garnishment a lien upon the debt, or an assignment of it; and, once that is accomplished, notice by publica-

tion, or in such other manner as may have been provided by statute, may be given to the principal defendant, upon which the court may proceed to final judgment, disposing of the debt as effectually as, upon like notice by publication, it may dispose of a chattel seized in attachment. If, in the ordinary case of foreign attachment, there can be rendered against a resident debtor a judgment in garnishment which, under the general principles of international law and the constitution of the United States, the courts everywhere will respect as valid, there can be no objection, in reason or principle, to a like judgment against a foreign corporation, which, by law and by its own consent, has become subject to the service of process in the state where sued, as if chartered or incorporated there. In both cases, alike, there is due process of law; and, if in the state courts, the proceedings and the judgments, it is provided by act of congress (Rev. St. § 905), "shall have such faith and credit given them in every court within the United States as they have by law or usage in the courts of the state from which they are taken;" or, as it is declared in section 1, art. 4, of the federal constitution, "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state." The proceedings and judgments of the courts of the United States are entitled to equal respect, and it follows that a proceeding in garnishment, begun in any court of competent jurisdiction against a corporation doing business and subject to process in two or more states, would be entitled to precedence of any suit for the same cause commenced later in another district or state, and that the supposed inconvenience of different suits in different jurisdictions, and danger of debtors being compelled to discharge their obligations more than once, is more imaginary than real. No court can rightfully disregard the lien upon the debt which is established by the service of process in garnishment upon the debtor. For the purpose of taxation, debts belong, of course, to the creditors to whom they are payable, and follow their domicile, wherever that may be. *State Tax on Foreign-Held Bonds*, 15 Wall. 300, 319. But when it is a question of garnishment, or of the administration of an estate consisting of credits, resort must be had to a forum which can reach the debtor. The obligation is in him, and can be enforced for the benefit of the plaintiff in attachment only by proceedings against him, wherever the evidence of the debt may be held. In the language of the supreme court of Vermont in *Cahoon v. Morgan*, 38 Vt. 236:

"It is true that the trustee process is sometimes called 'attaching a debt,' because it creates a lien upon the debt, as attachment does upon personal property. But the validity of the two kinds of liens rests on wholly different grounds. Attachment of personal property must be by taking possession of it. But no possession can be taken of a debt. To make the lien valid against the debt all that is required is notice to the debtor (garnishee or trustee) of the suit,—a mere summons."

In *Moshassuck Felt Mill v. Blanding*, 17 R. I. 297, 21 Atl. 538, in response to the same objection to the jurisdiction which is urged here, the court said:

"There is much force in this contention, and there are many cases which sustain such a view, where there is no statute providing for the service of

process on foreign corporations. But, in states where such service is provided for, the jurisdiction, so far as we are aware, has been uniformly asserted. *Fithian v. Railroad Co.*, 31 Pa. St. 114; *Barr v. King*, 96 Pa. St. 485; *Roche v. Association*, 2 Ill. App. 360; *Railroad Co. v. Tyson*, 48 Ga. 351; *McAllister v. Insurance Co.*, 28 Mo. 214; *Bank v. Huntington*, 129 Mass. 444; *Cousens v. Lovejoy*, 81 Me. 467, 17 Atl. 495. In *Roche v. Association*, supra, it was held by the appellate court of Illinois that in such case the foreign corporation becomes, for all purposes of suit, a resident corporation, and that the debt due from such corporation, though payable elsewhere, by the terms of the contract under which it fell due, was, nevertheless, subject to garnishment in that state."

In the case of *Reimers v. Manufacturing Co.*, 17 C. C. A. 228, 70 Fed. 573,—which has just come to our attention,—the parties were all nonresidents of Michigan, where the action was brought, and in that respect the case is distinguishable from this; but the decision is based mainly upon the doctrine of *Douglass v. Insurance Co.*, supra, and like cases. The court says:

"It may be conceded that, under the statutes of Michigan, a corporation of another state, which assumes to do business in Michigan, subjects itself, through its agents in that state, to service of process by garnishment; but this does not determine the question whether a creditor of such a corporation is affected by this fact, so that the debt owing is given a locality and situs within the state lines of Michigan, such as to permit the courts of Michigan, under general principles of international law and the constitution of the United States, to seize the debt."

For the reasons already stated we do not deem the matter important, but, even if regard must be had to the idea of situs or domicile, sufficient authority for asserting the jurisdiction in question may be found in the decision of the supreme court in the case of *Insurance Co. v. Woodworth*, 111 U. S. 138, 4 Sup. Ct. 364, where, after stating the considerations which had led the legislatures of the states to require of foreign insurance corporations submission to the jurisdiction of their courts, and after referring to the statute of Illinois, which, in respect to process, is essentially the same as that of Indiana, the court said:

"In view of this legislation, and the policy embodied in it, when this corporation, not organized under the laws of Illinois, has, by virtue of those laws, a place of business in Illinois, and a general agent there, and a resident attorney there for the service of process, and can be compelled to pay its debts there, by judicial process, and has issued a policy payable, on death, to an administrator, the corporation must be regarded as having a domicile there, in the sense of the rule that the debt on the policy is assets at its domicile, so as to uphold the grant of letters of administration there. The corporation will be presumed to have been doing business in Illinois, by virtue of its laws, at the time the intestate died, in view of the fact that it was so doing business there when this suit was brought (as the bill of exceptions alleges), in the absence of any statement in the record that it was not so doing business there when the intestate died. In view of the statement in the letters, if the only personal property the intestate had was the policy, as the bill of exceptions states, it was for the corporation to show affirmatively that it was not doing business in Illinois when she died, in order to overthrow the validity of the letters, by thus showing that the policy was not assets in Illinois when she died. The general rule is that simple contract debts, such as a policy of insurance, not under seal, are, for the purpose of founding administration, assets where the debtor resides, without regard to the place where the policy is found, as this court has recently affirmed in *Wyman v. Halstead*, 109 U. S. 654, 3 Sup. Ct. 417. But the reason why the state which charters a corporation is its domicile, in

reference to debts which it owes, is because there only can it be sued, or found for the service of process. This is now changed, in cases like the present; and in the courts of the United States it is held that a corporation of one state, doing business in another, is suable in the courts of the United States established in the latter state, if the laws of that state so provide, and in the manner provided by those laws. *Insurance Co. v. French*, 18 How. 404; *Railroad Co. v. Harris*, 12 Wall. 65; *Ex Parte Schollenberger*, 96 U. S. 369; *Railroad Co. v. Koontz*, 104 U. S. 5, 10. It is argued for the plaintiff in error that administration could have been taken out in Michigan on the policy, on the view that that was the domicile of the assured, and that it could have been taken out in Massachusetts, without regard to the location of the policy at the time of the death of Mrs. Woodworth, and without regard to the fact that she died in another jurisdiction; and the case of *Bowdoin v. Holland*, 10 Cush. 17, is cited as holding that administration may be granted in Massachusetts on the estate, situated there, of a person who died while residing in another state, although the will of the deceased had not been proved in the state of his domicile, on the view that otherwise debts due in Massachusetts, to or from the intestate's estate, could not be collected. The reason assigned for taking out letters in Massachusetts has equal force when applied to a state where the debtor does business under the laws of that state, and can be sued as fully as in Massachusetts, and is sure to be found so as to be served with process. If the defendant is to be sued in Illinois, administration must be taken out there, and administration in Massachusetts or in Michigan would not suffice as a basis for a suit in Illinois. The consent and capacity to be sued in Illinois still require, if an administrator is to be the plaintiff, that letters should be issued in Illinois; and by the terms of the policy, on the death of the assured, the suit must be by her executor or administrator. So it results that the question in this case must be decided on the same principle as if Illinois were the only state in which suit could be brought, and therefore the state in which letters of administration must be taken out for the purpose of a suit."

In the recent case of *Insurance Co. v. Chambers* (N. J. Ch.) 32 Atl. 663, which, in respect to the question under consideration, is not to be distinguished from the present case, the court of chancery of New Jersey disposes satisfactorily of every objection which was urged there, or has been urged here, either upon principle or policy, to the assertion of jurisdiction in such cases. It hardly need be said that the case does not, like *St. Clair v. Cox*, 106 U. S. 350, 1 Sup. Ct. 354, involve the question of jurisdiction to render a personal judgment against the principal debtor. The judgment below is reversed, with direction that the demurrers to the pleas to the jurisdiction be sustained, and that further proceedings be had consistently with this opinion.

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UNITED STATES v. HENSEL et al.

(Circuit Court, S. D. New York. February 11, 1896.)

No. 2,124.

1. CUSTOMS DUTIES — CLASSIFICATION — PHILOSOPHICAL AND SCIENTIFIC APPARATUS.

Microscopes and a movable object table held to be "philosophical and scientific apparatus," within the meaning of paragraph 677 of the act of 1890. Contra, however, as to a microscope case imported without a microscope.

2. SAME—PHILOSOPHICAL SOCIETIES OR INSTITUTIONS.

The College of Physicians and Surgeons, which is known as the "Medical School of Columbia College," is an "institution" for whose use

philosophical and scientific apparatus may be entered free of duty, under paragraph 677 of the act of 1890.

8. SAME.

A microscope imported by a physician or surgeon who swears that it is for use in his laboratory, of which he is the instructor (being evidently a laboratory for clinical purposes), is to be regarded as imported for the use of an "institution," within the meaning of paragraph 677 of the act of 1890. But a microscope imported by one who swears that he is to be instructor of a class of histology at Greenville, in the state of South Carolina, is not to be so regarded, in the absence of evidence to show that such a class is in existence.

Appeal on behalf of the United States from a decision of the board of general appraisers which reversed the action of the collector in assessing duty upon certain articles imported by Hensel, Bruckmann & Lorbacher.

Henry D. Sedgwick, Jr., Asst. U. S. Atty.  
Albert Comstock, for importers.

COXE, District Judge (orally). Four separate articles are involved in this controversy. The first two are microscopes, the second is a movable object table, and the third is a microscope case. The collector assessed them for duty according to the materials of which they were composed. The importers insist that they are entitled to free entry under paragraph 677 of the tariff act of 1890, which provides for "philosophical and scientific apparatus \* \* \* specially imported in good faith for the use of any society or institution incorporated or established for religious, philosophical, educational, scientific, or literary purposes, and not intended for sale." Two questions arise on this appeal. The first is whether or not these articles are philosophical or scientific apparatus; the second is whether or not they were imported for the use of a society or institution incorporated or established for philosophical, educational, scientific or literary purposes. With regard to the first question I am inclined to think that each of the articles imported is scientific in character, with the exception of the microscope case. It appears from the return that the case was imported without a microscope, and I am unable to say that a microscope case, a simple box, designed to hold a microscope, is a scientific instrument. The situation would be quite different if the case contained a microscope.

The second question, whether or not the affidavits bring the importers within the language of paragraph 677, remains to be considered. As to the movable table, I do not understand that there is any serious contention. That was intended for the use of the College of Physicians and Surgeons, which is well known as the "Medical School of Columbia College,"—clearly an institution within the language of the statute.

With regard to the microscope imported for Dr. Kyle, I am also inclined to think that the affidavit is sufficient under the provisions of the statute. His laboratory is evidently one for clinical purposes, he is the instructor and it would seem to follow as a necessary inference that an institution having an instructor must also have some one to be instructed. As to the other microscope the affidavit is insuffi-

cient. I do not see how it can be said that a person who swears that he is to be an instructor of a class of histology at Greenville, in the state of South Carolina, brings himself within the law. Neither the affiant nor class can be regarded as a society or an institution. There is nothing to show that the class is in existence, the whole matter is in embryo. The class may never be organized, and the doctor may thus get the microscope for his own personal use without the payment of duty. It seems to me that the affidavit is entirely insufficient under this paragraph. Therefore, there should be a reversal of the decision of the board with reference to the microscope imported for Dr. Freeborn and also the microscope case imported for Dr. Byron; as to the other two articles the decision of the board is affirmed.

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MATTHEWS et al. v. UNITED STATES.

Circuit Court, S. D. New York. February 10, 1896.)

No. 1,134.

CUSTOMS DUTIES—CLASSIFICATION—NEEDLE CASES.

Where needles not subject to duty are imported in cases of a form in which they have been imported for from 16 to 20 years, the court will not be justified in finding that such cases were designed for a different use, especially where they are evidently of cheap construction, and purport on their face to be needle cases. Therefore they will be entitled to free entry, under section 19 of the customs administrative act of June 10, 1890, and cannot be subjected to duty according to the materials of which they are made.

Appeal by Matthews, Blum & Vaughn, importers, from a decision of the board of general appraisers which affirmed the action of the collector in assessing duty upon the importations in question.

Everit Brown, for importers.

Henry C. Platt, Asst. U. S. Atty.

COXE, District Judge (orally). The importers imported various articles, samples of which have been produced before the court, being cases containing needles. The collector assessed duties upon them under various paragraphs of the statute having reference to the material of which they were made. The importers insist that they should have been permitted to enter free of duty under the provisions of section 19 of the customs administrative act of June 10, 1890. There is no dispute that the needles in question are free under paragraph 656 of the act of Oct. 1, 1890. The only question before the court is whether or not the cases referred to are or are not usual and ordinary coverings. If they are unusual in form or design or are intended for use otherwise than in the bona fide transportation of the needles they are subject to duty. The question is whether or not they are unusual. I understand the evidence to be substantially uncontradicted that needles have been imported in this form for 16 or 20 years, and as was said in *U. S. v. Richards*, 66 Fed. 730,

the court will not be justified in saying that there was an intent upon the part of the importers to bring here under the guise of needle cases other articles designed for a different use. In other words, no attempt to commit a fraud is shown. It seems to me if these are not coverings for needles within the section referred to it is practically impossible to say what they are. They are evidently cheap in construction, and bear upon their face in large letters the statement that they are needle cases. The decision of the board of general appraisers is reversed.

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UNITED STATES v. STERN et al.

(Circuit Court, S. D. New York. February 6, 1896.)

No. 1,972.

CUSTOMS DUTIES—CLASSIFICATION—PARASOL COVERS.

Parasol covers of silk, with an overwork finish of netting and figured silk, were dutiable as "manufactures of silk," under paragraph 414 of the act of 1890, and not as "laces," under paragraph 413.

Appeal on behalf of the United States from a decision of the board of general appraisers which reversed the action of the collector in assessing duty upon certain importations made by Stern Bros., which are known as "parasol covers."

The goods were assessed for duty at 60 per cent. ad valorem, as "laces," under paragraph 413 of the act of 1890, but the importers, by their protest, claimed that they were dutiable at 50 per cent. ad valorem, under paragraph 414. The board of appraisers found that the parasol covers were composed of silk, with an overwork finish of netting and figured silk, and that they were not known as "silk lace," but were known commercially as "parasol covers."

Henry C. Platt, Asst. U. S. Atty.

D. I. Mackie, for importers.

COXE, District Judge (orally). The question is whether or not the articles imported should be classified under paragraph 413 as "laces," or under paragraph 414 as "manufactures of silk." 26 Stat. 598. Upon the evidence before the board of appraisers they find that they were not laces and were manufactures of silk. Some evidence has been taken in the circuit court, which does not, in my judgment, in any way aid the contention of the appellant. The decision of the board upon the disputed question of fact is conclusive, and their decision is affirmed.

## FOPPES et al. v. UNITED STATES.

(Circuit Court, S. D. New York. February 6, 1896.)

No. 1,732.

**CUSTOMS DUTIES—CLASSIFICATION—RATTAN STICKS FOR WHIP HANDLES.**

Rattan sticks for whip handles, painted, polished, and nearly completed, were dutiable as "manufactures of wood," under paragraph 230 of the act of 1890, and not as "reeds, wrought or manufactured from rattans or reeds," under paragraph 229. In re Foppes, 56 Fed. 817, followed.

Appeal by Foppes & Partisch, importers, from a decision of the board of general appraisers which sustained the classification of the collector of the merchandise in question.

The merchandise in controversy consisted of rattan sticks for whip handles, which were painted, polished, and nearly completed. They were assessed by the collector for duty at 35 per cent. ad valorem, under paragraph 230 of the act of 1890, as "manufactures of wood" not specially provided for. The importers protested, claiming that the goods were dutiable at 10 per cent. ad valorem as "reeds, wrought or manufactured from rattans or reeds," under paragraph 229. They further claimed that the goods were articles manufactured in whole or in part, not specially provided for, and if not dutiable under paragraph 229, should be assessed at 20 per cent. ad valorem, under section 4 of the act of 1890.

Stephen G. Clarke, for importers.

J. T. Van Rensselaer, Asst. U. S. Atty.

COXE, District Judge (orally). The question here involves the construction of paragraph 229 of the tariff act of 1890. It is admitted that it is not confined to chair reeds, but that it covers other reeds as well. The contention of the importers is that it covers not only commercial reeds, but commercial reeds which have been wrought or manufactured. It seems to me that there is considerable force in this contention, that the language of the paragraph not only covers a crude reed, but a reed which has been manufactured or advanced to a certain extent beyond the crude form provided it be still a reed, in short, a manufactured reed. The precise question is, however, *res judicata* in this court. In the Case of Foppes, reported in 56 Fed. 817, the issue depended between these parties, and, as I read the statement of facts, the dispute related to articles precisely similar to those involved in this controversy. The construction put upon the paragraph is that it refers to chair reeds and other reeds known commercially as reeds, and that whipstocks, fishing rods, and such articles, which have been advanced from the commercial reed, by a process of manufacture, cease to be reeds. That decision is conclusive upon this court. The decision of the board of appraisers is affirmed.



## UNITED STATES v. MERCADANTE.

(Circuit Court of Appeals, Second Circuit. December 13, 1894.)

No. 628.

## CUSTOMS DUTIES—REIMPORTATION OF AMERICAN MANUFACTURES—"SHOOKS."

This was an appeal by one Mercadante from a decision of the board of general appraisers imposing a duty upon certain barrels which had been manufactured in this country and exported in the form of "shooks." The circuit court, per Wheeler, Circuit Judge, reversed the decision of the appraisers, delivering the following opinion:

"Shooks, when returned as barrels," are free of duty; but proof of identity is to be "made under general regulations to be prescribed by the secretary of the treasury." These are shocks so returned; but that proof of identity has not been made, for no such regulations appear to have been so prescribed. Such proof appears to have been provided for as a further safeguard of identity, but not as exclusive. The fact of identity has been made to appear, and is not disputed. Nothing more could be made to appear by any proof, however prescribed. The failure to prescribe leaves the fact without further requirement to have its effect. Judgment reversed.

From this decision of the circuit court, the United States appeal.

Henry C. Platt, Asst. U. S. Atty.

Stanley, Clarke & Smith, for respondent.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

Reversed in open court, without opinion.

## DOMINICI et al. v. UNITED STATES.

(Circuit Court, S. D. New York. February 6, 1896.)

No. 627.

## 1. CUSTOMS DUTIES—REIMPORTED AMERICAN MANUFACTURES—"SHOOKS."

There is no regulation made by the secretary of the treasury in relation to the proof of identity of reimported American goods, which is applicable to barrels exported in the form of "shooks"; and even if there be such a regulation the method prescribed by it is not exclusive, and if the identity appear by other evidence the goods are entitled to free entry.

## 2. SAME—JUDICIAL NOTICE OF TREASURY DECISIONS AND REGULATIONS.

The court takes judicial notice of the Synopses of Treasury Decisions, and of the General Regulations prescribed by the department.

Appeal by Dominici & Marino, importers, from a decision of the board of general appraisers which sustained the action of the collector in assessing duty upon certain merchandise.

Stephen G. Clarke, for appellants.

Max J. Kohler, Asst. U. S. Atty.

COXE, District Judge (orally). In the case of U. S. v. Mercadante, ubi supra, to which the attention of the court has been directed,

as I understand it, the circuit court of appeals either reversed the decision of the circuit court or dismissed the appeal on the ground that upon the record before them there was no evidence to sustain the finding that "the fact of identity has been made to appear and is not disputed." If this be true, it seems to me that the decision of the circuit court upon the question in controversy should be followed here. The court decides two propositions, first, that there is no regulation of the secretary of the treasury applicable to shooks; and secondly, that it sufficiently appeared from the report of the appraiser, and from the return of the board of general appraisers also, that the shooks were of American manufacture, and therefore entitled to free entry and that the proof required by the regulation, even if the regulation were applicable to shooks, was only an additional safeguard and not conclusive. In this cause there is a finding of the local appraiser and also of the board of general appraisers that in fact these articles are shooks of American manufacture, and the board base their decision sustaining the action of the collector solely upon the ground that the importers have not complied with the regulation of the secretary of the treasury. Under the decision alluded to which holds first, that there was no such regulation, and secondly, that if there were it was not necessary to comply with it in the present circumstances, I am of the opinion that the decision of the board must be reversed.

There were before the court upon this hearing the original invoices and entries and accompanying papers, to wit, by the steamer "Balcarses Brook," May 28, 1891; "Caledonia," March 28, 1891; the "Australia," May 12, 1891; and the "Scotia," May 23, 1891. The court takes judicial notice of No. 10,291 of the Synopses of Treasury Decisions, and of articles 373, 374, 375, 376, 377 and 378, and articles 381, 382, 383 and 384 of the General Regulations of 1884, as amended by the Department Circular No. 85 of September 28, 1890, referred to in said decisions. The attention of the court is also called to the decision of the circuit court of appeals in the case of *U. S. v. China & Japan Trading Co.*, 71 Fed. 864. The court is of the opinion that that ruling is inapplicable to the present case.

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STEMMLER et al. v. UNITED STATES.

(Circuit Court, S. D. New York. February 11, 1896.)

No. 2,187.

CUSTOMS DUTIES—CLASSIFICATION—"SUGAR WAFERS."

Sweetened biscuit known as "sugar wafers" are dutiable as nonenumerated articles, under section 3 of the act of 1894 (28 Stat. 547). They cannot be entered free, under paragraph 667, as "wafers, unmedicated, and not edible," for this description provides for only one kind of wafers, namely, those which are unmedicated and nonedible.

Appeal by F. W. Stemmler & Co., importers, from a decision of the board of general appraisers which sustained the classification of the collector in assessing duty upon the merchandise in question.

Albert Comstock, for importers.  
Henry C. Platt, Asst. U. S. Atty.

COXE, District Judge (orally). The importations consist of sweetened biscuits, known as "sugar wafers." The collector assessed them under section 3 of the act of 1894 (28 Stat. 547), which provides for nonenumerated articles. The importer insists that they should have been admitted free of duty, under paragraph 667 of the same act. The question depends upon the construction of paragraph 667, which provides for "wafers, unmedicated, and not edible." It seems to me, in view of the language itself and of the circumstances under which the corresponding paragraph of the act of 1890 was amended, that the paragraph was intended to provide for "unmedicated and nonedible wafers." The importers insist that it should be construed as if there were a paragraph for unmedicated wafers and also a paragraph for nonedible wafers. It is a familiar rule that in the construction of statutes punctuation should not be considered. The construction adopted by the board, especially in view of the decision of the court admitting these wafers free under the act of 1890, is the natural one. I think it but fair to presume that congress legislated with reference to that decision. The decision of the board of general appraisers is affirmed.

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BLUMENTHAL v. UNITED STATES.

(Circuit Court, S. D. New York. February 12, 1896.)

No. 1,591.

1. CUSTOMS DUTIES—CLASSIFICATION—HARMONICAS.

Harmonicas made of wood and metal, and harmonica cases of celluloid, imported on the same vessel, but in different boxes and under different invoices, *held* to have been dutiable as "toys," under paragraph 436 of the act of 1890, and not under paragraphs 215 and 221, respectively, according to the materials of which they were composed.

2. SAME—PROTEST—ESTOPPEL.

Calling certain articles "musical instruments" in an alternative clause of a protest does not estop the importer from claiming that they are dutiable as "toys," as asserted in another clause of his protest.

Appeal by the importer from a decision of the board of general appraisers which affirmed the action of the collector in assessing duty upon certain merchandise.

Stephen G. Clarke, for importer.  
Henry C. Platt, Asst. U. S. Atty.

COXE, District Judge (orally). The importations are harmonicas, consisting of two parts, one made of wood and metal which may be called the harmonica proper, and the other a celluloid case to cover the same. These articles were imported by one importer and upon the same vessel. They were, however, in different boxes and covered by different invoices. The evidence is that the cases have no use except for harmonica covers, and that any harmonica of the size im-

ported will fit any of the cases imported. If the collector was right in deciding that these articles are not toys he assessed duty upon them under the proper paragraphs relating to the materials of which they are composed, paragraphs 215 and 221, respectively, of the tariff act of 1890. The importer insists that they should have been classified under paragraph 436 of the same act as "toys."

I understand that it is undisputed that in a former decision of this court harmonicas similar to these were held to be toys. The district attorney insists that the importer is not in a position to raise this question for the reason that he has in his protest called them "musical instruments." The protest is in the alternative form, one clause clearly raising the question which is in dispute here. The testimony taken in this court seems to sustain the contention of the importer that they are toys and have been so known for years. I see no reason why the importer is estopped by his alternative protest, or how the situation is changed because these toys were imported in different cases and under different invoices, there being no dispute that the parts referred to are intended for conjoint use and can be used in no other way.

I think the decision of the board should be reversed.

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DAVIS v. UNITED STATES.

(Circuit Court, S. D. New York. February 12, 1896.)

No. 2,164.

CUSTOMS DUTIES—CLASSIFICATION—COLLECTIONS OF ANTIQUES.

Several different antique articles, never assembled together in Europe, but imported in separate ships, under separate invoices, could not be entered free, under paragraph 524 or the act of 1890 (26 Stat. 604), as a "collection of antiquities," although the importer intended to add them to a collection in this country. *Tiffany v. U. S.*, 66 Fed. 729, followed.

Appeal by the importer from a decision of the board of general appraisers which sustained the action of the collector in assessing duty upon the importations in question.

D. B. Ogden, for importer.

Henry C. Platt, Asst. U. S. Atty.

COXE, District Judge (orally). The articles in controversy in this cause are five in number, and consist of one tapestry and four paintings. These articles were purchased at different times, of different dealers and artists, and were sent to this port in different ships, arriving at different dates, no one of the invoices containing more than one article. It is conceded that they were not assembled together in Europe further than in the mind and intention of the importer. There was no actual assembling together. Although I am in favor of the most liberal interpretation of the paragraphs of the tariff law relating to works of art, it seems to me, having in view the language of the paragraph and the inter-

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pretation which has so often been placed thereon by this court and by the circuit court of appeals, that there is here no room for construction. The case of *Tiffany v. U. S.*, 66 Fed. 729, to which the attention of the court is called, was decided by the judge who is now sitting. In that case the effort was to place on the free list an antique opal, known as the "Hope Opal," and there was evidence tending to show that it was the intention of the importer to add it to a collection, but it came here alone in one invoice. The court held that:

"If an importer assembles a collection of antiques, which, under the decisions of the courts, must certainly contain more than two articles, and intends to import the collection into this country, the mere fact that through mistake the articles forming the collection are imported in different steamers or at different times is not material. But there must be a collection of which the importation is a part."

In other words, it is the collection that must be imported. The collector must deal with facts, not intentions. Concededly there was no collection of these articles in Europe. The fact that imported antiques are assembled in this country is not material.

The decision of the board is affirmed.

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STACHELBERG et al. v. UNITED STATES.

(Circuit Court, S. D. New York. February 12, 1896.)

No. 1,722.

CUSTOMS DUTIES—CLASSIFICATION—TOBACCO.

If a bale of tobacco contained any portion suitable for cigar wrappers, the whole bale was dutiable, under paragraph 242 of the act of 1890, as "suitable for cigar wrappers," and the court had no discretion to determine whether there was an appreciable percentage of such tobacco in the bale.

Appeal by Stachelberg & Co., importers, from a decision of the board of general appraisers which sustained the classification by the collector of certain tobacco in bales.

Charles P. McClelland, for appellants.

J. T. Van Rensselaer, Asst. U. S. Atty.

COXE, District Judge (orally). The appellant imported four bales of filler tobacco, which was assessed by the collector as leaf tobacco "suitable for cigar wrappers" under paragraph 242 of the act of 1890. The importers protested insisting that it should have been classified under paragraph 243 of the same act. There is no dispute that three of the bales contained a percentage of leaf tobacco suitable for cigar wrappers, the percentage differing in the different bales. The proviso of paragraph 242 provides "that if any portion of any tobacco imported in any bale \* \* \* shall be suitable for cigar-wrappers, the entire quantity of tobacco contained in such bale \* \* \* shall be dutiable" under that paragraph. It is hard to conceive of stronger or more unambiguous language. It is so clear that there is no room

for construction. It is practically prohibitory in its terms. The importers contend that the court is permitted to consider the question whether or not the percentage is appreciable or otherwise. I do not think that question can be considered under the language quoted. Therefore, as to three of the bales the decision of the board is affirmed. As to bale 5,677 several of the witnesses testify that it contained no wrapper tobacco. As the board did not pass upon the question of fact involved with reference to this bale, but based its decision upon the ground that the merchandise had gone out of the possession of the government, I think the question is still open in this court. The weight of evidence is that the importer's contention as to this bale is correct. As to bale 5,677 the decision of the board is reversed.

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UNITED STATES v. BENJAMIN et al.

(Circuit Court, S. D. New York. February 11, 1896.)

No. 1,726.

CUSTOMS DUTIES—VALUATION—CLERICAL MISTAKE IN INVOICE.

The board of general appraisers has jurisdiction to correct a mistake in the appraisement, arising from a clerical error in invoicing the goods as worth so many marks instead of so many pfennigs.

Appeal on behalf of the United States from a decision of the board of general appraisers which reversed the action of the collector in relation to certain merchandise imported by Benjamin & Caspery.

Henry D. Sedgwick, Jr., Asst. U. S. Atty.

Robert Weil, for importers.

COXE, District Judge (orally). We start in this cause with the undisputed fact that there was a clear clerical mistake in the invoice of the goods, which, though in fact worth so many pfennigs, were invoiced as worth so many marks. This being true, the court is naturally inclined to give the importers relief, if possible. As soon as the mistake was discovered the importers protested against the illegal exaction of duty. The protest, with all the proceedings, was returned by the collector to the board of general appraisers. They find as facts that there was a clear clerical mistake in the valuation of the goods, and that the appraising officer, had he made a careful and intelligent examination would have discovered the mistake on the face of the invoice. The board then correct the mistake, find the true market value of the goods, and sustain the protest. I am inclined to think that the board had jurisdiction and that their finding is correct. I cannot believe that it was the intention of congress to require an importer whose property is thus taken to go through the complicated and inconsequential proceedings which have been suggested here, especially when some of them concededly would not furnish the relief sought for or lead to any practical result. A mistake so plain demands a simple remedy.

The decision of the board of general appraisers is affirmed

## STERN et al. v. UNITED STATES.

(Circuit Court, S. D. New York. February 11, 1896.)

No. 1,861.

## CUSTOMS DUTIES—CLASSIFICATION—NAIL CLEANERS.

Silver-handle nail cleaners were dutiable as "manufactures of metal," under paragraph 215 of the act of 1890, and not as "files," under paragraph 168, though they may have had a file attached to them.

Appeal by Stern Bros., importers, from a decision of the board of general appraisers which affirmed the action of the collector in assessing duty upon the importations in question.

D. I. Mackie, for appellants.

Henry C. Platt, Asst. U. S. Atty.

COXE, District Judge (orally). The articles imported are known as files or nail cleaners. The collector assessed them for duty under paragraph 215 of the act of 1890 as "manufactures of metal." The importers insist that they should have been assessed under paragraph 168 of the same act, which provides for files. The general appraiser found that they were silver-handle nail cleaners, and were not files either in fact or commercially. No evidence was taken before the board of general appraisers and none has been taken in this court. In fact, the court is without the sample which was before the board and has nothing of which to predicate a finding that the decision of the board is incorrect. It is said that the burden is upon the importer to satisfy the court that the findings of the board are unsupported by evidence; but irrespective of that question it would seem, from the description given by the general appraiser and by the board, there is very great doubt whether these articles can be regarded as files. There is perhaps a file upon them, but they are more correctly designated in the terms of the appraiser as "silver-handle nail cleaners." I think the record is insufficient to justify the court in interfering with the decision of the board of general appraisers, and it is, therefore, affirmed.

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## HENSEL et al. v. UNITED STATES.

(Circuit Court, S. D. New York. February 11, 1896.)

No. 1,903.

## 1. CUSTOMS DUTIES—REIMPORTATION OF AMERICAN GOODS—CERTIFICATE.

Upon the reimportation of exported American manufactures, the mere failure to state, in the certificate presented on the entry, that the goods had not been advanced in value or improved in condition since they left this country, as required by the former treasury regulations, did not justify the collector in requiring payment of duties, if the fact that they had not been advanced in value or improved in condition otherwise appeared. The regulation requiring the statement in the certificate was unreasonable, as appears from the fact that it was omitted from the amended regulations, on the ground that it was impossible for foreign customs officials to state such facts from their own knowledge.

**2. SAME—TIME OF FILING CERTIFICATE.**

Failure to file the certificate required on the reimportation of exported American machines, immediately upon the entry of the goods, does not deprive the importer of the right to re-enter them free, if such certificate is filed in a short time.

Appeal by Hensel, Bruckman & Lorbächer, importers, from a decision of the board of general appraisers which sustained the action of the collector in assessing duty upon the merchandise in question.

W. Wickham Smith, for importers.

Henry D. Sedgwick, Jr., Asst. U. S. Atty.

COXE, District Judge (orally). The imported articles are machines made in this country, taken to Germany, not accepted there by the consignees, and reimported on August 15, 1893. The collector assessed duty upon them under paragraph 215 of the act of 1890, concededly the correct paragraph if the articles were subject to duty. The importers insist, however, that they were entitled to free entry under paragraph 493 of the same act, and I understand it to be admitted upon the part of the collector that that paragraph correctly describes the importations, that is, there is no dispute that these machines were manufactured in the United States and that they have not been advanced in value or improved in condition since they were exported.

This is another of those cases where the facts are of such character that the court naturally inclines to aid the importers, if possible to do so, because it must be conceded that, upon the merits, there is but one side to the controversy. Beyond question the collector has taken duty from the importers upon articles which were entitled to free entry, and the only excuse of the collector is that he was justified in this course because the importers failed to comply with all the technical requirements of the law. In other words, the collector's contention is based upon the strictest construction of the statute and of the treasury regulations made in pursuance thereof. The certificate presented upon the entry of the goods complied with the requirements of the law, except that it failed to state that the machines in question had not been advanced in value or improved in condition since they left this country. I suppose it will be admitted that if this provision of the treasury department were an unreasonable or an impossible one, that the insistence upon it by the collector was beyond his power. That it was an unreasonable regulation is sufficiently established by the action of the treasury department itself. When its attention was called to the matter the regulation was amended by leaving out this provision, upon the ground that it was an impossibility for the foreign customs official, in a majority of cases, to be able to state of his own knowledge that the imported article had not been improved in value.

But even if the importers are wrong in this contention, it still remains to be considered whether or not the fact that they have supplied the certificate in the precise language of the amended regula-



tion, is not, in the circumstances, a sufficient compliance. I do not understand that any fault is found with the certificate as it now appears, except that it was not filed in time. The regulation, unless very strictly construed, provides no particular time within which the certificate must be furnished. The evident intention of the law is that the collector shall at some time, some reasonable time of course, have evidence that the goods are entitled to free entry. Although there is language in the regulation which might imply that this must be done at the time of entry, still it does not seem to me that it can be said that the importer must lose the benefit of paragraph 493 if he delays furnishing the certificate for a short period of time. The spirit of the law is otherwise. Upon the merits there is no dispute. Even if the above constructions were doubtful, the doubt should be resolved in favor of the importers.

The decision of the board of general appraisers is reversed.

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PIERCE & BUSHNELL MANUF'G CO. v. WERCKMEISTER.

(Circuit Court of Appeals, First Circuit. January 24, 1893.)

No. 118.

1. COPYRIGHT—PAINTING—COPIES—REV. ST. § 4962.

The word "copies," in Rev. St. § 4962, requiring a notice of copyright to be inserted in the several copies of the edition of a copyrighted book, or, if the copyrighted article be a map, painting, etc., to be inscribed upon some visible portion thereof, refers not to reproductions of an original, but to the individual copyrighted things, whether one or many. Accordingly, *held* that, in order to maintain an action for the infringement of a copyright of a painting, a notice of copyright must have been inscribed upon some visible portion thereof, when it was published. Colt, Circuit Judge, and Nelson, District Judge, concurring, and Webb, District Judge, dissenting. 63 Fed. 445, reversed.

2. SAME—PUBLICATION.

A painting which is publicly exhibited is "published," within the meaning of the copyright laws. Colt, Circuit Judge, and Nelson, District Judge, concurring, and Webb, District Judge, dissenting.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

This was a suit in equity for infringement of a copyright in a painting entitled "Die Heilige Cäcilie." The artist was Gustav Naujok, a citizen and resident of Germany. The painting was completed in 1891. From January, 1892, to March, 1892, the picture was publicly exhibited by the artist at Berlin, Germany; and at Munich, in the summer of 1892. Upon the 5th day of March, 1892, Naujok made the following assignment:

"I transfer hereby to the Photographische Gesellschaft in Berlin for my work 'Die Heilige Cäcilie' the right of publication,—by which I wish to have understood the exclusive right of reproduction,—against a payment of 500 marks, and nine gratuitous copies thereof.

"Königsberg, in Prussia, March 5, 1892.

Gustav Naujok."

On May 16, 1892, the plaintiff, a citizen of Germany, under the business name of the Photographische Gesellschaft, deposited in the office of the librarian of congress the title of the painting, with the photograph and description thereof, claiming a copyright therein as proprietor, as appears by the following certificate:

"Library of Congress, Copyright Office, Washington.

"To wit: Be it remembered, that on the 16th day of May, Anno Domini 1892, Photographische Gesellschaft, of Berlin, Ger., have deposited in this office the title of a painting, the title or description of which is in the following words, to wit: 'Die Heilige Cäcilie, G. Naujok.' Photo. & descript. on file; the right whereof they claim as proprietors, in conformity with the laws of the United States respecting copyrights.

"A. R. Spofford, Librarian of Congress."

In the summer of 1892 the artist sold the painting; to whom it does not appear. There was no notice of copyright inscribed on the painting, or upon any visible portion thereof. On August 24, 1892, photographic copies of the picture made in Germany by the plaintiff were sent to the United States. These copies were marked: "Copyright 1892, by Photographische Gesellschaft." On September 19, 1892, photographic copies of the picture were published by the plaintiff in Germany. Some time during the year 1893, and prior to the commencement of this suit, in May of that year, a photograph made from one of the photographs taken in Germany by the plaintiff was made, published, and sold by the defendant.

The appellant (defendant below) assigns the following errors: First. That the court, having found that the complainant failed to inscribe the notice required by law upon some visible portion of the painting alleged to be copyrighted, or of the substance on which the same was mounted, erred in finding that he was not thereby debarred from maintaining this action for the infringement of his copyright. Second. That the court erred in finding and holding that the painting alleged to be copyrighted had not been "published," within the sense of the copyright law, prior to the deposit of the description and photograph thereof in the office of the librarian of congress. Third. That the court, having found that the complainant had published copyrightable, but uncopyrighted, photographs of his alleged copyrighted painting, and that the defendant had copied solely the uncopyrighted photograph, and not the copyrighted painting itself, erred in finding that such copying was an infringement of the copyright upon the said painting. Fourth. That the court, having found that the complainant had placed upon the uncopyrighted photographs a notice of copyright, and had failed to place the same upon the copyrighted painting, erred in not finding that the plaintiff, by virtue of such false and incorrect marking of his uncopyrighted photograph, had debarred himself from equitable relief. Fifth. That the court erred in finding that the complainant's uncopyrighted photograph could not have been copyrighted under section 3 of the act of 1891. Sixth. That the court, having found that the complainant had published copyrightable, but uncopyrighted, photographs of the said alleged copyrighted painting, erred in finding that he had not thereby dedicated the right of copying said photographs to the public, including the defendant herein, and therefore also erred in enjoining the defendant herein from copying said copyrightable, but uncopyrighted, photograph. Seventh. That the court erred in finding that the complainant was the proprietor or assign of the said copyrighted picture, or of the right to copyright the same, at the time of his alleged copyrighting thereof, and also erred in finding that the said copyright was rightfully and effectually registered by the complainant in his own name.

Alexander P. Browne and William A. Jenner, for appellant.

Louis C. Raegener, for appellee.

Before COLT, Circuit Judge, and NELSON and WEBB, District Judges.

COLT, Circuit Judge (after stating the facts as above). This is a bill in equity for the infringement of a copyright in a painting. The court below directed a decree for the plaintiff (63 Fed. 445), and the case now comes before us on appeal.

It appears that the appellee, who was the plaintiff below, failed to

inscribe upon some visible portion of the painting alleged to be copyrighted, or upon the substance on which the same was mounted, the notice required by the statute. Rev. St. § 4962; Act June 18, 1874 (18 Stat. 78, pt. 3); Act March 3, 1891 (26 Stat. 1106). This is made the ground of the first assignment of error. To secure a statutory copyright under the laws of the United States, all the prescribed requisites of the statute must be complied with. *Wheaton v. Peters*, 8 Pet. 591, 664; *Parkinson v. Laselle*, 3 Sawy. 330, 332, Fed. Cas. No. 10,762; *Boucicault v. Hart*, 13 Blatchf. 47, 50, Fed. Cas. No. 1,692; *Lawrence v. Dana*, 4 Cliff. 1, 60, Fed. Cas. No. 8,136. Section 4952 of the statute declares that certain persons shall be entitled to copyright in certain things "upon complying with the provisions of this chapter." Section 4956 declares that "no person shall be entitled to a copyright" unless he shall, on or before the day of publication, deliver at the office of the librarian of congress, or address by mail to said librarian, a printed copy of the title of the book, map, chart, etc., or a description of the painting, drawing, etc., for which he desires a copyright; and that not later than the day of the publication he shall make the proper deposit of two copies of such copyright book, map, chart, etc., or, in case of a painting, drawing, etc., a photograph of the same. But, although a person coming within the class mentioned in section 4952 is entitled to a copyright upon complying with the provisions of section 4956, he cannot enforce any right against infringers except upon giving the notice required by section 4962, as amended by the act of June 18, 1874, which reads as follows:

"No person shall maintain an action for the infringement of his copyright unless he shall give notice thereof by inserting in the several copies of every edition published, on the title-page, or the page immediately following, if it be a book; or if a map, chart, musical composition, print, cut, engraving, photograph, painting, drawing, chromo, statue, statuary, or model or design intended to be perfected and completed as a work of the fine arts, by inscribing upon some visible portion thereof, or of the substance on which the same shall be mounted, the following words, viz.: 'Entered according to act of congress, in the year —, by A. B., in the office of the librarian of congress, at Washington;' or, at his option the word 'Copyright,' together with the year the copyright was entered, and the name of the party by whom it was taken out; thus: 'Copyright, 18—, by A. B.'"

The necessity of this notice is to inform the public. *Lithographic Co. v. Sarony*, 111 U. S. 53, 55, 4 Sup. Ct. 279.

Copyright, under the statute, is the exclusive right to publish a literary or artistic work. Such work may be a transcript or reproduction from some original manuscript, plate, or negative, as a book, engraving, or photograph, or may itself be an original, as a painting, statue, model, or design; and such work may or may not be published in multiple form. In the case of a book, map, engraving, or photograph, it is commonly published in multiple form; in the case of a painting or statue, it may or may not be published in multiple form. If we confine ourselves to the subjects of copyright, and eliminate from our minds any distinction between "copy" and "original," the meaning of section 4962 seems to be clear. It begins by declaring that "no person shall maintain an action for the infringement of his copyright unless he shall give notice thereof by

inserting in the several copies of every edition published," etc. The words "several copies" are not used in the sense of a copy or reproduction from some original, but are used in the sense of each individual copyrighted thing, whether a copy or an original, so called; and the words following, "of every edition published," plainly mean each published production or reproduction of every copyrighted thing. In Webster's International Dictionary we find, among the definitions of the word "copy": "An individual book, as a copy of the Bible;" and it is in this sense the word is used in this section. We copyright a book under sections 4952 and 4956, and section 4962 then requires that, in order to maintain an action for infringement, notice of copyright shall be inserted in each book (whatever may be the form of the book) which is published, and upon each book of every edition or reproduction which is published. The fact that such book may be a copy from some original manuscript is immaterial, and has nothing to do with the notice required by this section. It is the published book, or the book which is made public by offering for sale or otherwise, which must contain the notice. A book is published in multiple form, and no one particular book is any more entitled to be called an original than another. We copyright a map, and section 4962 declares that, in order to enforce our rights against infringers, notice of copyright must be inscribed upon each published map, and upon each map of every edition or reproduction which is published. The fact that a map may be an impression from some original drawing or design is foreign to the question of notice under this section. So far as the law of notice is concerned, there is no such thing as a particular map which may be called the original, but all are original maps as much as any single one. We copyright a chromo, which is a picture produced by the process of chromo-lithography, and section 4962 declares that notice must be inscribed upon every published chromo. Each chromo is as much an "original" as a "copy," and either term applies equally well to all chromos. We copyright a painting, and section 4962 requires notice of copyright upon the published painting, and upon each replica or reproduction which is published. And what has been said with respect to a book, map, chromo, or painting applies to the other copyrighted things enumerated in this section. Section 4962 does not deal with "copies" as distinct from "originals," or with "originals" as distinct from "copies," as those terms are commonly understood; but it deals with published copyrighted things, and it declares that no action for infringement will lie unless each copyrighted thing which is published or made public, be it a "copy," so called, or an "original," so called, or another edition or reproduction of such copy or original, has inscribed upon it the notice of copyright. The notice required by this section only applies to published copyrighted things, and has no application to copyrighted things which are not published. An artist may desire to copyright his original painting, not for the purpose of publishing it, but for the purpose of protecting his published replica. While his original painting remains unpublished, it is unnecessary to put

any notice of copyright upon it, but the notice is only required upon the published replica; and so, in the case of a design or model, no notice is necessary upon the unpublished originals while they remain unpublished, but only upon the published reproductions.

The proposition which has been advanced in this case that no notice is required by section 4962 upon a published original copyrighted painting, but only upon a published reproduction, seems clearly untenable. It leads to the following results: An artist need not put any notice upon his published original copyrighted painting, but must put it upon his published replica. A sculptor need not put any notice upon his published original copyrighted statue, but must put it upon a duplicate or reproduction. An original copyrighted painting, which is publicly exhibited everywhere, without reservation, is protected from copying without giving any notice of copyright to the public, while a published replica, to secure protection, must be inscribed with notice. An original copyrighted statue, which is publicly exhibited in a park or gallery, without any kind of reservation, is protected against copying without notice; while a published duplicate or reproduction is unprotected, in the absence of notice. When a copyrighted original and duplicate of a painting or a statue are publicly exhibited together, without reservation, the originals are protected from copying without notice, while the duplicates must be inscribed with notice. In view of the express language and evident purpose of section 4962, a construction which requires a person to give notice of copyright on "his copyright" book, map, chart, musical composition, print, cut, engraving, photograph, and chromo, which are published, and which requires no notice of copyright on "his copyright" painting, drawing, statue, statuary, model, or design, which are published, should not be adopted if this section be capable of another interpretation which makes it harmonious and applicable alike to all the enumerated subjects of copyright.

Under the statute of 8 Anne, copyright commences from the first day of publication. The first publication is the foundation of the right, and a condition precedent to the existence of the right. Whatever right the author may have possessed before publication must have been at common law. *Jefferys v. Boosey*, 4 H. L. Cas. 815, 847, 886, 955. In this country, under the statute, copyright is granted for a limited term from the time of recording the title (section 4953); but this is done for the purpose of protecting the author between the first and last acts necessary to perfect the copyright. Statutory copyright is obtained for the purpose of protection after publication, which at common law works a forfeiture.

The bill in this case alleges publication of the painting on or about September 15, 1892. The evidence shows that the painting was publicly exhibited in Berlin, from January to March, 1892; and at Munich, in the summer of 1892. Under these circumstances, we hold that the alleged copyrighted painting has been "published," within the meaning of section 4962, and should have been inscribed with notice of copyright in order to entitle the plaintiff to main-

tain this action for infringement. Upon this ground, and without passing upon the other questions raised by the assignment of errors, the decree of the circuit court is reversed, and the cause remanded to that court, with directions to dismiss the bill, with costs.

WEBB, District Judge. I cannot concur with either the reasoning or the conclusions of the majority of the court, but am of opinion that the judgment of the circuit court should be affirmed.

NOTE. The statutes relating to copyright (Rev. St. tit. 60, c. 3, p. 957; Act June 18, 1874 [18 Stat. 78, pt. 3]; Act March 3, 1891 [26 Stat. 1106]) material to the present controversy are:

"Sec. 4952. The author, inventor, designer or proprietor of any book, map, chart, dramatic or musical composition, engraving, cut, print, or photograph or negative thereof, or of a painting, drawing, chromo, statue, statuary, and of models or designs intended to be perfected as works of the fine arts, and the executors, administrators or assigns of any such person shall, upon complying with the provisions of this chapter, have the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing, and vending the same," etc.

"Sec. 4956. No person shall be entitled to a copyright unless he shall, on or before the day of publication in this or any foreign country, deliver at the office of the librarian of congress, or deposit in the mail within the United States, addressed to the librarian of congress, at Washington, District of Columbia, a printed copy of the title of the book, map, chart, dramatic or musical composition, engraving, cut, print, photograph, or chromo, or a description of the painting, drawing, statue, statuary, or a model or design for a work of the fine arts for which he desires a copyright, nor unless he shall also, not later than the day of the publication thereof, in this or any foreign country, deliver at the office of the librarian of congress, at Washington, District of Columbia, or deposit in the mail within the United States, addressed to the librarian of congress, at Washington, District of Columbia, two copies of such copyright book, map, chart, dramatic or musical composition, engraving, chromo, cut, print, or photograph, or in case of a painting, drawing, statue, statuary, model, or design for a work of the fine arts, a photograph of same: provided, that in the case of a book, photograph, chromo, or lithograph, the two copies of the same required to be delivered or deposited as above shall be printed from type set within the limits of the United States, or from plates made therefrom, or from negatives, or drawings on stone made within the limits of the United States, or from transfers made therefrom. During the existence of such copyright the importation into the United States of any book, chromo, lithograph, or photograph, so copyrighted, or any edition or editions thereof, or any plates of the same not made from type set, negatives, or drawings on stone made within the limits of the United States, shall be, and it is hereby, prohibited, except," etc.

"Sec. 4962. No person shall maintain an action for the infringement of his copyright unless he shall give notice thereof by inserting in the several copies of every edition published, on the title-page, or the page immediately following, if it be a book; or if a map, chart, musical composition, print, cut, engraving, photograph, painting, drawing, chromo, statue, statuary, or model or design intended to be perfected and completed as a work of the fine arts, by inscribing upon some visible portion thereof, or of the substance on which the same shall be mounted, the following words, viz.: 'Entered according to act of congress, in the year —, by A. B., in the office of the librarian of congress, at Washington;' or, at his option the word 'Copyright,' together with the year the copyright was entered, and the name of the party by whom it was taken out, thus: 'Copyright, 18—, by A. B.'"

"Sec. 4963. Every person who shall insert or impress such notice, or words of the same purport, in or upon any book, map, chart, dramatic or musical composition, print, cut, engraving, or photograph, or other article, for which he has not obtained a copyright, shall be liable to a penalty of one hundred

dollars, recoverable one-half for the person who shall sue for such penalty and one-half to the use of the United States.

"Sec. 4964. Every person, who after the recording of the title of any book and the depositing of two copies of such book, as provided by this act, shall, contrary to the provisions of this act, within the term limited, and without the consent of the proprietor of the copyright first obtained in writing, signed in presence of two or more witnesses, print, publish, dramatize, translate, or import, or, knowing the same to be so printed, published, dramatized, translated, or imported, shall sell or expose to sale any copy of such book, shall forfeit every copy thereof to such proprietor, and shall also forfeit and pay such damages as may be recovered in a civil action by such proprietor in any court of competent jurisdiction.

"Sec. 4965. If any person, after the recording of the title of any map, chart, dramatic or musical composition, print, cut, engraving, or photograph, or chromo, or of the description of any painting, drawing, statue, statuary, or model or design intended to be perfected and executed as a work of the fine arts, as provided by this act, shall, within the term limited, contrary to the provisions of this act, and without the consent of the proprietor of the copyright first obtained in writing, signed in presence of two or more witnesses, engrave, etch, work, copy, print, publish, dramatize, translate, or import, either in whole or in part, or by varying the main design with intent to evade the law, or, knowing the same to be so printed, published, dramatized, translated, or imported, shall sell or expose to sale any copy of such map or other article as aforesaid, he shall forfeit to the proprietor all the plates on which the same shall be copied and every sheet thereof, either copied or printed, and shall further forfeit one dollar for every sheet of the same found in his possession, either printing, printed, copied, published, imported, or exposed for sale, and in case of a painting, statue, or statuary, he shall forfeit ten dollars for every copy of the same in his possession, or by him sold or exposed for sale;\* one-half thereof to the proprietor and the other half to the use of the United States."

\*This section was amended March 2, 1895, to read from here on as follows: "Provided, however, that in case of any such infringement of the copyright of a photograph made from any object not a work of fine arts, the sum to be recovered in any action brought under the provisions of this section shall not be less than one hundred dollars, nor more than five thousand dollars; and provided, further, that in case of any such infringement of the copyright of a painting, drawing, statue, engraving, etching, print, or model or design for a work of the fine arts or of a photograph of a work of the fine arts, the sum to be recovered in any action brought through the provisions of this section shall be not less than two hundred and fifty dollars, and not more than ten thousand dollars. One-half of all the foregoing penalties shall go to the proprietors of the copyright and the other half to the use of the United States." 28 Stat. 965.

## DUNHAM v. BENT et al.

(Circuit Court, D. Massachusetts. September 8, 1885.)

No. 2,042.

### 1. PLEADING IN PATENT SUITS—MULTIFARIOUSNESS.

Where a bill is primarily for infringement, it is not made multifarious by setting out a contract between complainant and defendant, whereby, it is alleged, defendants have bound themselves not to contest the validity of the patent.

### 2. SAME—JURISDICTION OF FEDERAL COURTS.

A federal court has jurisdiction of a suit, which is primarily for infringement, notwithstanding that the bill sets up certain contracts which are alleged to constitute an estoppel against defendants, but which are not sued upon and which relate to other machines than those in respect to which infringement is averred. *Hartell v. Tilghman*, 99 U. S. 547, distinguished.

### 3. SAME—CONTRACT NOT TO CONTEST PATENT.

A stipulation by the lessee of specified patented machines that "he will not in any way contest the validity of any of the patents he is hereby licensed to use" held to be of general obligation, and not restricted to the machines covered by the lease.

### 4. SAME—PUBLIC POLICY.

It is not contrary to public policy to allow a party to contract not to contest the validity of a patent.

This was a suit in equity by Ella B. Dunham, administratrix, against James M. Bent and others, for alleged infringement of a patent. Defendants demurred to the bill.

Charles H. Drew, Charles F. Perkins, and P. E. Tucker, for complainant.

George L. Roberts & Bro., for defendants.

COLT, Circuit Judge. This is a bill in equity, brought to restrain the defendants from infringing two letters patent for improvements in machines for nailing the soles of boots and shoes, granted to Henry Dunham, August 18, 1874, and November 14, 1876, and numbered, respectively, 154,129 and 184,281. The bill sets forth two leases from Dunham to the defendants. These leases covered certain designated machines, and limited the rights of the defendants to the use of the particular machines. In the leases we find the following provision:

"The said lessee hereby agrees that he will not in any way contest the validity of any of the patents he is hereby licensed to use, or the sufficiency of their specification, or the validity of the title of the lessor or of his successors, legal representatives, or assigns to said patents."

The present suit is brought for infringement of the patents by the use of machines not covered by the licenses. The defendants have demurred to the bill on several grounds. It is contended that the bill is multifarious, in that it seeks relief against the defendants as infringers, and also upon certain contracts. Primarily, this suit is for an infringement of patent rights. It sets out the contract in order to show that the defendants have bound themselves not to contest the validity of the patents, and that, therefore, they are estopped from setting up this one defense to the action. It cannot be said that this is such a joinder of distinct and independent matters as to render the bill multifarious.

Another ground of demurrer is that this court has no jurisdiction, both parties being citizens of Massachusetts, because the suit is brought upon a contract, and not under the patent laws of the United States. But, in our view, this suit is not brought upon the leases. They covered only certain designated machines, and not those in controversy. In respect to the machines in suit, the defendants do not occupy the position of licensees. This case, therefore, does not come within the decision in *Hartell v. Tilghman*, 99 U. S. 547, and other like cases. We think the court has jurisdiction.

Another ground of demurrer is that the provisions in the leases wherein the defendants agree not to contest the validity of the patents concern only the specific machines which the defendants were licensed to use, and do not concern the machines complained of. In our opinion, neither of the several provisions in the leases, taken together, nor the specific provision already cited, will warrant such a construction. In the absence of any specific agreement not to contest the validity of the patents, the estoppel of the defendants would be confined to the particular machines covered by the licenses. But we see no reason why a party may not, in consideration of receiving a lease for a certain number of machines, bind himself generally not to dispute the validity of the patents embodied in those machines, nor why he should not, in a suit for infringement for the use of unlicensed machines, be bound by his agreement. Re-



citals in a deed are generally made for the purpose of carrying into effect the general object of the deed, and not for collateral purposes; and therefore a party may not be estopped to dispute the facts so admitted in an action by the other party, not founded on the instrument, and wholly collateral to it. *Bigelow, Estop.* 255; *Carpenter v. Buller*, 8 Mees. & W. 209. But, if parties insert a provision in an instrument which is designed to extend beyond the main object of the instrument itself, it should be enforced. Now, the purpose of inserting this provision in these leases was to prevent the defendants from disputing the validity of these patents in any suit which might be brought against them. In the absence of any such provision, they would be estopped to the extent of the machines covered by the leases, and therefore this part of the agreement has no force and effect if not made to extend beyond the licensed machines. In *Railway Co. v. Warton*, 6 Hurl. & N. 520, the suit was upon a bond conditioned for the due performance of a certain contract; and the question was whether the plaintiffs were not estopped by a subsequent deed between the same parties in which it was contended that the claims sued upon were adjusted and settled. While it was held that the subsequent deed was intended only to cover a settlement of certain matters specified, and did not embrace the claims in suit, and that the recital in the subsequent deed would not be binding because the suit was not brought upon that instrument, the court say that a recital in such a deed would be binding if it was the bargain on the faith of which the parties acted. In other words, "if the parties had agreed in the subsequent deed to release all other claims, it would create an estoppel."

The defendants' counsel urge that it is contrary to public policy to allow a party to contract not to contest the validity of a patent, after analogy to the rule adopted as to statutory limitations and statutory exemptions. But the reasons of public policy which forbid a party from making a valid promise which will render inoperative a statute limiting the time within which actions may be brought, or a statute exempting certain property from attachment, do not apply, it seems to us, to a patent right. Further, as between lessor and lessee, it is well settled that the lessee is estopped to deny the validity of the patent. This is a distinct recognition of the principle that a party may so bind himself. Demurrer overruled.

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YOUNG REVERSIBLE LOCK-NUT CO. v. YOUNG LOCK-NUT CO. et al.  
(Circuit Court, D. New Jersey. January 22, 1896.)

1. FEDERAL JURISDICTION IN PATENT CASES—INFRINGEMENT SUITS—MATTERS OF CONTRACT.

Where the case made by the bill is based upon the patent exclusively, the court has jurisdiction, notwithstanding the fact that by the answer the defendant admits the validity of the patent, and its own use and sale of the patented articles, and sets up, by way of defense, an alleged power of attorney, and a contract made thereunder, purporting to give it the right to use the invention. *White v. Rankin*, 12 Sup. Ct. 768, 144 U. S. 628, followed.

**2. SALE AND ASSIGNMENT OF PATENT — FRAUD OF ATTORNEY IN FACT — BONA FIDE PURCHASER.**

An attorney in fact for the sale of a patent organized among his personal friends and associates a corporation with \$300,000 of stock, of which only \$2,500 were in fact subscribed, not letting his own name appear as an officer or stockholder. He thereupon contracted in the name of his principal, who was absent in Europe, to sell the patent to the corporation on terms which were entirely beyond his authority, and thereafter conveyed the patent to the corporation. His principal repudiated the transaction immediately on being informed of it. *Held*, that the sale was a fraud upon the principal, and that the corporation could not claim the patent as a bona fide purchaser.

**3. ORGANIZATION OF CORPORATIONS—FILING CERTIFICATE—NEW YORK STATUTES.**

It is not essential to the capacity of a New York manufacturing corporation to maintain a suit that a certificate of its organization should be filed in the county of its principal place of business, if such a certificate has been filed in the office of the secretary of state and in the clerk's office of the county where the office of the company is located.

**4. SAME—SUITS BY CORPORATIONS—PROOF OF PAYMENT OF CAPITAL STOCK.**

A manufacturing corporation organized under the laws of New York may maintain a suit without showing compliance with the New York statute in respect to subscription and payment of its capital stock; for a failure in this regard would not ipso facto, and in the absence of action by the state, work a dissolution of the corporation, or prevent it from recovering its property.

This is a suit by the Young Reversible Lock-Nut Company against the Young Lock-Nut Company and others, for infringement of letters patent No. 447,224, issued February 24, 1891, to Levi H. Young, for a device for locking nuts. A preliminary injunction was heretofore denied. 66 Fed. 563. The bill is based exclusively on the patent, as in ordinary infringement suits. The answer concedes the validity of the patent, and admits the use by defendant of the patented improvement, as charged in the complaint; and, by way of defense, it makes the following averments:

First. It alleges a power of attorney made by Levi H. Young to one Ira Abbott, from whom the defendant company claims its alleged rights, and further avers: "That said power of attorney was made irrevocable for the reason, and as the defendant is informed and believes, said power of attorney was coupled with an interest in said patent to the extent of one-twelfth part thereof, duly assigned by said Levi H. Young to said Ira Abbott."

Second. That, acting in pursuance of this power of attorney, the said Ira Abbott, on April 24, 1893, made an agreement in writing in the name of Levi H. Young to sell the said letters patent to the defendant company, and duly authorized it to manufacture and sell the patented article.

Third. That on or about the same date (April 24, 1893), the said letters patent were, by said Levi H. Young, acting through his said attorney, Ira Abbott, duly assigned, transferred, and set over to the defendant company.

Edwin H. Brown and Louis O. Van Doren, for complainant.  
Alexander Thain, for defendant.

ACHESON, Circuit Judge. The ruling in *White v. Rankin*, 144 U. S. 628, 12 Sup. Ct. 768, is decisive against the objection made to the jurisdiction of the court. Here, as there, the case presented by the bill is based upon the patent exclusively, and upon the face of the bill the court has cognizance of the case. The answer here, as there, sets up an agreement in writing between the patentee and one of the defendants under which the defendants claim to have

the right to make, use, and sell the invention. The issue here does not differ materially from the issue in *White v. Rankin*, where the supreme court held that the circuit court erred in dismissing the bill for want of jurisdiction, and remanded the cause with directions to the court to hear the case upon the merits. Indeed, jurisdiction is clearer in this case than it was in the case cited, for the plaintiff's position is that the instrument set up by these defendants as their justification was null and void ab initio. A hearing upon the merits, of course, involves an inquiry into the validity of the agreement which is set up as a defense to the charge of infringement.

By letter of attorney, dated March 30, 1892, Levi H. Young, the grantee of United States letters patent No. 447,224, dated February 24, 1891, for a device for locking nuts, constituted Ira Abbott "irrevocably" his attorney to conduct negotiations for sale or other disposition of said patent, or for the formation of a company to manufacture and sell the patented articles, with power to transfer and deliver the patent for such consideration as he might deem advisable and think fit and proper in Young's interest, and to execute all necessary documents for the purposes specified, and to utilize and convey, if necessary, the franchises, concessions, and privileges which Young had at Newport News, Va., or elsewhere. The allegation in the answer that this power of attorney was made irrevocable, because it was coupled with an interest in the patent to the extent of one-twelfth part thereof, assigned by Young to Abbott, is not supported by any evidence. On the contrary, it is shown that Abbott never had any interest whatsoever in the patent. The power, then, undoubtedly was revocable (*Hunt v. Rousmanier*, 8 Wheat. 174; *Blackstone v. Buttermore*, 53 Pa. St. 266); but whether it was effectually revoked by Young before Abbott undertook to act under it need not be considered in the view I take of the case. By an instrument of writing dated March 31, 1892, signed by Young and Abbott, and executed before the delivery of the power of attorney, it was stipulated that Abbott should not dispose of the patent unless he secured to Young the sum of \$50,000 by direct payment or by deposit in bank to his credit, half thereof, at least, "spot cash," and the balance in approved notes at three, six, nine, and twelve months, together with the one-quarter of the capital stock of the company to be formed. The power of attorney and the collateral paper were executed in anticipation of Young's going abroad for a short time on business connected with his European patents for the lock-nut invention. Young sailed for England on April 2, 1892, not expecting to be absent from the United States more than 60 days, but he was detained abroad until October, 1893. On April 19, 1892, Abbott wrote to Young,—then in London,—suggesting that \$50,000 was an excessive cash payment, and that it might be well for Young to take "33½ per cent. of the stock and \$10,000 spot cash, and \$25,000 with 6 per cent. at the end of the year after the stock has had a 10 per cent. dividend." Upon the receipt of this letter, Young, on May 3, 1892, cabled Abbott

his assent to this suggestion. It is argued by the defendants that in the subsequent transaction on April 24, 1893, about to be mentioned, between the Young Lock-Nut Company and Abbott, the latter was acting in pursuance of Young's cablegram. This view, however, is quite inadmissible, for not only had Young withdrawn his assent, but, as respects the "\$10,000 spot cash," Abbott's suggested plan was not carried out, as we shall see. By an agreement in writing dated and made on April 24, 1893, executed by Ira Abbott, professedly under the above-recited power of attorney, and in the name of Levi H. Young, and by the corporation defendant, the Young Lock-Nut Company, it was stipulated that Young should sell and convey to said company, and that the company should purchase his said letters patent and his franchises, concessions, and privileges at Newport News or elsewhere, for the sum of \$135,000, to be paid as follows: \$100,000 in the capital stock of the company at the par value of \$100 a share, \$10,000 in cash, and \$25,000 by the note of the company, bearing interest, "to be paid at the end of one year after the stock of said company shall have earned and paid a net dividend of ten per cent. per annum"; said payments to be made "on or before one year from the date hereof," and upon the transfer to the company of said patent and properties; and that in the meantime, and until payment of said purchase money and the delivery of the patent and properties, the company should be authorized to manufacture and sell the patented nut locks, paying to Young by way of royalty a sum equal to such dividends as might be declared by the company upon \$135,000 of its stock, such payments to be made at the time of the payment of such dividends. After learning of the above-recited agreement, Young, upon June 7, 1893, sent a cablegram and a letter to Ira Abbott, repudiating the agreement as unauthorized, and on the same date he gave notice by letter to the defendants Charles P. Treat, Job Abbott, Robert Hazlett, Otto Crouse, and Alexander Thain, who embraced in their number all the officers and all the corporators of the Young Lock-Nut Company, that he had not sanctioned the formation of that company, and warning them against the infringement of his rights as sole owner of said patent.

It is very plain from the proofs that in making the agreement of April 24, 1893, Ira Abbott acted without rightful authority, and in fraud of Young. Can the Young Lock-Nut Company be deemed a bona fide purchaser without notice? The certificate of the corporate organization of that company bears date April 8th, and was executed on April 17, 1893, and it was filed on the day of the date of said agreement. The certificate shows that the company was formed for the purpose of manufacturing and vending Young's patented lock nuts, and for the sale of rights under Young's patent. Beyond question, Ira Abbott was the projector and organizer of this company, although he discreetly kept his name out of the organization papers, except that he subscribed the certificate as an attesting witness, and made the affidavit annexed thereto of the due execution of that document. The certificate fixes the capital stock

of the company at \$300,000, to be divided into shares each of the par value of \$100, and it provides that the amount with which the company shall commence business shall be \$2,500. That meager amount only of stock—25 shares—was subscribed for. Whether this stock subscription was ever paid does not appear. There were but four subscribers and corporators, namely, Job Abbott, brother of Ira Abbott; Robert Hazlett, a subordinate office associate of Job Abbott; Alexander Thain, a lawyer and the legal adviser of Ira Abbott; and one Otto Crouse, who, it seems, is a lawyer, residing in Jersey City. Job Abbott's office became the place of business of this company. From the start Ira Abbott was the manager of the company. This company, so brought forth and constituted, having neither means nor credit, undertook to purchase from Ira Abbott, as the agent of Levi H. Young, the latter's valuable patent and other property out and out, and to acquire an immediate vested right therein, without paying or securing to Young any part whatever of the named purchase price, \$135,000. Can such a company, a mere paper concern, between whose membership and Ira Abbott such close relations existed, without having paid or secured ought to Young, be esteemed a bona fide purchaser, without notice of Abbott's lack of authority? To this hour the company has made no payment or tender to Young. It is most significant that not one of the defendants—among whom are the officers and all the corporators of the company—has been called to sustain the bona fides of this transaction. Under the circumstances, their absence from the witness stand amounts to confession that the purchase here set up is indefensible. True, most of the plaintiff's evidence was objected to, and it may be that as to some of it the objections were well taken, but there is enough of competent evidence in this record impeaching the good faith of the purchase by the Young Lock-Nut Company from Ira Abbott to make it incumbent upon the defendants to sustain that purchase by counter proofs, if it were possible to do so. But no such attempt was made, and a conclusion unfavorable to the defendants is irresistible. Upon the uncontradicted proofs the Young Lock-Nut Company must be regarded as a mere instrument, devised and used by Ira Abbott to further his unwarrantable scheme, and as lending itself thereto, and hence without any lawful title to or right in Young's patent.

Touching the objection raised to the capacity of the plaintiff company to sue, little need be said. The certificate of its corporate organization was offered without objection. The subsequent motion to strike it out seems to have been based upon the alleged failure to file the certificate in the office of the secretary of state of the state of New York. By leave of court, however, evidence of such filing has been supplied. The office of the company being in Queens county, the filing of the certificate in the clerk's office there was sufficient without also filing it in New York county, although its principal place of business may have been in the latter county. I do not think that the plaintiff was called on to show compliance

with the requirements of the statute of New York in respect to subscriptions to its capital stock and the payment thereof. Were the court to assume, without proof, failure in this regard, such failure would not ipso facto work a dissolution of the corporation, especially in the absence of complaint by the state of New York, or prevent the company's prosecuting an action to recover its property.

Finally, even were it true that Young was indebted to Ira Abbott for money loaned, or on account of transactions relating to the European patents, these matters afforded no justification for Abbott's action in regard to the patent in suit, and they constitute no sort of defense here.

Let a decree be drawn in favor of the plaintiff in accordance with the prayers of the bill.

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GOSHEN SWEEPER CO. OF GRAND RAPIDS, MICH., v. BISSELL  
CARPET-SWEEPER CO.

(Circuit Court of Appeals, Sixth Circuit. December 9, 1895.)

No. 319.

**1. PATENTS—INFRINGEMENT—CARPET SWEEPERS.**

Where a patent for an improvement in carpet sweepers embodies mechanism whereby one end of the brush roller may be pressed downward, so as to sweep more heavily, simply by exerting additional pressure upon the handle, thus accomplishing a new and useful result, an infringement of the patent is not avoided by simply duplicating the mechanism so that the brush roller may be pressed downward at both ends; for this, though an improvement, is a mere change in degree, and a carrying forward of the same idea.

**2. SAME—CLAIMS FOR IMPROVEMENTS.**

Where a patent was limited to a specific improvement upon a certain part of the mechanism of carpet sweepers of the kind which have the brush roller operated by friction driving wheels, *held*, that it was not necessary that the claims should include, as an element of the combination, the brush roller itself, where the specifications fully described the machine, and pointed out all the elements necessary to construct it; for a patent is addressed to those familiar with the art, and need only point out distinctly the part claimed as new, so as to advise the public as to the extent of the invention.

**3. SAME—SUFFICIENCY OF SPECIFICATIONS—DESCRIPTION OF THE FUNCTION OF A PATENT.**

The function or principle which the inventor is required to clearly describe is the mode of operation proper to his mechanism or structure, and not the results, effects, or advantages achieved thereby; and if these results, effects, and advantages are the immediate result of the structure and mode of operation, the patentee is entitled to the benefit thereof, whether, at the time of applying for his patent, he understood all of its beneficial results or not.

**4. SAME—CARPET SWEEPERS.**

The Plumb patent, No. 233,371, for an improvement in carpet sweepers, in which the brush roller is operated by friction driving wheels, and whereby the brush roller may, at the will of the operator, be pressed down, so as to sweep heavy or light, thus giving it a "broom action," construed, and *held* valid and infringed.

## On Rehearing.

## 5. SAME—LIMITATION OF CLAIMS.

Concluding a claim with the words, "when constructed as and for the purpose described," *held* not to limit the patent to one only of the obviously beneficial functions of the combination, where the specifications themselves contained a broader declaration of the purposes and objects of the invention.

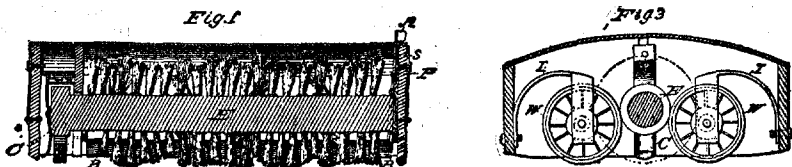
## 6. APPEAL FROM INTERLOCUTORY ORDER FOR INJUNCTION.

On appeal from an interlocutory order granting an injunction after a final hearing, where the circuit court of appeals necessarily considered and expressed an opinion upon the merits, *held* that, upon affirming the decree below, the court was not called upon, at that stage of the case, to determine the effect of this affirmance in case of a subsequent appeal from the final decree; and *held*, that the mandate should simply recite that the court finds no error in the decree awarding the injunction.

Appeal from the Circuit Court of the United States for the Western District of Michigan.

This was a bill in equity by the Bissell Carpet-Sweeper Company against the Goshen Sweeper Company, of Grand Rapids, Mich., for alleged infringement of a patent. The circuit court rendered an interlocutory decree granting an injunction, etc., and defendant appeals.

This is a bill for infringement of patent No. 233,371, granted to A. D. Plumb, October 19, 1880, for an improvement in carpet sweepers. The complainant is the Bissell Carpet-Sweeper Company, assignee of Plumb's patent; and the defendant is the Goshen Sweeper Company, of Grand Rapids, who, it is alleged, is making and selling several forms of carpet sweepers which infringe the Plumb patent. The drawings of the patent are a material part of the description of the patent, and are shown below, so far as they affect the second claim:



These drawings show a carpet-sweeper case, in which is carried a rotary brush, one end of which is enlarged, for frictional purposes, and is called the "brush roller." This brush shaft is journaled at each end of the case so as to permit free revolution. One end of the case is carried on two wheels, W, W, and the case is connected to the wheels by two springs, I, I, each of which is fastened at one end to the case at one place only, and at the other end to a flat piece of metal, or to a yoke, in which the wheel is journaled. The sweeper case is thus spring-supported on its wheels. The dustpan is also shown, but, as its construction and operation are not here involved, we omit further description. The specification describes one of the objects of the invention as follows: "Second, to journal the driving wheels to bearings having both vertical and lateral motion, substantially as described." The specification then states: "I, I, represent the springs, so arranged as to produce the friction by pressing the driving wheels against the friction pulley on the brush roller. The spring, I, may be made of one piece of metal, or of more, and the bearing of the wheel may be a flat piece of metal, or may be in the form of a yoke. The spring, I, may also be varied in length. The fastening of the spring to the case of the sweeper in one place only allows the free motion of the wheel, and the center of the brush roller being above the center of the driving wheels enables the operator to increase the friction between the wheels and the brush roller by merely pressing down on

the sweeper. I prefer to attach this spring, I, to the side of the case, and have it pass over on a curve in the form shown in the drawings, but it may be varied in form and construction to suit the operator." The only claim here involved is the second, which is in these words: "The combination of the springs, I, I, driving wheel, W, and sweeper case, the springs being attached at one end to the side of the sweeper case, and supporting the wheel, W, by a journal, on which the wheel, W, revolves, when constructed as and for the purpose described." A construction of this claim was involved in the case of the Bissell Carpet-Sweeper Company against George C. Wetherbee & Co., which was a suit in the circuit court of the United States for the Eastern district of Michigan, for the infringement of this patent, wherein the defenses were substantially the same as those now presented. The infringing devices were substantially identical with those made by appellant company. The cause was tried by Judge Brown (now Mr. Justice Brown), who, in an unpublished opinion, gave to the patent a broad construction, saying: "The idea being, generally, to make the carpet sweeper to correspond as nearly as possible to a broom moved by hand, so that the pressure of the brush upon the carpet may be increased or diminished at pleasure; and it does not remain uniform, as in the ordinary carpet sweeper." That very learned and acute patent judge did not regard Plumb's invention to be limited to a mere frictional device, but found other beneficial functions resulting from the contrivance he had devised, and that he was entitled to all the advantages inherent in his machine. Although the defendants in that case had not used the form of spring proposed by Plumb, nor attached it in the same way, yet he found that they had obtained substantially the same result, by substantially the same means, and were guilty of infringement. That suit was decided in 1888, and for several years seems to have been acquiesced in by carpet-sweeper manufacturers. The present suit was begun in 1893 to restrain infringements substantially similar to those enjoined in the former suit. An application for a preliminary injunction was refused by Judge Severens, of the Western district of Michigan. His reasons are very clearly stated in an opinion found in the record, and substantially states the construction of Plumb's patent now contended for by appellant. After stating the construction given the patent by Judge Brown in the earlier case above referred to, Judge Severens said that it was impossible for him "to find in the specifications and claim of the Plumb patent any foundation for imputing to the inventor the general idea" which seems to have been credited to him by Judge Brown. After some comment upon the presence of certain statements in his specifications, and the absence of others, he continued by saying: "It may be, and I think is, true, that a sweeper constructed on the Plumb patent would have, to some extent, the possibility of such action, but only to a quite limited extent and in a very imperfect manner; for, while it would be operative for that purpose at the end in which the springs are, it would be wholly inoperative at the other. It is inconceivable that the inventor, having the subject before him, should have left the specifications and claims in such a shape, if he had intended the useful result now claimed. The invention claimed by Plumb was one for the securing of constant friction upon, and the consequent motion of, the brush roller, and not for the securing of a varying pressure of the brush roller upon the carpet. It now turns out that by an extension of Plumb's device, and attaching the springs at both ends of the sweeper, this peculiar feature of the broom action is produced. The object and result sought to be obtained is an essential part of the statement of the invention required by the statute to be declared by the inventor. The elements of his invention are to be construed with reference to this. The result must be useful, and he must show how his invention, in practice, produces it. The construction which I have given to the Plumb patent is, as it appears to me, the utmost that can be claimed for it, and it must be thus limited in order to make it sustainable. The use of a spring to hold the axle and wheel in such relation to the brush roller as to produce more or less effective friction was not new, and the earlier Bissell patent, of February 29, 1878, crowds the Plumb invention into close quarters. But it was new, as I have said, to combine the springs and the axle in such a way as to



produce the peculiar operation of the Plumb patent. I am not satisfied that any of the defendant's machines infringe that patent, construed as I think it must be, and it would seem that they do not more invade the proper limits of the latter than did some prior patents relating to the art as it existed when Plumb's application was made. If this be so, there would, of course, be no infringement. Such is the leaning of my judgment upon the subject. It is not necessary to declare a final opinion upon the vital questions in the case, which may be more appropriately reserved until the final hearing, when possibly new reasons may be shown for a different conclusion. For the present my convictions are so strong that I do not feel at liberty to disregard them to the extent to which I should be compelled in awarding an injunction." Upon a final hearing upon pleadings, proof, and exhibits, Judge Severens sustained the patent, and granted a final injunction as prayed. This result he seems to have reached independently of any opinion of his own, and entirely upon the authority of the earlier interpretation of the same patent by Judge Brown. From this decree the Goshen Sweeper Company was allowed an appeal, and has assigned error.

Offield, Towle & Linthicum and Butterfield & Keeney, for appellant.

Taggart, Knappen & Denison (Geo. H. Lathrop, of counsel), for appellee.

Before TAFT and LURTON, Circuit Judges, and HAMMOND, J.

After stating the foregoing facts, the opinion of the court was announced by LURTON, Circuit Judge.

If, as contended by the learned counsel for appellant, Plumb's patent is to be construed as only securing an efficient frictional contact between the driving wheels and the brush shaft, then the field for improvement in frictional devices in sweepers was an exceedingly narrow one. This is abundantly shown by numerous prior patents in evidence. That end was the purpose of so many of these earlier devices, and that result had been secured in so many ways, closely approximating the means adopted by Plumb, that his claim, if sustainable at all, is only to be upheld by limiting him to the specific friction device he has described and claimed. If his patent be thus limited, it is doubtful whether any of the sweepers made by the Goshen Company infringe his second claim. On the other hand, it has been most ably argued that the patent was rightly interpreted by Judge Brown, and that it is entitled to so broad a construction "that any carpet sweeper whose case is carried on its wheels, whether two or four, by springs of any form, or by any equivalent elastic, yielding connection, infringes his second claim." When we come to interpret Plumb's patent, and mark out its limits, we are at once confronted with the well-established fact that a carpet sweeper constructed according to his plans, as described in his specifications, possesses, in practical operation, advantages in usefulness which distinguish it in a most decided way from each and all of the alleged anticipatory structures. If we analyze these advantages, we find that in practical use the most obvious improvement in the utility of such machines lies, not in the mere matter of securing a more certain and reliable friction between his driving wheels and the brush roller, but in the adaptability of his mechanism for securing a varying pressure of the brush on the carpet by mere downward

pressure upon the sweeper case, whereby the brush may be made to bear heavily or lightly on the surface to be swept, as the conditions of sweeping seem to require. This adjustability of the brush by downward pressure resembles the action of a broom under hard or light pressure, and has been aptly described by the experts as the "broom-action" advantage of Plumb's mechanism. This, the chief advantage of his improvement in carpet sweepers, is the very feature which it is said he has not pointed out in his specifications in such definite way as to be regarded within the perception of the inventor, or the limits of his patent. That this advantage does not exist to so great a degree in a two-wheeled sweeper, such as shown by Plumb's model sweeper filed with his application, may be conceded. Neither his drawings, specifications, nor claim confine him to a two-wheeled sweeper, though the model filed by him does show that one end of his sweeper rested upon an unyielding metal shoe, so that no amount of pressure would lower that end of the case, or that end of the brush roller carried in the case. Sweepers thus constructed were in fact made and sold by Plumb for several years after his patent. But the decided weight of the evidence is that Plumb's two-wheeled sweepers were exhibited and advertised as sweepers capable of doing hard or light sweeping by downward pressure upon the sweeper case, and that this was called "broom action." The evidence also clearly shows that this feature of his improved sweeper was then regarded with great favor by both the general public and by manufacturers of sweepers, who soon began efforts to obtain the same function in their several devices. The recognition of the existence and utility of this very feature may in truth be said to have, at an early day, revolutionized the carpet-sweeper industry. Though this varying pressure of the brush on the floor was not so beneficial as when both ends of the brush could be lowered, still it is evident, even in that form of sweeper, that downward pressure on the sweeper case would lower the wheel end of the case, and with it the wheel end of the brush roller, so that hard or light sweeping might be done by a part of the brush. The difference between the advantage of sweeping heavily or lightly with the whole of the brush, and with a part only, is, at last, but one of degree. It was a new and useful improvement to be able to vary the pressure on but a part of the brush. The interposition of wheels between the brush roller and end of the case necessarily leaves an unswept margin next a baseboard. Any limitation upon the broom-action function of Plumb's combination in consequence of supporting his case on wheels at one end only was somewhat offset by the fact that the shoe end of the case was better adapted to sweep close to the baseboard. At the date of Plumb's invention this was regarded as giving two-wheeled sweepers an advantage over those carried on four wheels, and they were then much the most popular in the market. Plumb himself was the first to extend his principle to four-wheeled sweepers. If the mechanism contrived by Plumb embodied this broom-action adaptability to a degree constituting it a new and useful improvement upon the old structures, and he has sufficiently de-

scribed or pointed out his improvement to meet the requirement of the patent law, then he is not to be deprived of the benefit of this feature because, by a duplication of his wheels, this advantage can be obtained to a greater degree. Appellant cannot escape liability as an infringer by a mere duplication of Plumb's combination. That is a mere carrying forward of his idea, by duplicating the parts, doing the same thing in identically the same way, with better results. *Roberts v. Ryer*, 91 U. S. 150; *Belding Manuf'g Co. v. Challenge Corn-Planter Co.*, 152 U. S. 107, 14 Sup. Ct. 492.

Passing from a consideration of these practical advantages of Plumb's sweeper, as observed in its operation, let us contrast its mechanism with that found in the earlier devices, and see how far that indicates a purpose, and what that design was. Here we again find very marked mechanical differences. This difference lies, not in the case, or brush, or wheels, but in the connection between the case and the wheels. Theretofore the connection between the case and wheels had been rigid. He made that connection elastic. He did this by spring-supporting his case on its wheels, so that both the wheels and the case have a vertical motion relatively to each other. The combination of old elements, by which he makes the connection between the case and wheels elastic, constitutes the claim here involved. That mechanism provides for the rotation of the brush by frictional contact between the brush roller and the driving wheels, which are held in contact with the brush roller by the action of the springs, I, I. The necessary mechanical effect of these springs, when arranged as described, is to keep the wheels pressed against the pulley wheel of the brush shaft, and, by the friction thus produced, rotate the brush when motion is given the wheels by driving it over the surface to be swept. Plumb calls attention to the fact that his wheels are allowed "free motion," attributable in part to the fastening of these springs to the case in one place only. This reference, looking to the whole language of his specification, and construed as one skilled in the mechanics pertaining to carpet sweepers would construe it, does not refer to the mere rotation of the brush roller, but to the "free motion" of the wheels vertically in relation to the case. The only object conceivable in interposing a spring between the case and wheels, each being connected to the spring, is to permit one to move relatively to the other under pressure, and to restore the moved object to its normal position when the pressure is removed. This vertical motion gives what is called "broom action," because the brush roller is journaled in the case, and must move with the case. While the vertical motion of the wheels relatively to the case makes a mechanism adapted to give a varying pressure on the brush, as the necessary law of the structure, the lateral motion of the wheels permits the same spring which supports the case to give frictional contact between the wheels and the brush roller. That this friction is slightly increased by downward pressure upon the sweeper case is due to the fact that the center of the brush roller is above the center of the driving wheels, so that one effect of this "free motion" of the wheels vertically is

that the descending brush roller crowds the driving wheels further apart, and increases the tension of the springs, I, I. That Plumb makes two independent statements—one in relation to the free motion of his wheels under downward pressure on the sweeper case, and the other concerning an increase of tension in springs, I, I—is made more evident by a comparison of the grammatical construction of his original application with that now forming part of the patent. In his original specification he stated, concerning his spring, that:

"The spring, I, may be made from a single piece of metal. It is attached to the side of the case, as shown, passes over on a curve, and its lower end supports the journal for the driving wheel. This gives the wheel free play, when pressed both horizontal and perpendicular. The pulley, E, being above the center of wheels, W, W, the friction may be increased by pressing the sweeper on the carpet. The spring, I, may be varied in form, and may be constructed of any suitable material."

In the amended specification, now the patent, he stated the second object of his invention to be "to journal the driving wheels to bearings having both vertical and lateral motion." He then said:

"The spring, I, may be made of one piece of metal, or of more; and the bearing of the wheel may be a flat piece of metal, or may be in the form of a yoke. The spring, I, may also be varied in length. The fastening of the spring to the case of the sweeper in one place only allows free motion of the wheel, and the center of the brush roller being above the centers of the driving wheels enables the operator to increase the friction between the wheels and the brush roller by merely pressing down on the sweeper. I prefer to attach this spring, I, to the side of the case, and have it pass over on a curve in the form shown in the drawings, but it may be varied in form and construction to suit the operator."

We quite agree with counsel for appellee in their contention that the quotation above contains two distinct statements, which are substantially the same as the two statements of the original specification above quoted. The first of these statements is substantially that wheels thus journaled in bearings attached to one end of a spring, the other end of which is attached to the side of the sweeper case, would permit the free motion of the wheels when pressure is brought to bear upon the case. The second statement is that, if the center of the brush-roller wheel be above the center of the driving wheels, downward pressure upon the case will crowd the driving wheels further apart by the descent of the brush roller, "and increase the friction between the wheels and the brush roller." We can but regard the specification as clearly explaining that the principle of his invention lies in the fact that his wheels are so journaled as to be capable of both vertical and lateral motion. This principle is an essential to every carpet sweeper having the advantage of "broom action," for broom action is nothing more nor less than the vertical motion of the wheels relative to a case carrying a brush attached to the case. That this claim does not include, as an element, a brush roller, is immaterial. The claim is not for a complete machine, but is limited to a specific improvement of a part of the mechanism of carpet sweepers, "having the brush roller operated by friction driving wheels." The specification fully describes such a machine, and points out all the elements necessary to con-

struct it, and describes how the ingredients of his combination are to be arranged to co-operate with the other well-known parts to make a complete working carpet sweeper. A patent is addressed to those familiar with the art. A new and useful improvement upon an old machine is just as much the subject of patent rights as a new machine. All that the inventor is required to do is to point out distinctly the part he claims as new, so as to advise the public as to the extent of his invention, and what is thereby withdrawn from the public. *Parks v. Booth*, 102 U. S. 102; *Seymour v. Osborne*, 11 Wall. 516-541; *Roberts v. Nail Co.*, 53 Fed. 916; 2 Rob. Pat. §§ 530-534. A distinction exists, though not always observed, between a statement of the mechanical functions of a machine, and the beneficial advantages, uses, or results due to that function, and contributing to the success of the invention. The function of a mechanism is its mode of action or operation proper to the structure, and does not ordinarily refer to the results, effects, or advantages of that appointed power of acting in a specific way. The patent statute recognizes this distinction, for it requires that a patentee shall state the "principle" of his machine,—meaning thereby its mode of operation,—and nowhere mentions the beneficial effects, results, uses, or advantages. The principal function of Plumb's spring-supported sweeper case, when arranged to co-operate with the other ingredients of a carpet sweeper, is that, under downward pressure upon the sweeper case, the brush roller is lowered, and thus a varying pressure can be applied to the brush. This capacity of his contrivance he perceived and described when he referred to one of the effects of downward pressure as being an increase of driving friction. The lowered end of the brush is necessarily brought to bear more heavily on the boor. That this would be an advantage in the practical operation of a carpet sweeper would seem obvious. That it is of very great practical utility in the actual operation of his sweeper is established by the evidence, as well as by inspection of the exhibits. That Plumb did not see this advantage resulting from the function of his combination is hardly to be credited. This capacity of adjusting the brush for heavy or light sweeping is so obvious, so directly the appointed action of his mechanism, that whether he has described it specifically is not material. Neither the function, nor its advantage in the success of his sweeper, was a mere obscure property lurking in some accidental corner of the device. It lay upon the very surface, and was continuously in evidence when the sweeper was in operation. This combination resulted in an improved sweeper, capable of a new and beneficial use. He was the first to provide an elastic connection between the wheels and case. This new and most beneficial function is the immediate result of the idea of supporting a sweeper case by a spring connection on its wheels. He is entitled to this beneficial function of his invention, whether he then knew all its beneficial uses or not. *McCormick Harvesting Mach. Co. v. C. Aultman & Co.*, 16 C. C. A. 259, 69 Fed. 371; *Roberts v. Ryer*, 91 U. S. 150; *Brown v. District of Columbia*, 130 U. S. 87-103, 9 Sup. Ct. 437; *Eames v. Andrews*,

122 U. S. 40, 7 Sup. Ct. 1073; *Miller v. Manufacturing Co.*, 151 U. S. 201, 14 Sup. Ct. 310; *Stow v. Chicago*, 104 U. S. 550; *Tucker v. Spalding*, 13 Wall. 453; *Appleton Manuf'g Co. v. Star Manuf'g Co.*, 9 C. C. A. 42, 60 Fed. 411; *Western Electric Co. v. Sperry Electric Co.*, 7 C. C. A. 174, 58 Fed. 186; *Galt v. Parlin*, 9 C. C. A. 49, 60 Fed. 422; *Pfeifer v. Dixon-Woods Co.*, 14 U. S. App. 294, 295, 5 C. C. A. 148, 55 Fed. 390; *Thompson Meter Co. v. National Meter Co.*, 12 C. C. A. 671, 65 Fed. 427. Patents cover the means employed to effect results. Neither an idea nor a function, nor any other abstraction, is patentable in a machine patent. *Burr v. Duryee*, 1 Wall. 570; *Fuller v. Yentzer*, 94 U. S. 288. In *Eames v. Andrews*, cited above, the patent was for an improved method of constructing artesian wells, and was for the process of drawing water from the earth by means of a driven well. Neither the scientific theory nor principle involved, and supposed to constitute the invention, were set forth either in the original or reissued patents. The comment of Judge Blatchford, who had tried the case upon the circuit, in relation to this defect in description, met with the approval of the supreme court. That great patent judge said:

"It may be that the inventor did not know what the scientific principle was, or that, knowing it, he omitted, from accident or design, to set it forth. That does not vitiate the patent. He sets forth the process or mode of operation which ends in the result, and the means for working out the process or mode of operation. The principle referred to is only the why and the wherefore. That is not required to be set forth. Under section 26 of the act of July 8, 1870 (16 Stat. 201), under which this reissue was granted, the specification contains a description of the invention, and of the 'manner and process of making, constructing, compounding, and using it,' in such terms as to enable any person skilled in the art to which it appertains to make, construct, compound, and use it; and, even regarding the case as one of a machine, the specification explains the principles of the machine, within the meaning of that section, although the scientific or physical principle on which the process acts when the pump is used with the air-tight tube is not explained. An inventor may be ignorant of the scientific principle, or he may think he knows it, and yet be uncertain, or he may be confident as to what it is, and others may think differently. All this is immaterial, if, by the specification, the thing to be done is so set forth that it can be reproduced."

*Roberts v. Ryer*, cited above, affords an interesting illustration of the scope of a patent which actually embodies a capability of use not perceived or described by the patentee. The patent involved was for an improvement in refrigerators, "whereby the whole of the contained air is kept in rotation, purification, desiccation, and refrigeration, with economy of ice." The apartments in the device pointed out for accomplishing this end were constructed so as to obtain the full benefit of the descending current of cold air in refrigerating the articles placed therein for that purpose. The defense was that the invention had been anticipated by a patent to one Lyman. Upon an examination it was found that both inventions adopted substantially the same means for cooling the air, and causing its circulation through the refrigerator. It appeared, however, that Lyman had so arranged his device as to use only the ascending air for the purposes of refrigeration, upon the wrongful supposi-

tion that the greatest benefit was to be derived from that current. The complainant had seized upon this mistake, and, while adopting Lyman's method for confining and rotating the air, had arranged his refrigerating chamber so as to get the greatest benefit from the descending current. As to this the court said:

"It being then certain that Lyman contrived a machine which would produce the desired circulation, and could be used for refrigeration in the ascending current, it remains only to consider whether, if one desired to make use of the descending current for the same purpose, he could claim such a use as a new invention. It is no new invention to use an old machine for a new purpose. The inventor of a machine is entitled to the benefit of all the uses to which it can be put, no matter whether he had conceived the idea of the use or not. \* \* \* With both inventors the circulation, by means of an ascending and descending current, was the principal object to be attained. One considered the greatest benefit for the purpose of refrigeration was to be derived from the use of the descending current, while the other had his attention directed more particularly to the ascending current. They each had both, and could utilize both. It is no invention, therefore, to make use of one rather than the other."

In *McCormick Harvesting Mach. Co. v. C. Aultman & Co.*, heretofore cited, this precise question as to whether it is always essential that a patentee shall describe the beneficial functions to be accomplished by the parts of his mechanism came before this court. It was a case of great importance, and received most careful attention. It was there said, concerning certain parts of Gorham's patent, that he had neither perceived nor described the beneficial effect resulting from certain segmental teeth in his improved grain binder, and that his patent should not be construed as including the invention subsequently asserted as within the scope of his patent, and dependent upon the functions of these teeth whose use was undescribed. Judge Taft, for the court, said, as to the effect on the patent of this defect in stating the results to be attained by these segmental teeth, that:

"It is not material that Gorham did not describe in full all the beneficial functions to be performed by the parts of his machine, if those functions are evident in the practical operation thereof, and are seen to contribute to the success of his device. *Eames v. Andrews*, 122 U. S. 40, 7 Sup. Ct. 1073. It is difficult to believe that a man of Gorham's inventive genius did not perceive the useful functions which the parts of his machine so well performed, even though he did not specifically mention them all."

In *Pfeifer v. Dixon-Woods Co.*, cited above, the circuit court of appeals had a like question to deal with. Judge Shipman, in delivering the opinion of the court, said:

"The specification closely, and altogether too closely, adheres to mere mechanical features, and creates doubt as to whether Tondeur thoroughly understood his invention. It indicates that the patentee did not understand the philosophical principles which caused his mechanism to produce an improved annealing. If he had known, they would have been alluded to in the patent; but an examination of the specification and its drawings leaves little doubt that the patentee meant, and that the specification means, to describe bars in such relation to each other that the glass is carried forward constantly in the same horizontal plane."

In the conclusion he added:

"He did not know, or he did not tell, why the new method would produce better results. He simply told how to construct a machine which carried

the glass through the leer on a level, and saved much breakage; but he ought not to lose the statutory benefits which would certainly belong to him if he had seen and described the philosophy of his machine accurately."

That the three sweepers made by appellant infringe the Plumb patent is a matter about which we have no doubt. Mechanically, they do not substantially differ from those held by Judge Brown to infringe in the Wetherbee Case. This was also the conclusion of Judge Severens, who, yielding to the interpretation placed by Judge Brown on the Plumb patent, found no reason for distinguishing between the devices which were made and sold by appellant, and those enjoined in the Wetherbee Case.

One of the infringing sweepers made by appellant is called the "Perfect." It is a four-wheeled sweeper. That is, in itself, no defense, if it is but a substantial duplication of Plumb's invention. At each side a straight spring rod passes through large holes in the ends of the case, this rod serving as the axle for a wheel at each end. Each rod is attached at its center to the top of the case by a bracket. Thus it is but a case spring-supported on its wheels, the spring differing only in form from that preferred by Plumb. There is little difference, mechanically, between appellant's "Star" and "Banner" sweepers and the "Perfect," already referred to. Each is spring-supported on its wheels. A straight metal rod, at each side of the case passes through large holes in the ends of the case, and carries a wheel at each end. These rods are controlled and pressed by a spring at each end of the case, so that the weight of the case is carried by these springs. None of these sweepers show any originality. They accomplish the same results attained by Plumb, by almost identically the same means. A mere change in the form of spring, or its place of attachment, by which vertical motion of the wheels relative to the case is obtained, is not invention. Our conclusion is that the decree of the circuit court must be affirmed.

#### On Rehearing.

(February 4, 1896.)

A petition for rehearing has been filed, which presents a question not definitely discussed in the opinion filed, although it received full consideration. Attention is called to the peculiar phraseology of the concluding line of the second claim of the patent, and it is said from this that "Plumb himself saw fit to limit his invention, whatever it is, upon the face of the claim itself, by the words 'when constructed as and for the purpose described.'" The argument of counsel for the petitioner is that "this qualifying and limiting clause admits that Plumb did not have but one purpose. The claim is not for 'purposes' described, which would indicate that the mechanical combination of Plumb's claim might accomplish two or more purposes, but is limited to a single purpose"; "and," continues counsel, "what other purpose can be referred to, except the purpose of producing constant friction by means of his spring-pressure arrangement?" The first paragraph of Plumb's specification is in these words: "My invention relates to improvements in carpet sweepers having the brush rollers



operated by friction driving wheels; and the objects of my invention are,—First, to dump the dirt by revolving the pans by means of spring levers so constructed as to lock the pans firmly in place when returned to the sweeping position; second, to journal the driving wheel to bearings having both vertical and lateral motion, substantially as described.” He then adds: “I attain these objects by the mechanism illustrated,” etc. Thus, after stating that his invention relates to improvements in carpet sweepers having the brush roller operated by friction driving wheels, he then proceeds to state the objects or purposes of his invention, one of these objects being, as he states, to so journal the driving wheels as that they shall have both vertical and lateral motion. One method of doing this constitutes the remainder of his specification, and is the subject of his second claim. The benefits, effects, or results of vertical as well as lateral motion of the wheels relative to the case are several, as we have already pointed out, one of which is an increase of driving friction, if the pressure is not so great as to force the center of the brush head below the center of the driving wheel. But he nowhere states that such increase is the object or purpose of his invention; and to apply the phrase, “for the purpose described,” to one, only, of the obviously beneficial functions of his combination when in co-operation with the other parts of a carpet sweeper, would be to do violence to the larger declaration of purpose appearing on the face of his specification. In no other place in the patent is there any expression of the inventor’s object or purpose; and by the use of the singular form of the noun “purpose” the inventor evidently intended to refer to what he had expressly declared to be the second “object” of his invention.

The other points argued in the petition were fully presented and considered upon the original argument. The very forcible way in which the question of the proper interpretation of the second claim has been again presented has compelled the attention of the court, though it has not disturbed our faith in the soundness and justice of the conclusions heretofore announced. We have been obliged to consider and express an opinion upon the merits of the entire case, because the injunction awarded was granted only upon a full hearing by the circuit court, and upon a full consideration of the validity and proper interpretation of the second claim of Plumb’s patent, and a determination that appellants had infringed that claim as construed. We find no error in the action of the circuit court in awarding the injunction, and affirm the decree, in so far as the question is involved by this appeal. *Watch Co. v. Robbins*, 12 C. C. A. 174, 64 Fed. 384-400. We do not think, in the present status of this suit, no final decree having yet been announced, that we are called upon to determine the effect of this affirmation should the case be again appealed after the account of profits and damages has been stated and confirmed. The mandate will simply recite that the court finds no error in the decree awarding an injunction. The application for a rehearing must be denied.

## THE WILLAMETTE.

OREGON IMP. CO. et al. v. NELSON et al

(Circuit Court of Appeals, Ninth Circuit. October 31, 1895.)

No. 204.

**1. APPEAL IN ADMIRALTY—DECREE ON STIPULATION BOND—DECISION.**

Where a personal decree was rendered against a principal and sureties on a release bond, and, on appeal, it was decided that the sureties were not liable to certain interveners, because they intervened after the bond was given, *held*, that the decree would be reversed as against the sureties and affirmed as against the principal.

**2. SAME—JOINDER OF SUITS IN REM AND IN PERSONAM—OBJECTION NOT RAISED BELOW.**

Failure of respondents to object to the joinder in one libel of a suit in personam with a suit in rem on the same state of facts, until final hearing on appeal, authorizes the court to disregard an objection made at that time.

In this case the original libel was filed by Jacob Nelson against the steamship Willamette to recover damages for personal injuries received in a collision. Several intervening libels were afterwards filed, a statement of which, and of the various proceedings heretofore had, both in the court below and in this court, will be found in the report of the decision rendered here on September 18, 1895. 70 Fed. 874. Certain of the intervening libelants have now petitioned this court to modify a portion of the decree rendered at that time.

Andrew F. Burleigh, for appellants.

Stratton, Lewis & Gilman, for intervening libelants.

D. J. Crowley, Ben Sheeks, A. R. Titlow, and A. H. Garretson, for appellees.

Before GILBERT and ROSS, Circuit Judges, and MORROW, District Judge.

GILBERT, Circuit Judge. The intervening libelants Foran, Miller, Rankin, Vest, and Richardson petition the court to modify that portion of its decree which reverses the several judgments rendered in their favor in the court below against the claimant and the stipulators upon the bond, and that the same be allowed to stand as judgments against the claimant only. Under the authorities cited in the opinion, there can be no doubt that the decree must stand reversed so far as concerns the judgments of the said intervening libelants against the stipulators. But, upon a careful consideration of the record, we are of opinion that sufficient appears therein to sustain the judgments of Miller, Vest, and Richardson against the Oregon Improvement Company, the claimant. These libels are brought both against the vessel and her owner. They contain all the essential averments of libels in personam, except the single allegation that the vessel, at the time of the collision, was the property of the claimant. That defect is supplied, however, by the stipulation, found at page 96 of the transcript, where it is admitted, by all the parties to the litigation, that, on the appeal to this court, the pleadings follow-

ing the said libels shall be omitted from the record, and that the issues shall be deemed the same as in the case of the libellant Reese, so far as they affect the ship Willamette, and the liability of the claimant for damages of any kind. In the case of Reese, so referred to, it distinctly appears in the pleadings that the claimant was the owner of the Willamette at the time of the collision. The evidence in the transcript, upon which the decree of the district court was based, fully sustains the liability of the claimant for the injuries complained of. In the interlocutory decree it was ordered that the claimant pay to the said libellants the respective amounts so found to be due them. In the final decree, it is true, judgment is given against the claimant and against the stipulators, and against each of them. No reason is perceived why the judgments may not properly be affirmed as against the claimant, while they are reversed as against the stipulators. It is not necessary to consider the question whether, under admiralty rule 15, the joinder in one libel of a suit in personam with a suit in rem upon the same state of facts would be permissible, if timely exception were taken. There has been no objection or exception to such joinder, and the court now, upon final hearing, may undoubtedly regard the libels as in personam, and render decree accordingly. In the cases of Foran and Rankin the libels are in rem only, and they must be so regarded, notwithstanding the stipulation of the parties to which we have referred. The Zodiac, 5 Fed. 220.

The decree heretofore entered is hereby modified so as to read as follows: The judgments of the district court in favor of Jacob Nelson, D. J. Wynkoop, and Ella E. Wynkoop, and D. J. and Ella E. Wynkoop and Philip L. Reese, administrator, etc., be, and hereby are, affirmed, with costs to the said appellees; and that the judgments in favor of intervening libellants Emma D. Miller, E. W. Vest, and Ida F. Richardson be, and they are hereby, affirmed, as against the Oregon Improvement Company, with costs, and that they be, and they are, reversed, as against L. S. J. Hunt and John Collins, with costs to said stipulators; and that the judgments in favor of the intervening libellants Thomas Foran and John Rankin be, and they are hereby, reversed, with costs to the appellees; and that, as to them, the cause is remanded to the district court for further proceedings, without prejudice to the right of the court below, in its discretion, to treat the intervening petitions of said Foran and Rankin as independent libels, and to issue process thereon against the steamship Willamette, or, upon amendment, against her owners, or to take such other proceedings therein as justice may require.

## DAVIS v. DAVIS et al.

(Circuit Court of Appeals, Fifth Circuit. February 4, 1896.)

No. 431.

**FEDERAL COURTS—FOLLOWING STATE PRACTICE—EQUITABLE DEFENSES.**

Rev. St. § 914, providing that the practice, pleading, etc., in the circuit and district courts in civil causes shall conform as nearly as may be to the practice, pleading, etc., in the state courts, does not authorize the federal courts to disregard the established distinctions between law and equity nor to permit equitable defenses in actions at law, although the state statutes permit such defenses to be made in the state courts.

Appeal from the Circuit Court of the United States for the Southern District of Mississippi.

W. L. Nugent, for appellant.

E. Mayes, for appellees.

Before PARDEE and McCORMICK, Circuit Judges, and BOARMAN, District Judge.

PARDEE, Circuit Judge. The appellant brought his bill in the chancery court of the county of Adams, in the state of Mississippi, against Leander Hargrave, James L. Ligon, the New England Security Mortgage Company, and others, to establish his equitable title to, and recover possession of, the one undivided half of the Homo Chitto plantation, situate in the said county of Adams, state of Mississippi. The defendants above named removed the cause to the circuit court for the Southern district of Mississippi, on the ground that the suit was one arising under the constitution and laws of the United States. In the circuit court the said defendants interposed a general demurrer to the bill, which, upon hearing, was sustained; and thereupon the appellant appealed to this court, assigning as error the single proposition that the court erred in sustaining the demurrer and in dismissing the bill. The bill, besides setting out with great particularity the complainant's equitable title and the history of his case, especially charged as follows:

"That on the 12th day of March, A. D. 1889, said S. B. Newman, Jr., instituted against your complainant, in the circuit court of said Adams county, an action of ejectment to recover possession of the whole of said lands, and your complainant filed a plea therein defending for the one undivided half part of said lands; and on the trial of said cause, your complainant having been permitted, under the law of this state, to introduce his equitable defenses, the plaintiff, said S. B. Newman, Jr., suffered a nonsuit. That subsequently said S. B. Newman, Jr., instituted an action of ejectment, for the whole of said lands, against your complainant, in the United States circuit court for the Southern district of Mississippi, wherein he prevailed, under the decisions of the supreme court of the United States and the rigid distinctions between law and equity jurisdictions, and wherein the trial of the issue in ejectment is confined to the strict legal title, and equitable defenses are not admissible. Your complainant filed a plea to said action, defending for the one undivided half part of said lands, and on the trial offered to make his equitable defenses; but these were excluded by the court, and said Newman, Jr., recovered possession of said half part of said plantation on the

legal title conveyed to him as aforesaid by said trustee. That the only question tried and decided in said action was as to the legal title between said S. B. Newman, Jr., and your complainant, and no equitable questions were or could have been considered in said action, and said Newman obtained judgment."

The question presented under the assignment of error appears to be this: The practice act of the state of Mississippi permits equitable defenses to be made to actions at law, and in ejectment permits a recovery upon an equitable title; and section 914 of the Revised Statutes of the United States provides that "the practice, pleadings and forms and modes of proceeding in civil causes, other than equity and admiralty causes in circuit and district courts, shall conform as near as may be to the practice, pleadings, forms and mode of proceeding existing at the time in like causes in the court of record of the state within which circuit and district courts are held." Therefore, in the circuit court of the United States for the Southern district of Mississippi, the appellant, when sued in ejectment, to recover the lands in controversy, was entitled to set up any equitable title he had to defeat the action; and that the ruling of the court in such action, denying him the right to plead and prove his equitable title, was, at most, a mere error of the law judge, in the exercise of his law jurisdiction, which could only have been remedied by writ of error, and cannot now be remedied by a bill in chancery.

The learned counsel for the appellees admits the general common-law rule that cognizance of equitable titles cannot be had in actions of ejectment, and admits that such rule, under ordinary circumstances, ought to be, and will be, applied in federal courts. He says:

"But, after all, there is no such thing as a universal system of common law, applicable to the entire United States. The common law, as enforced in the several states, by the federal courts therein, is enforced as the law of the states in which the courts are held. The cases relied upon by counsel, and the other cases to the same effect, not cited by him (of which there are several), are unquestionably sound law. But our proposition is, and this is also indubitably true, that not a single one of those cases was decided in a state in which, in the common-law courts of that state, a different practice obtained at the time, which practice was, by section 914 of the Revised Statutes of the United States (being the act of 1872) adopted. Now, the bill in this case admits that, in Mississippi, an equitable title could be offered in an action of ejectment in the common-law courts, as a good defense. Section 914 of the Revised Statutes of the United States, we claim, therefore, produces this result: That by virtue of an act of congress, in such case made, that practice is, as to this state, and every other state in which a similar practice obtains, adopted, not as common-law practice, but, as to the federal courts, a statutory practice; and that question has not been raised in any of the cases cited by counsel, or in any of the cases in which the supreme court of the United States has decided that equitable titles cannot be passed on in ejectment suits."

As cases in which the supreme court of the United States has recognized the principle for which the learned counsel contends, he cites *Morgan v. Eggers*, 127 U. S. 63, 8 Sup. Ct. 1041; *Sears v. Eastburn*, 10 How. 187; *Lamaster v. Keeler*, 123 U. S. 376, 8 Sup. Ct. 197. In *Morgan v. Eggers*, a local statute, to the effect that, in an action of ejectment, the plaintiffs were entitled to recover against the defendants, or either of them, the whole of the premises in controversy,

or any part thereof, or any interest therein, according to the rights of parties, was recognized as applicable in the circuit court of the United States for the district of Indiana. In *Sears v. Eastburn*, supra, the practice act of Alabama, abolishing fictitious proceedings in ejectment, and substituting in their place the action of trespass, for the purpose of trying title to lands, and recovering their possession, was held applicable in the circuit court for the district of Alabama. In *Lamaster v. Keeler*, supra, it was held that, under proper construction of sections 914, 916, Rev. St. U. S., a Nebraska statute respecting stay of executions and orders of sale did not govern proceedings after judgment in the circuit courts of the United States sitting in Nebraska. In none of these cases do we find that the generally recognized distinction between law and equity is at all affected by the practice acts of any of the states.

In *Bagnell v. Broderick*, 13 Pet. 436, which was an action of ejectment, in which it was sought to set up equitable titles, the supreme court said:

"The equity side of the circuit court is the proper forum, and a bill the proper remedy, to investigate the equities of the parties."

And that has been the rule, many times recognized, so that, in *Foster v. Mora*, 98 U. S. 425, 428, the court declared, not deeming it necessary to cite authorities:

"In actions of ejectment, in the United States courts, the strict legal title prevails. If there are equities which would show the right to be in another, these can only be considered on the equity side of the federal courts."

And see *Langdon v. Sherwood*, 124 U. S. 74, 85, 8 Sup. Ct. 429.

It is unnecessary to multiply authorities, for counsel for appellees admits the general rule, but claims that the decisions of the supreme court declaring it have not been rendered since section 914 was adopted (1872) in any case arising in any state in which, in the common-law courts of that state, a different practice obtained at the time. The argument is that *Scott v. Neely*, 140 U. S. 106, 11 Sup. Ct. 712, and *Cates v. Allen*, 149 U. S. 451, 13 Sup. Ct. 883, 977, are only to the effect that, when it is a question of jurisdiction on the chancery side of the federal courts, the courts are sedulous in observing a distinction between common law and equity, for the reason that the act of congress declares, in express terms, that the United States courts sitting in equity shall have jurisdiction in those cases only in which there is no plain, complete, and adequate remedy at law; and that, on the other hand, congress itself, by the act of 1872, has declared a different rule in respect to common-law jurisdiction, and, just so clearly as federal legislation has restricted the equity jurisdiction of the federal courts, has it, on the other hand, enlarged, by a plastic and variable rule, the common-law practice, so as to conform to the local practice in those courts exercising common-law powers.

Without discussing the points decided in *Scott v. Neely* and *Cates v. Allen*, we are of opinion the matter has been conclusively settled by the supreme court in *Scott v. Armstrong*, 146 U. S. 499, 512, 13 Sup. Ct. 148, where the question as to whether a circuit court of the United States (sitting as a court of law in a state where, by the

practice act of the state, all distinctions between actions at law and suits in equity were abolished, and all defenses, counterclaims, and set-offs, whether formally known as legal or equitable, were permitted) had jurisdiction to entertain an equitable defense was squarely presented, and the court said:

"Section 914 of the Revised Statutes, in providing that the practice, pleading, and forms and modes of proceeding in civil causes, in the circuit and district courts, shall conform as near as may be to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held, in terms excludes equity causes therefrom; and the jurisprudence of the United States has always recognized the distinction between law and equity as, under the constitution, matter of substance, as well as of form and procedure. And, accordingly, legal and equitable claims cannot be blended together in one suit in the circuit courts of the United States, nor are equitable defenses permitted. *Bennett v. Butterworth*, 11 How. 669; *Thompson v. Railroad Co.*, 6 Wall. 134; *Scott v. Neely*, 140 U. S. 106, 11 Sup. Ct. 712; *Montejo v. Owen*, 14 Blatchf. 324, Fed. Cas. No. 9,722; *La Mothe Manuf'g Co. v. National Tube Works Co.*, 15 Blatchf. 432, Fed. Cas. No. 8,033. We are of opinion that the circuit court had no power to grant the set-off in question in the suit at law."

Later, in *Lindsay v. Bank*, 156 U. S. 485, 493, 15 Sup. Ct. 472, in dealing with the practice on the law side of the United States court, sitting in Louisiana, the court said:

"The case is thus brought within the rule, which this court has so often had occasion to lay down, that the remedies in the courts of the United States are, at common law or in equity, not according to the practice of state courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of these principles; and that, although the forms of proceedings and practice in the state courts shall have been adopted in the circuit courts of the United States, yet the adoption of the state practice must not be understood as confounding the principles of law and equity, nor as authorizing legal and equitable claims to be blended together in one suit. *Bennett v. Butterworth*, 11 How. 669, 674; *Thompson v. Railroad Co.*, 6 Wall. 134; *Broderick's Will Case*, 21 Wall. 503, 520. It is true that the cases in which such strictures have been expressed have been usually those in which resort has been had to equitable forms of relief instead of legal remedies, and when defendants have thus been deprived of the constitutional right of trial by jury; but so long as we attach importance to regular forms of procedure, we cannot sustain so plain an attempt as is here presented to substitute the machinery of a court of law, in which the facts are found by the jury, and the law prescribed by the judge, for the usual and legitimate practice of a court of chancery."

As to the right of the complainant to appeal to equity to recognize a meritorious, equitable title, after judgment at law, see *North Chicago Rolling Mill Co. v. St. Louis Ore & Steel Co.*, 152 U. S. 615, 14 Sup. Ct. 710, where it is said:

"Again, it is well established that equity will entertain jurisdiction, and afford relief against the collection of a judgment, where, in justice and good conscience, it ought not to be enforced, as where there is a meritorious equitable defense thereto, which could not have been set up at law, or which the party was, without fault or negligence, prevented from interposing. Illustrations of these general principles are found in the cases of *Leeds v. Insurance Co.*, 6 Wheat. 565; *Scammon v. Kimball*, 92 U. S. 362; *Crim v. Handley*, 94 U. S. 652; *Embry v. Palmer*, 107 U. S. 3, 2 Sup. Ct. 25; *Knox Co. v. Harshman*, 133 U. S. 152, 10 Sup. Ct. 257; *Marshal v. Holmes*, 141 U. S. 589, 12 Sup. Ct. 62."

We are clear that the circuit court erred in sustaining the general demurrer to the bill, and therefore the decree appealed from is reversed, and the cause is remanded, with instructions to overrule the demurrer, and thereafter proceed as equity may require.

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## JONES v. MANN et al.

(Circuit Court of Appeals, Fourth Circuit. February 14, 1896.)

No. 160.

**APPEAL—DISMISSAL—DELAY IN FURNISHING RECORDS AND BRIEFS.**

Where the case is docketed and the record filed before the return day, as prescribed by rule 16 of the circuit court of appeals for the Fourth circuit (11 C. C. A. cvi., 47 Fed. vii.), the appeal will not be dismissed, although the appellant so long delayed the filing of the record that it was impossible for him to file and furnish to the opposite parties the printed copies of the record and of his brief within the times prescribed by rules 23 and 24 (11 C. C. A. lii., 48 Fed. iii.).

Appeal from the District Court of the United States for the Eastern District of Virginia.

Alfred P. Thom, for appellant.

Sharp & Hughes and Whitehurst & Hughes, for appellees.

Before GOFF and SIMONTON, Circuit Judges, and PAUL, District Judge.

SIMONTON, Circuit Judge. This is a motion to dismiss the appeal in this case (1) because appellant did not print and file 20 copies of the record 20 days before the beginning of the term; (2) because he did not furnish to the appellees 3 copies of the record 10 days before the term; (3) because he did not file 20 copies of printed brief 10 days before the term. Rule 16 of this court (11 C. C. A. cvi., 47 Fed. viii.) makes it the duty of appellant to docket the case and file a record thereof with the clerk of this court by or before the return day, whether in vacation or in term time. The decree appealed from was filed on December 4, 1895. Appeal allowed, and citation issued 4th January, 1896. The record was filed 22d day of January, 1896, and the return day of the citation was 1st February, 1896. So in this respect the appellant was within the rule. It is true, he might by great diligence have filed the record sooner, but he was not required to do so, and cannot be punished for not doing so. The record having been filed on 22d of January, and printed on the 30th January, it was impossible for appellant to file printed copies with the clerk 20 days before the term, which began 4th February, 1896, as required by rule 23 (11 C. C. A. lii., 48 Fed. iii.), and equally impossible for him to file with the clerk 10 days before the term printed copies of his brief, as required by rule 24, Id. But as his inability to do these resulted from the late date at which the record was filed and printed, and as the filing at that date broke no rule of this court, he cannot be punished for not following rules 23 and 24. Circumstances prevented the trial of the case at this term. It is continued, the motion being refused.



## GORDAN et al. v. JACKSON.

## SAME v. FAVOR.

(Circuit Court, E. D. Arkansas, W. D. February 13, 1896.)

EQUITY—JURISDICTION—ADEQUATE REMEDY AT LAW—SUIT TO REMOVE CLOUD ON TITLE.

A suit in equity, to remove a cloud upon complainant's title to land and exclude defendant from such land, cannot be maintained, in a federal court, when the defendant is in possession of the land and the complainant is not, the remedy at law being adequate and complete; and a local statute, permitting the bringing of such suits in the state courts, does not enlarge the power of the federal courts to entertain the same.

P. C. Dooley, for plaintiffs.

Williams &amp; Bradshaw, for defendants.

WILLIAMS, District Judge. On the 7th day of July, 1891, James G. Gordan and others filed two bills in equity,—one against W. F. Jackson, and the other against J. C. Favor. Although the bills and the cases made upon them present some points of difference, they are so far similar that, in my opinion, they must be controlled by the same principle. They allege that the plaintiffs are the owners in fee of certain lands, described, and set out the manner in which they were acquired; that defendants claim some estate or interest therein adverse to plaintiffs, the exact nature of which is unknown; that such claim is invalid, but is, nevertheless, a cloud on complainants' title; that the suit is brought to determine what interest or estate the defendants have; that defendants have made improvements on the land, and received rents and profits therefrom, which receipts exceed the cost of improvements; and that said claims should be set off. The prayer is that "the title to the land be determined and fully quieted between the parties," that plaintiffs' title be confirmed, and for general relief. On the 2d day of November, A. D. 1891, the defendants filed demurrers to the bills for the reasons, in substance, (1) that it appeared by the bill that complainants were not, but that defendants were, in possession of the lands; (2) that the bill sought to remove a cloud from title, and did not disclose what the cloud was; (3) that the cause of action alleged in the bill was in effect an action of ejectment, and could not be maintained in equity. On the 4th day of January, 1892, the complainants filed amended bills, alleging, in substance, the facts set out in the original bills, and specially praying that each of the defendants "be required to disclose fully any and all title, claims, liens, or incumbrances he may have to said property, and all rents and profits received by him in any form from said land, and that a decree be entered fully settling and determining the question of title and ownership between the parties, and awarding the property to the plaintiffs, and that defendants be excluded from the property and enjoined from asserting any claim or title, that the proper orders be made to carry the decree into effect, and for general relief. On the 5th day of June, 1893, the defendants filed their answers in the several suits, asserting title in themselves,

and denying the title of complainants. Their claims of title are based upon divers conveyances, set up in their respective answers, and upon adverse possession for a time sufficient to create title under some statutes of limitations of the state of Arkansas that are specially pleaded. The demurrer to the original bill had not been acted on at that time; and defendants, in their answers, repeat the facts set up as grounds of demurrer, and ask that the suits be dismissed. The causes proceeded to a hearing upon the pleadings and proofs, including depositions, and the defendants have filed elaborate briefs in which they renew the grounds taken by demurrer.

When the questions thus presented are defined and understood, and the authorities bearing upon them are examined, I am forced to the conclusion that the suits cannot be maintained. The objection is not without force that the bills do not disclose any deed to the defendants that constituted a cloud on complainants' title, but only charge that defendants asserted a claim, as to the character of which complainants are ignorant, and ask that they be required to disclose their claim, and that it be held invalid. The case of *Rich v. Braxton*, 158 U. S. 406, 15 Sup. Ct. 1006, may be read with interest upon this point, but I have not deemed it necessary to reach a conclusion upon it.

The other objection, that the defendants and not the complainants are in possession of the lands, and that complainants have a plain, adequate, and complete remedy at law, precludes the maintaining of these suits.

Article 7 of the constitution of the United States provides:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law."

The act of congress of September 24, 1789, provides:

"Suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate and complete remedy may be had at law."

These suits are, in effect, an effort, on part of an alleged owner out of possession, to recover from a party in possession lands alleged to be improperly withheld. That such a right was, at the time of the adoption of the constitution and statute cited above, cognizable at law, is a proposition that cannot be controverted; and it is equally well settled that, under the rules of chancery practice then in force, a suit to cancel a deed as a cloud upon title could not be maintained by one kept out of possession. *Pom. Eq. Jur.* §§ 253, 1394, 1396; *Wehrman v. Conklin*, 155 U. S. 322, 15 Sup. Ct. 129; *Holland v. Challen*, 110 U. S. 15, 3 Sup. Ct. 495. If, then, the complainants are permitted to maintain this suit, the defendants will be denied the right to a trial by jury guaranteed by the constitution, and the statute, which forbids a suit in equity where a plain, adequate and complete remedy may be had at law, will be disregarded. The fact that this case would have been cognizable at law when the constitution was

adopted brings it within the guaranty of a right to trial by jury. And the fact that a court of law could award the possession of the land, with damages for its detention, and forever put at rest any claim of title the defendants could then make, brings the case clearly within the inhibition of the statute. If this suit can be maintained, a defendant's right to a trial by jury is absolutely dependent on the will of the plaintiff, while the inhibition of the statute will close the doors of chancery to no one who elects to enter them.

But it may be insisted that this suit was maintainable under the provisions of the statutes of Arkansas, which provided that a suit might be brought by one out of possession against one in possession, to determine the estate or title of the occupant, and quiet the title of the plaintiff. Sand. & H. Dig. § 6120. This change in chancery practice was enacted in March, 1891. It was repealed by the next session of the general assembly of the state, in so far as it permitted this character of suit to be maintained where the lands were held adversely to the plaintiff. Its early repeal indicates that the new practice was not found to be an improvement on the old, and may be taken as a warning to courts sitting in chancery that they should not, of their own motion, extend their jurisdiction in this class of cases. When these suits were brought, that act was in force in the state of Arkansas, and regulated the practice in its courts. There were decisions of the federal courts, made with regard to similar statutes, that might well have been construed by the eminent and learned counsel who brought these suits as giving force to the state statute in chancery practice in the federal courts. Later decisions, however, are directly to the effect that this cannot be the case, and show that the former decisions, properly construed, never intended to permit such practice. The extent to which the state statute can be given effect in the federal courts is easily understood in the light of these later opinions.

Where lands were wild and unoccupied, it had been held that the federal courts, in chancery, sitting in states that had adopted such statutes, could entertain suits to quiet title in the rightful owner. *Holland v. Challen*, 110 U. S. 15, 3 Sup. Ct. 495. But, in such cases, a court of law can afford the owner no remedy, and therefore there is no right to a trial by jury, since such right existed only in cases at law. It is, therefore, no violation of the constitution or statute to bring such suits in equity. But where lands are unlawfully occupied, the owner can sue the occupant at law, and the consequent right of trial by jury exists. Hence, the difference from the case where no one is in possession or sued at law. In *Whitehead v. Shattuck*, 138 U. S. 146, 11 Sup. Ct. 276, the effect of a similar Iowa statute upon the practice of the federal courts of that state was well considered and clearly reasoned in an opinion by Justice Field. It is well to note that he had written the opinion of the court in *Holland v. Challen*, 110 U. S. 15, 3 Sup. Ct. 495, which is sometimes thought to warrant suits like this. But he clearly indicates the distinction between the case where no one is in possession, and a court of law can afford no remedy, and that where the defendant is

in possession, and the plaintiff may sue him at law, and obtain adequate and complete relief. He says:

"It [the Iowa statute] thus enlarges the powers of a court of equity, as exercised in the state courts; but the law of the state cannot control the proceedings in the federal courts, so as to do away with the force of the law of congress declaring that 'suits in equity shall not be sustained in either of the courts of the United States, in any case where a plain, adequate and complete remedy may be had at law,' or the constitutional right of parties in an action at law to a trial by a jury." 138 U. S. 152, 11 Sup. Ct. 276.

In the case of *Wehrman v. Conklin*, 155 U. S. 314, 15 Sup. Ct. 129, the question was again considered by the supreme court of the United States. The cases were carefully and clearly reviewed in an opinion by Justice Brown, and the effect of them was stated to be that they "denied the power of the federal courts to afford relief under such statutes, where the complainant was not in possession of the lands." 155 U. S. 325, 15 Sup. Ct. 129. The same ruling has been made, for the same reasons, in regard to statutes that have been passed in various states, authorizing the institution of suits by simple contract creditors to set aside fraudulent conveyances by their debtors. *Scott v. Neely*, 140 U. S. 106, 11 Sup. Ct. 712; *Cates v. Allen*, 149 U. S. 451, 13 Sup. Ct. 883, 977; *Hollins v. Iron Co.*, 150 U. S. 371, 14 Sup. Ct. 127. It was pressed upon that court, with regard to both classes of statutes, that suits under them had been maintained; and, as to each, the reply of the court was that it was a defense that might be waived, and was waived if not made before decree, and that in the cases referred to it had been so waived. 150 U. S. 380, 14 Sup. Ct. 127.

The questions presented by the pleadings and evidence in this case have regard largely to the dates when defendants entered upon and occupied the lands in dispute, the extent and character of their possession, and their claim of title as arising therefrom. These are questions that are appropriately triable at law, and the defendants have a right, under the constitution and statutes of the United States, to demand that they shall be thus tried. They presented their demand in apt time, and have in no manner waived it. It follows that the causes must be dismissed, without prejudice, however, to the rights of complainants to assert, in actions at law, any title they may have to the lands.

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SLOAN et al. v. MITCHELL et al.

BOUND v. SOUTH CAROLINA RY. CO.

(Circuit Court of Appeals, Fourth Circuit. November 11, 1895.)

No. 114.

**PRACTICE—ALLOWANCE TO COUNSEL—APPEAL.**

An order making an allowance to counsel in a foreclosure suit, made after investigation by the court with the aid of experts, should not be disturbed on an appeal taken by parties who had full opportunity to make objection to the order, but produced no evidence tending to indicate their own view of what the allowance should be.

Appeal from the Circuit Court of the United States for the District of South Carolina.

Samuel Lord, for appellants.

J. P. K. Bryan, for appellees.

Before GOFF, Circuit Judge, and HUGHES, District Judge.

HUGHES, District Judge. The original complainant in the proceeding below, F. W. Bound, was the individual holder of second-mortgage bonds of the South Carolina Railroad Company. He made the trustees of the second mortgage and the trustees of the first mortgage, and an individual holder of bonds of the first mortgage, on which judgment had been obtained, parties defendant to the suit. His bill prayed the foreclosure of the mortgages and the settlement of the debts of the railroad company according to their priorities. The trustees of the second mortgage, under which the complainant held bonds, challenged his right to bring and conduct this suit. But his right was sustained by the court below, and the suit went on to a conclusion there, under the control of the original complainant, and of his counsel, Mitchell & Smith. There was constant and active supervision of the property in its charge by the court, many and various vexed questions having been submitted and passed upon by the court, the litigation in support of the objects of the suit being conducted throughout by the counsel of the original complainant. At the close of proceedings in the suit, the court below made an allowance to these counsel of such an amount of compensation for their services in conducting the suit as it deemed just, proper, and adequate. It had sought and obtained the aid of experts in determining what the amount of this compensation should be. The persons and parties in interest who oppose this allowance, and who are appellants here, had had full opportunity to make objection, but produced no evidence tending to indicate their own view of what the allowance should be. Questions of this sort depend upon the special facts and circumstances of each particular case. Necessarily, they lie largely in the discretion of the judge dealing with them. We see no error in any ruling or order of the court below in these proceedings, and the record shows such facts and circumstances as justified the court below in making the allowances it did; therefore the decree complained of should not be interfered with. The decree of the court below must be affirmed.

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ROSENBERG v. JETT et al.

(Circuit Court, E. D. Arkansas, W. D. February 13, 1896.)

1. HOMESTEAD—OF WIFE DISTINCT FROM HUSBAND.

During coverture, and while the husband and wife are living together, there can be no such thing as a separate homestead of the wife, distinct from that of the husband.

2. DEEDS—ALTERATION—EVIDENCE.

In order to justify a finding that material words, essentially altering the effect of the instrument, have been introduced into a certificate of

acknowledgment of a deed after the execution of the deed and the signing of the certificate, the testimony that such alterations were so made should be quite convincing.

Rose, Hemminway & Rose, for plaintiff.

S. R. Cockrill, for defendant Mrs. Jett.

Ashly Cockrill, for minor defendants.

WILLIAMS, District Judge. This is a bill to foreclose a mortgage executed by E. D. Jett and Irene Jett, his wife, upon certain property in the city of Little Rock, to secure the payment of the sum of ——— dollars. After the execution of the mortgage, E. D. Jett departed this life, and this action is defended by Irene Jett, his widow, and ——— Jett, one of his heirs, a minor. It is contended in the answer of Irene Jett that the property in question was purchased partially with funds obtained by her from the estate of her parents, and partially by money made by her own efforts in the conduct of a business separate and apart from her husband, and that it was her homestead, and that she did not execute the mortgage in such a manner as to bind the property as her homestead. The minor, in his answer, claims that this property was the homestead of his father, and that the acknowledgment of the execution of the mortgage was not such as is contemplated by law, in order to bind the homestead and make it subject to the mortgage. The testimony on the part of Mrs. Jett attempts to show that this was her own homestead; that her husband, E. D. Jett, claimed to reside, during the last few years of his lifetime, near Washington, in the county of Hempstead; and that he claimed to be a citizen of that county, voted there at elections, and did not exercise the right of suffrage elsewhere, especially in the county of Pulaski, where this property is situated. But it also shows that the land he occupied there belonged to his wife.

I am clearly of the opinion that during coverture, and while the husband and wife are not separated, but are living together as husband and wife, there can be no such thing as a separate homestead of the wife, separate and apart from her husband; that the domicile of the husband is the domicile of the wife, and, wherever he may erect a homestead, it is, in the contemplation of the law, the homestead of the husband and wife. But it is unnecessary in this case to even pass upon that proposition or contention. The question as to a homestead is one of mixed law and fact, and the mortgagor, Jett, being dead, reference must be had to the testimony which shows his actions as to what his intentions were in regard to the homestead, and from that arrive at a conclusion as to the status of the property here, in relation to its being his homestead. From that testimony, and the application of the law to it, I am convinced that the property in controversy, from its purchase up to the time of the death of E. D. Jett, was unquestionably the homestead of said Jett, and that he could not reasonably and legally have claimed any other homestead. This being the case, the only matter in controversy is, did E. D. Jett and Irene Jett execute the mortgage in this case, and acknowledge it in the manner claimed by

the mortgagee, and as appears by the original mortgage exhibited with the depositions in this case? In the acknowledgment in that mortgage the words "and homestead" are interlined. They are necessary words, under the statute in this state, to be in the mortgage, in order to bind the homestead and make it subject to the mortgage. The contention on the part of the defendants in this case is that the words "and homestead," and several other words that are not so material, were interlined after the execution of the mortgage and its acknowledgment. It is attempted to show this by the testimony in this case, but it is denied strenuously by the plaintiff, and by the notary who took the acknowledgment of Jett, and who prepared the mortgage and the blank acknowledgment therefor. He testifies that all the words were interlined before it was sent to the state of Kentucky for execution, and before it was signed by either Jett or Mrs. Irene Jett. In view of the fact that the notary in this case must have known that if he added the material and most important words of the acknowledgment in it after its execution he was committing a most heinous crime, there ought to be testimony quite convincing that the words were interlined after execution before the court should so hold. The testimony in this case does not convince me that the words were interlined after execution. Mrs. Jett herself knew nothing about it. The testimony of the officer who took the acknowledgment in the state of Kentucky, and of the son-in-law of Mrs. Jett, comes far short of being convincing in its nature. Taking the testimony all together, I cannot find that the material words "and homestead" were interlined after execution, but am compelled to find that the mortgage was acknowledged by Jett and Irene Jett as is shown by the original mortgage exhibited in this case. So, finding the decree in this case must be for the complainant, and a decree of foreclosure will be entered herein.

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CONTINENTAL TRUST CO. OF NEW YORK v. TOLEDO, ST. L. & K. C.  
R. CO.

(Circuit Court, N. D. Ohio, W. D. February 21, 1896.)

CORPORATIONS—PREFERRED STOCK—LIEN.

A corporation cannot, in the absence of statutory authority, make its preferred stock a lien upon its property; nor can an agreement between the subscribers to the stock of the corporation make such stock a lien on its property, as against bondholders or general creditors without notice of such agreement.

On application of Charles Hamlin and others to be made parties defendant.

Doyle, Scott & Lewis and Benjamin Harrison, for interveners.  
Cary & Whitridge and C. W. Fairbanks, for trust company.

RICKS, District Judge. Charles Hamlin, for himself and other persons holding certificates of preferred stock issued by the defendant, the Toledo, St. Louis & Kansas City Railroad Company,

claims to hold a lien upon the property to be sold under these foreclosure proceedings, by virtue of such certificates, and asks that they be made parties defendant in this suit, with the right to be heard upon all issues affecting their lien, and especially to have their rights as lienholders fixed by the decree for sale to be hereafter entered, so that they may be able to protect their interests when the property is sold. The case has been at issue for some time, testimony has been taken, and the parties are substantially ready for hearing on the merits. The application now presented is not only to be allowed to be made parties defendant, but to open the testimony as to the issues made and to be made by the answer and cross bill, for the purpose of making new and material issues.

The certificates issued by the defendant railroad company, upon their face, say: "This stock constitutes a lien upon the property and net earnings of the company next after the company's first mortgage." The first contention important to consider, with reference to these certificates, is the claim that, by this acknowledgment, impressed upon the stock by the corporation itself, it is a lien upon the body and assets of the corporation, next after the first mortgage. Is this claim well founded? A corporation, within the powers conferred by law, and within the limitations imposed by law, may create indebtedness. It may issue bonds, and secure their payment by lien expressed by mortgage or trust deed. But, to make such bonds a lien, they must be issued and certified, and the instrument securing the lien must be recorded. Each and every step is prescribed by statute. Such liens thereby become fixed, and the whole world has notice of the amount so secured, by public records; and all persons dealing in them are protected. The corporation, by statutory provisions, may issue certificates showing its capital stock, and the amount authorized and issued. Such certificates, properly issued, make the owner a shareholder of the capital of the corporation. They are not payable at any fixed time,—are not an indebtedness against the corporation, but simply a certificate that, when the corporation is dissolved, and its debts are all paid, the holder is entitled to his just proportion of the net fund to be distributed. Such stockholder is, therefore, not even a creditor of the corporation. He is a joint owner of it, and he may be, and in many states by statute is, liable as such joint owner to creditors, not only for the amount of the stock he owns, but for additional amounts fixed by law; and, unless some statutory powers are conferred upon a corporation, such capital stock or certificates cannot become a lien upon its property and assets. No one dealing with such a corporation, or in its securities, would ever look elsewhere than to the statutes of the state in which it was authorized or created to see what kind of liens were authorized and legally outstanding against it. The defendant corporation was organized in each of the states of Ohio, Indiana, and Illinois, and the several corporations so authorized were consolidated, and became the Toledo, St. Louis & Kansas City Railroad Company. I have examined carefully the statutes of the three states named, but do not find any authority for a



railroad corporation, in either state, to make its own certificates of capital stock a lien upon its property and assets. There is, then, no lien provided by statute for such certificates.

But it is urged that, by the consolidation agreement entered into between the holders of the bonds of the several constituent companies comprising the original corporation which preceded the defendant company, it was agreed that the holders of certain classes of the bonds of those divisional roads should accept for their bonds these certificates of preferred stock, which should be a lien upon the property next after the first mortgage. But while, within certain limits, such an agreement might be binding upon the original parties thereto, the consolidation would only be legal and effective so far as it complied with the statutes of the states in which the corporations so consolidated were to do business. Such equities, as between the contracting parties, would be subordinate to the legal rights and liens created by law. Holders of bonds issued under mortgages, and transferable to bearer, and creditors dealing with the corporation upon the basis of powers conferred by statutes, would not be bound by equities arising under consolidation agreements to which they were not parties, and as to which they were not by law bound to investigate or take notice. So I cannot see how the present holders of bonds issued by the defendant corporation, or creditors of it, are bound by equities which spring from contracts not recorded, or to which they were not parties. General creditors, or innocent holders of bonds, are not bound by equitable liens of which they are not by law advised, and of which they have not had actual notice. They need not inquire back of the want of power of the corporation to create a lien for its capital stock to see whether some hidden equitable interests exist by virtue of preceding contractual relations. There is nothing now before the court to show any actual notice to such creditors of such equitable liens.

But it is urged that the holders of these certificates have been harshly dealt with by the reorganization, and by now being denied the status of lienholders are left wholly remediless. Their certificates of stock gave them the option of converting it into voting stock. They had this privilege to become stockholders, active in the management of the corporation. They chose their present position by their own contract. If they were misled, and do not occupy so favorable a status in the case, or in the corporation, it is the misfortune of having erred in judgment. Eminent counsel have advised them that they had a lien. That opinion is certainly entitled to great weight, and its correctness may yet be established; but it is not satisfactory to me, and I do not accept it as correctly defining their legal position with reference to this litigation. As the defendant corporation has no statutory power to make these certificates of preferred stock a lien upon the property, and as the equitable lien attempted to be worked out for them through the consolidation agreements cannot be made binding upon the holders of negotiable securities passing from day to day to innocent holders, or to general creditors who dealt with the

corporations in large sums in good faith, I do not see upon what basis the petitioners can be permitted to come into this suit and be heard as parties. If they have no such lien as has been claimed, they are merely preferred stockholders. As such, they are represented in this case by their corporation and its officers. No attempt has been made to show that the latter are not diligent in defending the corporation as to all its rights. I think the records of this case will show that they have been tireless and persistent, and have not underestimated the importance or nature of their trust. Until some showing is made of want of good faith, or a failure to act for their interests by the corporation, which is their own creation and agent, they cannot be heard by any other representative.

No one is now here to question the legality of these certificates. They are regularly issued, and are recognized as evidence of the amount of capital stock of the corporation which the holders own. But there are objections urged to the claim that they are a lien. It is contended that these objections are not made by the proper parties. The corporation, it is said, cannot make this defense. Neither can the trustee make it. Their status comes under consideration from the claim pressed by the holders of the certificates rather than from objections made by others. The application of the petitioners presents the contention, and it is properly met by the trustee. But it is urged that, even as preferred shareholders, they have adverse interests to the common stock, by which the corporation is managed, and that, by reason of this adverse interest, they are entitled to be heard in their own right. This contention is not supported by the authorities. The corporation is as much bound to protect and defend the interests of the preferred stockholders as of the common stockholders. As before stated, upon the proper showing that the corporation has failed to make such defense, the court might be called upon to act.

It is again urged that the holders of the old bonds, issued under the divisional mortgages hereinbefore referred to, took these preferred certificates of stock for their old bonds, and made Mr. Kneeland, the president of the defendant corporation, their trustee to buy the road with the bonds so converted. But that does not change their status. If Kneeland has failed to execute their trust, they have their remedy over against him. Such default on Kneeland's part cannot in any way affect the present holders of the bonds issued by the new consolidated corporation, or the general creditors of it.

But it is urged that none of these questions which the court has herein passed upon can be considered in this application. It is said that the facts stated in the answer and cross bill tendered must be accepted as true for the purposes of this hearing. The court has acted upon this theory; but, as the vital question—the very foundation—upon which petitioners' rights must stand depends upon the proposition that the certificates of preferred stock are a lien upon the corporation, and that contention has been found against the petitioners, their application must fall. It would be

idle to admit them as parties, prolong the litigation, and add to its expense, when, in the end, the court is sure they cannot prevail. For these reasons, the application of the petitioners is denied.

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**BROWN et al. v. CRANBERRY IRON & COAL CO.**

(Circuit Court of Appeals, Fourth Circuit. February 4, 1896)

No. 137.

**1. EQUITY JURISDICTION AND PRACTICE—PARTITION SUITS—ACTION AT LAW.**

Where the answer to a bill for partition of real estate entirely denies the title set up by complainant, the proper course is, not to send an issue out of chancery to try the title, but to stay the suit, and send complainant to a court of law for the purpose of establishing his title. In such case the equity court assumes no jurisdiction over the action at law, and, if either party be dissatisfied with the result thereof, he should move in that action for a new trial; and the proper method of reviewing such judgment is by writ of error.

**2. PRINCIPAL AND AGENT—PURCHASE OF LANDS—AGENT'S KNOWLEDGE.**

One purchasing lands through an agent is affected by the previously acquired knowledge of the agent in respect to matters affecting the title, if the agent had that knowledge in his mind when he made the purchase. Where it is sought, therefore, to bind the principal by his agent's knowledge, it is competent to adduce evidence tending to show previous knowledge by the agent, but the party is bound to follow this up by evidence tending to show that the agent had it in mind at the time.

**3. SAME—DECLARATIONS OF AGENT AFTER THE FACT.**

Declarations by an attorney in fact that a certain conveyance made by him in behalf of his principal conveyed the entire mineral interest in the lands described in the deeds, and that the grantees had a good title to all such minerals, do not estop his principal. This is especially true where such declaration or representation relates merely to the construction of the deeds.

**4. APPEAL—HARMLESS ERROR—ADMISSION OF IMPROPER TESTIMONY.**

In order to avoid a reversal for admission of incompetent testimony, on the ground that the same fact was afterwards proved by proper testimony, it must be clear beyond all doubt that the erroneous admission of testimony did not and could not prejudice the rights of the excepting party.

**5. ESTOPPEL BY DEED—MISTAKE.**

Grantors who sign a deed as prepared and drawn by the agent of the grantees are not estopped from asserting an interest which was not conveyed by the deed, although the grantees supposed that they were obtaining the entire interest, and the failure of the deed to convey it was due to the mistake of their attorney.

In Error to the Circuit Court of the United States for the Western District of North Carolina.

This was an action at law by W. Vance Brown and others, children and heirs at law of J. Evans Brown, deceased, and William B. Carter, against the Cranberry Iron & Coal Company, to establish title to an undivided half interest in certain mines and mineral interests, as tenants in common with the defendant. The action was brought pursuant to leave given in a suit in equity previously brought by the plaintiffs for partition. In the action at law, one issue only was tried to the jury, and a verdict thereon was given in favor of defendant, and judgment was entered accordingly. The other issue

was reserved and decided by the court also in favor of defendant (59 Fed. 434), but no judgment was entered on that issue. A writ of error was sued out by the plaintiff to review the judgment entered on the verdict of the jury, but the same was dismissed by this court on the ground that such judgment was not final. 13 C. C. A. 66, 65 Fed. 636. Further proceedings were afterwards had in the court below, resulting in a final judgment for defendant, from which the plaintiffs have sued out this writ of error.

Chas. A. Moore (of Moore & Moore), for plaintiffs in error.

R. H. Battle (of Battle & Mordecai), for defendant in error.

Before GOFF and SIMONTON, Circuit Judges, and BRAWLEY, District Judge.

SIMONTON, Circuit Judge. This cause comes up by writ of error to the circuit court of the United States for the Western district of North Carolina.

On the 16th August, 1887, J. Evans Brown a citizen of New Zealand, and William B. Carter, a citizen of Tennessee, filed their bill of complaint in the circuit court of the United States for the said district, against the Cranberry Iron & Coal Company, a body corporate under the laws of the state of North Carolina. The bill alleged that the complainants were tenants in common with the defendant in all the mines and minerals and mineral interests in certain lands in North Carolina, described in the bill, wherein they say the complainants are each entitled to an undivided fourth part, and the defendant to an undivided half. The answer of the defendant denied any title in the complainants in the realty sought to be partitioned, and averred that defendant is sole owner in fee simple absolute thereof. It also set up certain matters in pais as constituting an estoppel against the plaintiffs from setting up any title to said mines and minerals and mineral interests. Replication having been filed, the cause came to a hearing, whereupon the court entered its order in these words:

"This cause coming on to be heard at the present term, before the Honorable R. P. Dick, judge, present and presiding, and it appearing to the court from the pleadings that the title of the plaintiffs to the property sued for in the bill, and every part thereof, is denied in the answer, the court doth thereupon order the plaintiffs' bill to be retained for twelve months, with liberty to the plaintiffs in meantime to proceed at law touching the matters in question in this cause; but, in case the plaintiffs shall not proceed at law and to proceed to trial within the time aforesaid, the plaintiffs' bill is from thenceforth to stand dismissed out of this court, with costs to be taxed by the clerk, unless further time is given, upon cause shown, by the court; but, in case the plaintiffs shall proceed at law and to trial as aforesaid, the court does reserve the further consideration of the costs of this suit and of all further directions until after such trial shall be had; and in either case any of the parties are to be at liberty to apply to the court as they shall be advised. And it is further ordered that this decree be without prejudice to the rights of the parties to take further evidence on the matters and equities involved in the cause upon notice duly given. And to the end the merits may come in question upon such trial, and it is further ordered that it be admitted on both sides, on such trial, that there has been an ouster on the part of the defendant against the plaintiffs. It is further ordered by consent of parties that in any action at

law the plaintiffs may institute to establish the title to the property sued for in this bill, that the evidence and depositions now on file, and which were taken in this cause before R. M. Douglass, examiner in the same, or which may hereafter be taken and filed herein, may be used by either party on the trial of such action, without prejudice to the right of the parties litigant to use such evidence, also on the further hearing of this suit."

This course pursued by the learned judge who heard this case is in strict accord with the law and practice of courts of chancery. "When, on a bill for partition, where partition is a subject of equity jurisdiction, the legal title is disputed and doubtful, the course is to send the plaintiff to a court of law to have his title first established." *Cox v. Smith*, 4 Johns. Ch. 271; *Phelps v. Green*, 3 Johns. Ch. 302. Equity has no jurisdiction to try the title to lands. *Manners v. Manners*, 2 N. J. Eq. 384. *Obert v. Obert*, 10 N. J. Eq. 98. An action at law was ordered, and not an issue out of chancery. This is in accord with the practice in North Carolina. "An issue is sent from a court of equity to be tried before a court of law to aid the court of equity in the ascertainment of facts. An action is ordered to be tried in a court of law when the equity is based on a strictly legal right." *Fisher v. Carroll*, 1 Jones (N. C.) 27.

The complainants availed themselves of the leave granted to them by the court, and, within the period fixed, brought their action against the defendant, the Cranberry Iron & Coal Company, on the law side of the circuit court of the United States for that district. The action was begun by summons as prescribed in the Code of North Carolina, followed by complaint. It is in the form used to try the title to lands, sets up the claim of title in two undivided fourths of these minerals, mineral lands, and mineral interests, avers that defendants are unlawfully in exclusive possession, and prays to be let into possession, and for damages. The complaint and summons having been duly served on defendant, it answered, denying the claim of title set up by plaintiffs, setting up that defendant owns, and is in absolute and entire control of, said realty, and was so at the commencement of this action and for a long time prior thereto. Then it sets up certain matters of estoppel in pais against the claim of plaintiffs; also, its notorious, open, adverse, and exclusive possession, under deeds therefor, of this realty for more than 7 years next before the commencement of this action, and for more than 20 years prior to the same, pleading such occupation and the statute of limitations in bar of the claim of plaintiffs. The cause came on for trial before the judge and a jury, and it seems that every other issue in the pleadings was abandoned but one, viz.: Is the plaintiff estopped from claiming any title by deed, conduct, acts, or otherwise? So much of the issue as presented matters of fact was submitted to the jury in the form of a question: "Are the plaintiffs estopped by their acts, declarations, or otherwise from claiming any interest in the mines and minerals in the land described in the complaint? To this question the jury, under the charge of the judge, answered, "Yes." So much of the issue as involved the questions of law (the construction of deeds) his honor reserved for himself, and decided that they also estopped the plaintiffs from claiming title. 59 Fed. 434. Numerous

exceptions were taken during the trial and to the charge by the court on the part of the plaintiffs, all of which were duly formulated in the bill of exceptions, and are in the assignments of error.

This is an action at law, brought by plaintiffs as a condition precedent to proceedings in equity. Although it was brought by them because of the order of the court of equity, that order was not mandatory. It only prescribed that, if the action was not brought within a time limited, the bill would be dismissed. In cases of this character the court of chancery assumes no jurisdiction over the action. If either party be dissatisfied with the result, a new trial must be moved for in a court of law. "In directing the action at law," says Daniell, Ch. Prac. (3d Am. Ed.) 1119, "the court always orders it to be brought in such a form that the verdict should be regarded as conclusive."

Mr. Adams, in his work on Equity (page 378), says:

"In this class of cases there is not a mere point of law or fact incidentally in dispute as to which the court for its own satisfaction seeks the aid of another tribunal, but there is a general question of right, determinable as such by the ordinary courts, and requiring a decision according to the course of these courts both of disputed facts and the law applicable thereto."

In an action at law brought under the direction and by leave of the court, the court of equity does not assume to interfere with the course of pleadings in the court of law, and all errors made at the trial must be corrected in that court or by writ of error to the appellate court having jurisdiction over it. *Watt v. Starke*, 101 U. S. 250; *Smith, Ch. Prac.* 90; *Adams, Eq. (7th Ed.)* 378; *Bootle v. Blundell*, 19 Ves. 500.

The exceptions and assignments of error have been properly brought to this court by the writ of error. Before discussing any of the assignments of error, a brief statement of facts is necessary.

Hoke, Sumner, and Hutchinson were tenants in common of a tract of land in North Carolina. During negotiations for its sale in New York, they were informed that J. Evans Brown, one of these plaintiffs, and the estate of Avery, had a claim on the minerals in this land. They opened negotiations with Avery's executor, and contracted to purchase his interest, and then they dealt with W. J. Brown, the father of the plaintiff J. Evans Brown, and the late Z. B. Vance, who were attorneys in fact of J. Evans Brown, who lived in New Zealand. The purpose of Hoke and his associates was to remove all cloud on the title of their land. This was communicated to Avery and to the attorneys in fact of the plaintiff Brown. After the negotiations with Brown and Vance were completed, and the sale agreed upon, and the price fixed, the papers were all placed in the hands of Col. Gaither, the attorney for Hoke, and his associates, who had represented them in the negotiations, and who had examined into the title of the property purchased, and he prepared the conveyance. The important parts of this conveyance are these: John E. Brown, for the consideration of \$22,000, "doth bargain, sell, release, and confirm unto Thomas J. Sumner and Robert F. Hoke the following tract of land, situate and being in the county of Mitchell, in the state of North Carolina, that is, one-half of the mineral interest in

the said lands." Then follows a description by metes and bounds. "To have and to hold the one-half of the mines and minerals and mineral interests in said lands and appurtenances thereunto belonging." "And the said John E. Brown doth warrant and defend the title to the one-half of the mines, minerals on bank, and mineral interests to said Sumner and Hoke and their heirs, forever." The defendant holds under mesne conveyances from these grantees. The realty, the subject-matter of this arrangement, was this: The state of North Carolina had granted to one William Cathcart two contiguous tracts of land, containing together 158,200 acres. One William J. Brown claimed these lands, and Isaac T. Avery also claimed them. J. Evans Brown became the owner of all the interest of William J. Brown; and in 1853 he and Avery entered into a compromise whereby he released to Avery 40,000 acres of these tracts, and Avery released to him all the rest. The dividing line between him and Avery was a road running through the tract, Avery keeping all the land on the west side of this road, and Brown all the lands on the east side. The Cranberry iron ore bank was on the west side, on the lands of Avery. As a part of the compromise, Avery conveyed to Brown one-half of the Cranberry iron ore bank, so that Avery and Brown shall have a like and equal interest in said iron ore bank. These deeds were on record. The minerals conveyed to Hoke and his associates lay in lands on both sides of this road. The suit concerns the title in one-half the minerals on the east side of the road (that released to Brown).

The assignments of error are numerous, and are directed as well to the trial and determination of the issue of fact by the jury as to the ruling on the issue of law by his honor, the trial judge. The conclusion reached by us renders unnecessary the discussion of all the issues assigned. Two of them, which relate to the trial of the issue of fact, and those relating to the decision of the legal issue, will be noticed. There are two assignments of error which deserve special attention, the fifth and the first. They will be taken up in this order.

The fifth assignment of error is that the court below excluded the testimony offered by plaintiffs to prove (by his witness A. C. Avery) that Col. Gaither had for many years been the attorney for the plaintiff prior to June 7, 1867, and that he knew of the compromise between Isaac T. Avery and W. J. Brown, and represented the plaintiffs in the compromise transaction by which the compromise line was located. Under this compromise, Brown obtained all the mines, minerals, and mineral rights on the east side of the compromise line, and one-half of the Cranberry iron ore bed. The evidence disclosed that Col. Gaither was a lawyer of high standing and good practice, and that he represented the purchasers Hoke and his associates in completing the sale from Avery and Brown, and that he drew the deed which was executed by Brown's attorney in fact. The purpose of the question was to affect the purchasers with notice of the compromise between Brown and Avery, and of the fact that Brown owned all the mines and minerals on the east side of the line, and not one-half only. The point is not free from difficulty, and authorities differ upon it.

But, so far as federal courts are concerned, the rule has been fixed by the supreme court of the United States in *The Distilled Spirits*, 11 Wall. 366, 367. In that case, Mr. Justice Bradley, speaking for the court, says:

"The question how far a purchaser is affected with notice of prior liens, trusts, or frauds by the knowledge of his agent who effects the purchase, is one that has been much mooted in this country and in England. That he is bound and affected by such knowledge or notice as his agent obtains in negotiating the particular transaction is everywhere conceded. But Lord Hardwicke thought that the rule could not be extended as far as to affect the principal by knowledge of the agent acquired previously, in a different transaction. *Warrick v. Warrick*, 3 Atk. 291. Lord Eldon did not concur in this view of Lord Hardwicke. *Mountford v. Scott*, 1 Turn. & R. 274. And the distinction taken by Lord Hardwicke has been entirely overruled in *Dresser v. Norwood*, 17 C. B. (N. S.) 466. So that in England the doctrine seems to be established that if the agent, at the time of effecting a purchase, has knowledge of any prior lien, trust, or fraud affecting the property, no matter where he acquired the knowledge, his principal is affected. If he acquire the knowledge when he effects the purchase, no question can arise as to his having it at that time. If he acquired it previous to the purchase, the presumption that he still retains it, and has it present in his mind, will depend on the lapse of time and other circumstances. Knowledge communicated to the principal himself he is bound to recollect, but he is not bound by knowledge communicated to his agent, unless it is present in the agent's mind at the time of effecting the purchase. Clear and satisfactory proof that it was so present seems the only restriction required by the English rule as now understood. With the qualification that the agent is at liberty to communicate his knowledge to his principal [that is to say, that he did not receive it as a confidential communication], it appears to us a sound view of the subject."

This rule establishes the doctrine that a principal is affected by previously acquired knowledge of the agent if the agent had that knowledge in his mind when he made the purchase. It was competent, therefore, for the plaintiff to enter upon a course of examination tending to show previous knowledge of the agent. He was bound to follow this up by evidence tending to show that the agent (Col. Gaither) had this in mind at the time of the purchase. But he was entitled to lay the foundation for this evidence, and the question should have been permitted.

The first assignment of error is that his honor, the trial judge, against the exception of the plaintiffs, permitted R. F. Hoke, a witness for defendant, to relate a conversation had between him and William J. Brown, an attorney in fact for plaintiff J. E. Brown, in which William J. Brown said that the deed executed by him and Gov. Vance as attorney for J. E. Brown, some months before, and the deed executed by the executor of Avery to Hoke and his associates, conveyed the entire mineral interest in the boundaries covered by the deeds, and that Hoke and his associates had a good title to all the mineral interest in that boundary.

In *Packet Co. v. Clough*, 20 Wall., at page 540, the supreme court, on this subject, says:

"The rule is well stated by Mr. Justice Story that, when the act of the agent will bind the principal, then his representations, declarations, and admissions respecting the subject-matter will also bind him, if made at the same time and constituting a part of the *res gestæ*. A close attention to this rule, which is of universal acceptance, will solve almost every dif-



ficulty. But an act done by an agent cannot be varied, qualified, or explained, either by his declarations, which amount to no more than a mere narrative of a past occurrence, or by an isolated conversation held or an isolated act done at a later period. The reason is that the agent to do the act is not authorized to narrate what he had done or how he had done it, and his declaration is not part of the *res gestæ*."

Besides this, the evidence offered and admitted in this case was as to the construction of a deed. The deed speaks for itself. If there be no ambiguity in it, it explains itself. The statement of Brown that Hoke and Sumner had a good title to all the mineral interest in said boundary is a matter of opinion, and not of fact. The admission of this testimony was error. It is true that there was other testimony bearing on this same fact. There are cases when, if a fact is proved by improper testimony, and the same fact afterwards is proved by proper testimony, the allowing of the first testimony is held not to be ground of error. *Cooper v. Coates*, 21 Wall. 105. But it must be clear beyond all doubt that the erroneous admission of this testimony did not and could not have prejudiced the rights of the excepting party. *Gilmer v. Higley*, 110 U. S. 47, 3 Sup. Ct. 471; *Deery v. Cray*, 5 Wall. 795; *Railway Co. v. Jurey*, 111 U. S. 584, 4 Sup. Ct. 566; *Railroad Co. v. O'Reilly*, 158 U. S. 334, 15 Sup. Ct. 830.

Besides this issue of fact, there was an issue of law: Was the plaintiff Brown estopped by this deed? It is admitted that, if he is, his coplaintiff is also estopped, as he derived all his rights from Brown long after the transaction. His honor, the trial judge, held the deed an estoppel. The purchasers, Hoke and Sumner, desired a perfect title to all the mineral rights in this tract of land. The claims of Avery and of Brown were a cloud on the title to these mineral rights. These claimants knew this purpose on the part of Hoke and Sumner. The deeds were executed towards this end, and were accepted by the purchasers. What did the deed of Brown profess to convey? Were the purchasers induced to accept this deed by any language or conduct on the part of the makers of the deed upon which they had a right to rely and did in fact rely? The consideration of the deed is \$22,000. It bargains, sells, releases, and confirms to Sumner and Hoke "the following tract of land, situate and being in the county of Mitchell, in the state of North Carolina; that is, one-half of the mineral interest in the said lands. The habendum is one-half of the mines, minerals, and mineral interests in said lands. The warranty is as to the title to the one-half of the mines, minerals on bank, and mineral interests within the boundaries of the said lands. The title to these mineral interests was investigated by Col. Gaither, as counsel for the purchasers, who advised with them as to the purchase. He drew this deed, signed by Brown's attorney in fact, and they executed it as he prepared it. The deed, in fact and in law, was supposed to carry into execution the conclusions of the parties. It is a vital principle "that he who, by his language or conduct, leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations on which he acted. Such a change of position is sternly forbidden." *Dickerson v. Colgrove*, 100 U. S., at page 580. The deed clearly and

without any ambiguity conveys but one-half the mines, minerals, and mineral interests. Hoke and Sumner thought they were getting the whole. Were they induced to accept this deed by any representation, language, or conduct of Brown's attorney in fact? The deed does not convey, or profess to convey, all the right, title, and interest of Brown, to wit, the one-half, etc. It conveys without more the one-half. It does not convey the land. The language is qualified; that is, the one-half of the mineral interest in said land. The purchasers had employed a competent attorney. He drew the deed. He selected the words used. The grantees signed the deed so prepared by him. They knew him well. Both parties may have intended that all the mineral interest should be conveyed. It was not conveyed by this deed. The reason it was not so conveyed, if such was the mutual intent and purpose, was the mistake of Col. Gaither (his honest mistake, no doubt). But it is not a case of estoppel under the case quoted. In our opinion, this construction put on the deed by his honor, the trial judge, was error.

The course taken at the trial of this action at law in the abandonment of every issue but that of estoppel removed the chief reason for ordering the action, and really submitted to the law court an issue which could be decided in equity. It is true that it is a defense also available at law. *Dickerson v. Colgrove*, *supra*. But it is equitable estoppel, and its birthplace is the court of equity.

The verdict must be set aside, and the cause be remanded to the circuit court.

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BROWN et al. v. CRANBERRY IRON & COAL CO.

(Circuit Court of Appeals, Fourth Circuit. February 4, 1896.)

No. 138.

EQUITY PRACTICE—PARTITION—ACTION AT LAW.

In a partition suit, defendant denied complainant's title, and set up that complainant was estopped from claiming title. The court thereupon made an order that the bill be retained for 12 months, with liberty to complainant within the meantime to bring an action at law to establish his title; and in case he should not do so, or should fail to proceed to trial within 12 months, the bill should be dismissed. The complainant accordingly brought his action, proceeded to trial, and a verdict was found for defendant. Judgment was entered accordingly, and a writ of error sued out. Afterwards the court of equity, acting upon the verdict, dismissed the bill for partition. *Held*, that this was error, and that it was the duty of the court to retain the bill until the action at law was finally determined.

Appeal from the Circuit Court of the United States for the Western District of North Carolina.

This was a bill by W. Vance Brown and others, children and heirs at law of J. Evans Brown, deceased, against the Cranberry Iron & Coal Company, for partition of certain mining lands. The bill was dismissed by the circuit court, and complainants appeal.

Chas. A. Moore (of Moore & Moore), for appellants.

R. N. Battle (of Battle & Mordecai), for appellee.

Before GOFF and SIMONTON, Circuit Judges, and BRAWLEY, District Judge.

SIMONTON, Circuit Judge. This case comes up by way of appeal from the circuit court of the United States for the Western district of North Carolina. It has been heard at the same time, and is included in the same record with the case just decided. 72 Fed. 96.

The bill was filed on the equity side of the court, to obtain partition of the Cranberry iron ore bed land. The complainants claimed that each of them owned an undivided fourth in said ore bed, and that they were tenants in common with the defendant, who owned, as they allege, the other two-fourths. In its answer the defendant denied the title claimed by complainants, and further set up as a defense that they were estopped from claiming title. The court, hearing the bill and answer, and noting that the title of the plaintiffs was denied and put in issue, entered an order that the bill be retained for 12 months, with liberty to plaintiffs in the meantime to proceed at law touching the matters in question in the cause. But in case the plaintiffs shall not proceed at law, or fail to proceed to trial within the time aforesaid, the bill to be dismissed. Plaintiffs did proceed; brought their action at law by summons and complaint on the law side of the court; a trial was had before a jury; and a verdict found for the defendant. A writ of error was sued out by plaintiffs to this court. The cause has been heard, and has been remanded for a new trial. Meanwhile, however, the court on the equity side, acting on the verdict, dismissed the bill.

Having given the plaintiffs leave to bring their action at law to establish their claim of title upon conditions named, and the plaintiffs having exercised the right thus given them, fulfilling the conditions imposed, the court should not make a decree dismissing the bill until that action at law was heard, decided, and ended. The exceptions taken at the trial, the writ of error upon them allowed by the trial judge, the perfection of the appeal to this court, and the pendency of the appeal, suspended the judgment in the law case. That judgment has been reversed. The decree is premature, and must be reversed.

This cause has now been twice in this court. 13 C. C. A. 66, 65 Fed. 636. Without dictating any course, we offer suggestions for consideration. By the record of the case at law, which has been heard and used in this case, it would seem that the reason for the action at law has ceased. It was ordered that plaintiffs should establish their title before their claim to the equity of partition could be allowed, this title having been denied. When the action at law was tried, the only issue presented was whether the complainants were estopped in pais and by deed. The theory of the defendant was this: The complainant Brown and the estate of Avery both set up a claim in the mines, minerals, and mineral interests in certain lands which were owned by Hoke and others,

through whom defendant derived title. This claim embarrassed Hoke and his associates, as they desired to sell this land, and they set to work to clear the cloud from their title. To that end, in the year 1867, they entered into separate negotiations with the executors of Avery, and with the attorneys in fact of Brown, the result of which was the purchase of so much as the estate of Avery claimed, and a conveyance thereof by deed, and a subsequent purchase from Brown through his attorneys in fact, and the execution of a deed by them. The defendant contends that Hoke and his associates desired to purchase the entire interest of Brown in these mines, minerals, and mineral interests, and fully understood and believed that they were doing so; and that the attorneys in fact of Brown knew their purpose, understanding, and belief; and that they professed to fulfill these. Brown now contends that his deed executed by his attorneys in fact, by its express terms, conveyed only one-half the minerals in that part of this land on the east side of the dividing line between him and Avery, and that the other half of the minerals still remained his; he before 1867 being the sole owner of all the minerals in that part of the land. The deed was drawn by, and is in the handwriting of, Col. Gaither, who acted during this transaction as the attorney for the purchasers. If it be assumed, as defendant contends, that all parties to the transaction fully intended that the entire interest of Brown in the mines, minerals, and mineral interests in these lands should pass to the purchaser, and that it did so pass by the deeds, and if the deed failed so to express it, may this failure not have been caused by the mistake of Col. Gaither, shared, perhaps, by the others? Mistake is within the peculiar province of a court of equity, not always relievable, however, for one may lose his equity by lapse of time. If the defendant is entitled to this relief,—and on this point we have and we express no opinion,—can it obtain it under the present pleadings, or is there necessity for a cross bill? At all events, the questions in this case are purely of equitable cognizance. Were the case at law to end in establishing a legal title in plaintiffs as to an undivided half of the minerals, mines, and mineral interests claimed, yet, if the defendant can maintain and prove its position, it might be that this legal title is held in trust for the defendant through the original purchasers.

Let the case be remanded to the circuit court, with instructions to take such proceedings herein as are in conformity with this opinion.

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LOWENFELD v. CURTIS et al.

(Circuit Court, S. D. New York. January 8, 1896.)

1. PRACTICE—PRELIMINARY INJUNCTION—SECURITY FOR DAMAGES.

A suit was instituted by an agent of the complainant to restrain the production of a play by defendants. It appeared that complainant was entitled to a preliminary injunction, but the complainant being a non-resident alien, and the defendants questioning the right of his agent to

bring the suit, *held*, that security for damages resulting from the injunction, if the defendants should ultimately prevail, should be required, as a condition of granting it.

**2. CONTRACTS—BREACH—WAIVER—APPROVAL OF CAST OF PLAY.**

L., a resident of London, made a contract with C., a resident of New York, by which he gave to C. the right to produce a certain play, upon the condition, among others, that C. should "submit to the said L. for his approval the names of the various artists to be engaged for the performance of the play." On December 20, 1895, C. wrote to L. at London, sending him a list of the proposed cast for the play, and on December 25th, before the letter could have reached L., commenced the performance of the play. L. replied to the letter, without expressing disapproval of the cast, but it did not appear that he then knew that performances had been begun. *Held*, that C.'s performance of the play before the letter submitting the cast could have reached L. was a violation of the contract, which, under a clause providing that a failure to comply therewith should forfeit all rights, entitled L. to an injunction, and that there had been no waiver of the breach by L.

**3. SAME—INTERPRETATION.**

*Held*, further, that the plain terms of the contract could not be affected by evidence of the purpose of such conditions or of the interpretation commonly placed upon them by theatrical managers.

**4. SAME—WAIVER—SECOND BREACH.**

It subsequently appeared that C. informed L. of the performances commencing on December 25th, and remitted to him the agreed percentage of the receipts therefrom, which L. accepted without objecting to the cast, and this was claimed as a waiver of the breach; but it also appeared that C. had afterwards made substantial changes in the cast, without submitting the names of the actors to L. *Held*, that the waiver did not apply to the second breach, and the injunction should not be vacated.

Robert C. Beatty, for complainant.

Mr. Howe, A. H. Hummel, and Benjamin Steinhardt, for defendants.

Motion to Vacate Stay.

(January 8, 1896.)

LACOMBE, Circuit Judge. While the affidavits and papers submitted indicate that every other question in controversy is vehemently disputed, they show conclusively that defendants' only title to the play comes under the contract with the complainant, and, as such, is to be exercised in conformity to the terms of that contract. The weight of evidence so far adduced shows nonapproval of the cast, or, at least, of defendant Curtis in the title roll. The present stay will therefore be continued until hearing and decision of the main motion; but as complainant is a nonresident alien, and defendants question the authority of his agent to bring this suit, complainant must file security for damages, if any, resulting from the stay should defendants ultimately prevail, in the amount of \$1,000, and may have the whole of January 9th to prepare and file such bond.

(January 13, 1896.)

Motion for preliminary injunction to restrain defendants from performing a play known as "Gentleman Joe." The motion is made on bill, affidavits, and opposing affidavits.

LACOMBE, Circuit Judge. The defendant M. B. Curtis holds a written contract, duly executed by the complainant, purporting to lease to Curtis the performing rights for the United States and Canada of a certain play owned by complainant, and known as "Gentleman Joe." The contract expresses a consideration, and contains sundry covenants and conditions, some of which will be hereafter referred to. This contract, after execution by complainant, with the manuscript of the play and two music scores, was delivered in escrow to the Bank of New York. They were subsequently delivered by the bank to Curtis, upon payment of \$2,500. This was on October 21, 1895, the date of the contract being filled in as of that day; and thereupon Curtis mailed a duplicate original, signed by himself, to the complainant, in London. There is no dispute that the bank acted in good faith and in strict accordance with the instructions it had received in making such delivery. The complainant contends that Curtis was not entitled to receive these documents; that the proposed contract never became a binding agreement, for the reason that complainant's offer was not accepted by Curtis within the time allowed; and that defendant obtained the papers from the bank by "trick and artifice on his part," and in fraud of complainant's rights. It is unnecessary to set out the details of these averments. The burden of proof is on complainant, and, although he supports his charges with affidavits in addition to the bill, they are met with counter affidavits on the other side, resulting in a conflict of proof, which, as already intimated upon the argument, this court will not undertake to determine preliminarily to the trial, and without the opportunity of weighing the respective allegations of fact in the light afforded by cross-examination of the affiants. This motion will be disposed of, therefore, on the assumption that Curtis, on October 21st, came rightfully into possession of the written contract and manuscript copy of the play, with accompanying scores, and upon such facts only as are not in substantial dispute.

The fourth clause of the contract reads as follows:

"Fourth. The said M. B. Curtis hereby undertakes (a) not to perform the play less than one hundred and forty times in any year in the United States or Canada; (b) not to make any alterations or additions to the said play without the written consent of the said Henry Lowenfeld; and (c) to submit to the said Henry Lowenfeld, for his approval, the names of the various artists to be engaged for the performance of said play, but such approval shall not be unnecessarily withheld."

The defendants have produced the play in Newark, N. J., and at the Fifth Avenue Theater in this city. Affidavits are produced from persons who witnessed such performances, and who assert that they are familiar with the play of Gentleman Joe, from having witnessed it in London. They assert that in many important particulars the defendants' performance is unlike the original composition, and they specify the points of difference. It is averred that eight songs are omitted which are claimed to be essential to the working out of the plot and the proper interpretation of the author's lines; that among these songs is one entitled "He [or "She"; it appears both ways in the affidavits] Wanted Something to Play with," said to

have attained a very wide popularity, and to have been so identified with the play as to serve as one of the best mediums for making it known to the public; that in the dialogue there are absent many necessary lines that are contained in the London version; that the orchestration is different; that a great part of the dancing is left out, including all the dancing in the first act; and that in the second act certain variety specialties are produced which had no place in the original play. To these specific allegations the defendant replies with the simple statement that "the play as produced is precisely as it was furnished at the time he paid the \$2,500." The accuracy of this statement may be easily determined, should it become necessary to do so, by the production of the manuscript and of the two scores which defendant received from the bank; and it is to be presumed that the complainant himself has copies of these documents.

It will be observed that these alleged variances from the original are in part omissions and in part additions. As to the omission of any features of the play as it was produced in London, but which are not contained in the manuscript and the two scores, defendant refers to correspondence between complainant and himself. On October 21, 1895 (the day he obtained the documents from the Bank of New York), Curtis wrote to Lowenfeld advising him of that fact, and asking the latter to send him "the photographs of all the company, also property, gas, and scene plots, and full orchestration," and inquiring if "the American rights of the song 'He Wanted Something to Play with' are included in my contract, as there is an irresponsible party singing the song here in music halls, which I wish at once to enjoin, as I should like to sing it myself in Joe." To this letter Lowenfeld replied, on November 14th, that Curtis' action in taking the contract was a great surprise, "as it was quite understood that the matter between us was off, and that Mr. Aronson had the call of the piece until his arrival here," and adds: "But I understand that everything has been finally settled between you and him, and therefore I am giving him all the business you write for." Lowenfeld's action in delivering this "business" to Aronson was manifestly based upon his understanding that Curtis had no right to the contract, that Aronson was the one to whom he had leased the performing rights for the United States, and upon the supposition that the latter had made some arrangement with Curtis. From the complainant's point of view, he was entirely right in refusing to send these photographs, plots, and full orchestration to Curtis, but, as before stated, it cannot be assumed upon this argument that his understanding of the situation was correct. He may establish it to be so on the trial, but at this stage of the case the propriety of his action must be determined upon the theory that Curtis had a valid contract. This being so, he cannot complain of the omission from Curtis' representation of anything that is contained in the additional documents which Curtis asked for, and is not contained in the manuscripts and the two scores which were delivered with the contract. Additions to the play, however, are wholly unwarranted, except upon the written consent of the com-

plainant. Defendant was entitled to produce the play only in strict conformity to the manuscript and scores.

The only remaining question is as to the selection of the persons engaged in the performance. The contract requires the defendant Curtis to submit their names to the complainant for approval, such approval not to be unnecessarily withheld. When argument was had on the continuance of the stay, there was not satisfactory evidence of any such submission, and the proof tended strongly to indicate a distinct disapproval of Curtis himself in the title role. Further proof on this branch of the case has since been adduced. It now appears that on December 20, 1895, Curtis wrote to Lowenfeld, stating that he therewith submitted the cast of Gentleman Joe, in accordance with the contract of October 21, 1895, and adding some words of commendation of the persons selected. Inclosed with this letter was the complete cast, with Curtis' name in the title role, and letters of H. C. Miner and Charles Frohman expressing favorable opinions of the company. The first performance given by the defendant was at Newark on December 25th, and, as at that time it was physically impossible that the names thus submitted for approval could reach the complainant until two days after the performance, this was a flagrant violation of the contract.

The clause requiring a submission of the names for approval is manifestly inserted in the interest of the grantor, and any violation of it may be waived by him. He need not insist upon the submission at all, and if he knowingly permits performances to go on without objection, no names having been first submitted, it is to be presumed that he has waived this provision; or, names being submitted and a reasonable time elapsing without objection on his part, it may be inferred that he approves the selection, especially in view of the concluding words of the paragraph, "but such approval shall not be unnecessarily withheld." Relying upon these well-settled principles, defendants' counsel contends that this conceded violation of the contract should not work a forfeiture, in view of complainant's reply to defendant's letter of December 20th, inclosing the cast. This reply reads as follows:

"Your letter and inclosures are to hand. I explained to you in my last letter how the matter stands, and I sincerely hope that there will be no difficulties between you and Mr. Aronson, as this would be detrimental to all interests concerned."

It is insisted that because this does not expressly state that the cast is disapproved of, nor ask for further time to investigate as to the fitness of the individuals suggested to play the different characters, it is to be taken as an approval, or, at least, as a waiver of any failure to comply with the terms of the contract requiring submission of the names. A party, however, is not to be held to have waived his rights by reason of what he may say or do when he is ignorant of the facts; and there is not a scintilla of evidence tending to show that when Lowenfeld received the cast, on December 27th or 28th, and wrote the reply above quoted,



he had any suspicion that defendants had produced the play two days before. It is manifest that, ever since the contract was delivered to Curtis, complainant has insisted that the latter was not entitled to it. His letter of November 14th makes this plain. He wanted to get rid of Curtis and his contract; to that end, had brought this very suit; and it is inconceivable that, if he had known on December 28th that Curtis had deliberately broken that contract, he would have waived any rights inuring to himself by reason of such breach.

The affidavit of a theater manager has been submitted to the effect that the reservation of a right to approve the company is simply to prevent thoroughly incompetent performers from appearing on the stage of a first-class theater; that managers do not refuse to approve of a proper cast, made up of reputable actors; and that such objections are never made until after the production of the piece, and one or more of the actors have shown their incompetence to perform the part. And there are many affidavits testifying to defendant Curtis' ability as a star actor, and to the merit of the members of his company. But the difficulty with this agreement is that we are dealing with a written contract, expressed in positive language, without the slightest ambiguity. By its terms, Curtis undertakes "to submit to the said Henry Lowenfeld, for his approval, the names of the various artists to be engaged for the performance of said play." There may be room for argument as to how far any particular disapproval is or is not capricious or unsound or not fairly within the reservation of the contract, or whether a delay in acting upon the names proposed is or is not unreasonable; but there can be no doubt whatever that the opportunity for expressing approval or disapproval must be afforded to the party of the first part, and must be so afforded before performance, for it is the names of the artists "to be engaged for the performance" which are to be submitted. No explanation is given of the failure to submit the names of the proposed cast until a day so late that it would be impossible for complainant to receive and consider them. The requirement that the play should be first produced on or about January 1, 1896,—a requirement which would be fairly complied with by production a few days after January 1st,—did not make it necessary to produce it on December 25, 1895. If it were only a question of the title role, enough might be found in the papers to spell out a submission of Curtis' name so long a time in advance of any performance that the failure of complainant to notify him that he disapproved of his taking that part (and complainant never seems to have himself given such notice directly to Curtis) might be taken as sufficient to warrant the inference that he approved. In the letter of October 21st, after inquiring as to the American rights of the song "He Wanted Something to Play with," Curtis adds: "I should like to sing it myself in Joe." This may fairly be held to be a submission of his own name as performer of the title role, but is by no means a compliance with clause c of the fourth paragraph,

which, for obvious reasons, requires a submission of the names of the "various artists to be engaged."

The defendant, therefore, has broken the terms of his contract in what is certainly a material particular, and no excuse for such breach is shown. The seventh clause provides that, "should the said M. B. Curtis fail to fulfill any \* \* \* of the above terms, \* \* \* he thereby absolutely forfeits all rights to the performance of said play." It may be that, when all the testimony is adduced on the trial, there will be found some sufficient excuse for this flagrant violation of the express terms of the contract; but, as the case now stands, upon the undisputed facts, it is difficult to see upon what theory defendants claim that they have still the right to perform the play.

The motion is granted, order to be settled on two days' notice.

(February 3, 1896.)

Motion to vacate preliminary injunction.

LACOMBE, Circuit Judge. Since the occurrence of the facts recited in the former opinion, it appears that on January 1, 1896, defendant Curtis wrote to the complainant, in London, informing him of the six performances at Newark on December 25th and following days, stating that the box-office receipts therefor were \$2,211, and that \$221.10 was the percentage due to complainant, in accordance with the terms of the contract. To this, complainant, on January 15, 1896, replied, acknowledging the "letter and returns," expressing regret that trouble should have arisen, and making no objection to the cast with which the Newark performances had been produced, and of which he had been informed by Curtis' former letter of December 20th. Defendants' counsel contends that this operates as a waiver of the breach of contract on which preliminary injunction was granted, viz. producing the piece without giving Lowenfeld opportunity to examine the cast and express approval or disapproval. Complainant's counsel insists that the letter of January 15th must have been written under a mistake of fact as to the situation existing at the time, and asks for an adjournment. There is no sufficient reason for granting an adjournment. If the complainant has not sufficient intelligence to appreciate the desirability of consulting his counsel as to the existing situation of his case before replying to the letter of an adversary with whom he has embarked in a lawsuit, there is no reason why the court should be astute to relieve him from the consequences, since he does not sue as an infant, nor as one incapable of conducting his own business.

It does not follow, however, that this motion should be granted. Construing the letter of January 15th as a waiver of the breach which was the ground of the injunction, the utmost that can be fairly claimed for it is that it operates as an approval of the cast submitted in Curtis' letter of December 20th, and with which the play was produced at Newark. The piece, however, was subsequently played in New York, with four changes in the cast. That

these changes were substantial is indisputable, since they included the title role, which was played by Willard Lee, instead of M. B. Curtis, whose name was the only one submitted for approval to complainant. There is no pretense that Lee's name was ever submitted to Lowenfeld, nor any opportunity given him to approve or disapprove. Defendants' counsel construe the fourth clause of the contract as if it read simply, "Competent actors only shall be allowed to play." It is not susceptible of such construction. It provides that approval shall not be unreasonably withheld, but, as was pointed out in the earlier opinion, distinctly and expressly provides for a submission of the names to Lowenfeld, and opportunity to express approval or disapproval. Where the language of a written contract is not ambiguous or technical, and there is no evidence of fraud, omission, or mistake, courts will not alter its terms. *O'Brien v. Miller*, 14 C. C. A. 570, 67 Fed. 605. Under this clause, as it reads, the party of the second part must "submit the names" of the proposed actors for approval, and if he wishes to provide for the appearance of an "understudy" in any substantial and important part, in case of the unexpected inability of the actor selected for that part to perform, he should submit the name of the "understudy" as well. As the written contract in this case is unambiguous, the court should determine all questions arising upon undisputed facts according to its terms, until some modification of those terms be effected by acts of the parties, or until some equitable estoppel may preclude one or the other from insisting upon its observance. The circumstance that this second breach occurred after the commencement of the suit is immaterial. Equity practice does not require the institution of a new suit where the matters complained of may be appropriately set forth in a supplemental bill, which is the case here.

The motion is denied, and preliminary injunction continued.

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#### RAY v. TATUM.

(Circuit Court of Appeals, Fifth Circuit. January 7, 1896.)

#### No. 418.

1. MORTGAGE FORECLOSURES—FEDERAL EQUITY JURISDICTION—DEED ABSOLUTE IN FORM—STATE STATUTES.

A deed absolute in form, given as security for a loan of money, and executed contemporaneously with the debtor's notes and with a bond to reconvey, given by the grantee, all in accordance with the provisions of the Georgia Code (sections 1969-1971), may be foreclosed as a mortgage, by a suit in equity in a federal court, notwithstanding that the above Code provisions give a special remedy at law; for the equity jurisdiction of the federal courts cannot be limited by state legislation.

2. SAME—PRESENTMENT OF NOTE FOR PAYMENT.

Failure to present a note for payment at a bank where it is made payable, but where the maker at the time has no funds, and in a state in which he does not reside, is no defense to a suit to foreclose a mortgage securing the debt, where the note contains an express stipulation that the maker and indorsers severally waive presentment for payment, etc. 69 Fed. 682, affirmed.

Appeal from the Circuit Court of the United States for the Northern District of Georgia.

This was a bill by Eleanor Tatum against Lavender R. Ray to foreclose, as a mortgage, a deed absolute in form. In the circuit court there was a decree for complainant. 69 Fed. 682. Defendant appeals.

The material facts were as follows:

On March 1, 1893, the defendant executed to Charles A. Francisco his promissory note for \$3,500, due five years after date, together with 10 coupon interest notes for \$122.50 each, due semiannually, on the 1st days of March and September of each year. The principal and interest notes were each made payable to the order of Charles A. Francisco at the Second National Bank of Richmond, Ind. The principal note recited that "it is expressly agreed that if default be made in the payment of any one of the coupons hereto attached, representing the semiannual interest on this note or any part thereof, as they severally become due, then the whole principal sum represented by this note shall, at the option of the holder thereof, immediately become due, and, together with all arrearages of interest thereon, may be collected; time being of the essence of this contract." To secure the payment of said notes, the defendant, on March 1, 1893, executed and delivered to Charles A. Francisco a warranty deed to certain lands described therein. This deed recites that "this conveyance is made by said party of the first part to secure a loan of \$3,500, made to him by the second party hereto, under the conditions of a certain bond for reconveyance executed by said second party, which said bond is made a part hereof, and the covenants of which said first party hereby undertakes to perform. This deed and said bond are executed to conform to sections 1969, 1970, and 1971 of the Code of Georgia." On the same day, Charles A. Francisco executed and delivered to appellant his bond for reconveyance, known in Georgia as a "bond for titles," which, among other things, recited that "the deed above referred to and this bond being executed in reference to each other, and to conform to sections 1969, 1970, and 1971 of the Code of Georgia, and are to be construed and enforced according to the provisions thereof." These notes were transferred by indorsement to Eleanor Tatum, the complainant; and on March 7, 1893, Charles A. Francisco conveyed by deed to her the fee-simple title to said property, subject to said bond for titles referred to. The second coupon interest note which fell due March 1, 1894, was not paid at maturity. It appeared that this note was not presented at the Second National Bank of Richmond, Ind., where it was made payable, but at the time it fell due was in the hands of the Merchants' Bank of Atlanta, Ga., for payment. On June 8, 1894, complainant filed her bill in the circuit court for the Northern district of Georgia, praying a foreclosure of the instrument as a mortgage. Defendant demurred to the bill, on the ground, among others, that there was a plain and adequate remedy at law, in the manner prescribed by the above provisions of the Georgia Code, in accordance with which the instruments were executed. The demurrer was overruled, the court holding that, notwithstanding the existence of these remedies, the complainant still had a right to foreclose the instrument in equity as a mortgage. Thereafter, upon final hearing, the court held that, as the maker of the notes lived in Atlanta, Ga., and had no funds in the Indiana bank, at the maturity of the interest note upon which default was made, the failure to present the note at that place was no defense to the foreclosure suit, and the foreclosure decree appealed from was accordingly entered.

The sections of the Code referred to in the instruments are as follows:

"Sec. 1969. Whenever any person in this state conveys any real property by deed to secure any debt to any person loaning or advancing said vender any money, or to secure any other debt and shall take a bond for titles back to said vender upon the payment of said debt or debts, or shall in like manner convey any personal property by bill of sale, and take an obligation binding

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the person to whom said property was conveyed to reconvey said property upon the payment of said debt or debts, such conveyance of real or personal property shall pass the title of said property to the vendee, provided that the consent of the wife has been first obtained, till the debt or debts which said conveyance was made to secure shall be fully paid, and shall be held by the courts of the state to be an absolute conveyance, with the right reserved by the vendee to have said property reconveyed to him upon the payment of the debt or debts intended to be secured, agreeable to the terms of the contract, and not a mortgage.

"Sec. 1970. When any judgment shall be rendered in any of the courts of this state upon any note or other evidence of debt, which such conveyance of realty was made or intended to secure, it shall and may be lawful for the vendee to make and file and have recorded in the clerk's office of the superior court of the county wherein the land lies, a good and sufficient deed of conveyance to the defendant for said land; and if said obligator be dead, then his executor or administrator may in like manner make and file such deed without obtaining an order of the court for that purpose, whereupon the same may be levied upon and sold under said judgment as in other cases; provided that the said judgment shall take lien upon the land prior to any other judgment or encumbrance against the defendant.

"Sec. 1971. The vender's right to a reconveyance of the property, upon his complying with the contract, shall not be affected by any liens, encumbrances or rights which would otherwise attach to the property by virtue of the title being in the vendee; but the right of the vender to a reconveyance shall be absolute and permanent upon his complying with his contract with the vendee according to the terms."

Lavender R. Ray, in pro. per.

Rosser & Carter, for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and BOARMAN, District Judge.

McCORMICK, Circuit Judge. The promissory note, the deed, and the bond to reconvey evidence one transaction, must be construed together, and expressly show that the conveyance of the land was to secure the payment of the debt evidenced by the note. It is too plain to admit of argument that the transaction was a borrowing of money, and giving a lien on land to secure the loan. This is a mortgage. The grantee in such a mortgage, having the right to resort to the national courts, can proceed in equity in those courts to foreclose the equity of redemption. The terms of the instruments or of the local statutes may give other remedies, which, if pursued, may exact strict compliance with expressed conditions; but the existence of these different remedies and the express reference to them do not take away or limit the equity jurisdiction of the circuit court over the parties or the subject-matter. *Hughes v. Edwards*, 9 Wheat. 489; *Russell v. Southard*, 12 How. 139; *Shillaber v. Robinson*, 97 U. S. 68. The note in question is in the usual form of commercial paper. A memorandum embodied in it expressly stipulates that the drawers and indorsers severally waive presentment for payment, protest, and notice of protest and non-payment of this note, and that if default is made in the payment of any one of the attached coupons, representing semiannual interest, the whole principal shall, at the option of the holder, become due, declaring that time is of the essence of the contract.

We find no error in the decree of the circuit court, and it is affirmed.

## BRIDGEPORT ELECTRIC &amp; ICE CO. v. MEADER.

(Circuit Court of Appeals, Fifth Circuit. December 10, 1895.)

## 1. EQUITABLE MORTGAGE—CONTRACT TO GIVE MORTGAGE.

One S., the promoter of the B. Ice Co., made a contract with plaintiff for the purchase of an ice machine, for which the B. Ice Co. was to pay, partly in cash on delivery and after a short test, and partly by notes, to be secured by mortgage on the machine and the buildings and lands on which it was to be erected. The machine was delivered. The B. Ice Co. was organized, and formally ratified the contract made by S., but, instead of carrying out the terms of such contract, attempted to provide for the payment for the machine by issuing certain notes to the plaintiff, to be secured by bonds of the ice company, as collateral, which plaintiff agreed to accept if they were issued by a certain date. If not then issued a mortgage was to be made as at first agreed. The bonds were not issued, and the ice company became insolvent, without executing any mortgage. The plaintiff filed a bill in a federal court to enforce its equitable mortgage, and, at the same time, began an action at law for the price of the machine, in which it recovered judgment. This judgment it asked leave of a state court, in which a receiver of the ice company had been appointed, to enforce against the property in the receiver's hands. Leave was granted, and the property sold; but on appeal the order granting leave was vacated and annulled. *Held*, that plaintiff, by the agreement made with S., and ratified by the B. Ice Co., and by its own performance of such agreement became entitled to an equitable mortgage upon the property of the ice company, in accordance with such agreement, enforceable by sale of the property agreed to be mortgaged, and was not estopped to enforce such mortgage, either by taking judgment at law, the collection of such judgment having been prevented, or by its agreement to accept the bonds as collateral, the terms of such agreement not having been complied with, or by the fact that another creditor had, after the delivery of the plaintiff's ice machine, and with knowledge of its presence on the ice company's premises, waived a mechanic's lien for machinery sold by it, in reliance upon the expected issue of bonds to be secured upon the whole property of the ice company.

## 2. COURTS—JURISDICTION—POSSESSION OF SUBJECT MATTER.

Shortly after the insolvency of the ice company, the plaintiff filed his bill in the federal court to foreclose his equitable mortgage, and upon such bill an order was made enjoining the defendant from doing anything prejudicial to the plaintiff's rights. Two months thereafter a corporation, composed of the same individuals who composed the ice company, brought a suit in a state court, in which they procured the appointment of a receiver of the property of the ice company. *Held*, that possession of such receiver would not prevent the federal court from proceeding, in the suit first commenced, to decree the sale of the property of the ice company covered by plaintiff's equitable mortgage.

Appeal from the Circuit Court of the United States for the Northern District of Alabama.

This was a suit by A. B. Meader, trustee of the Blymer Ice Machine Company, against the Bridgeport Electric & Ice Company, to declare and foreclose an equitable mortgage. The circuit court rendered a decree for the complainant. Defendant appealed. Affirmed.

For report of former hearing, see 15 C. C. A. 694, 69 Fed. 225.

W. D. Shelby and Wm. L. Martin, for appellant.

Milton Humes and J. H. Sheffey, for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and SPEER, District Judge.

SPEER, District Judge. This is a suit in equity, in which the following facts are alleged: A. L. Soulard was a promoter of the Bridgeport Electric & Ice Company. On May 7, 1891, he entered into a contract with the plaintiff for the purchase of a machine for the manufacture of ice. It was stipulated in writing that the Bridgeport Electric & Ice Company should pay the plaintiff the sum of \$23,000 for the machine, as follows: \$5,750 on its delivery at Bridgeport, Ala.; \$5,750 when it had withstood a 15 days' test, producing 30,000 pounds of good merchantable ice per day. For the balance the purchaser agreed to give negotiable notes, with interest at 6 per cent. per annum from date of delivery,—one for \$5,850, payable in 4 months, and one for \$5,850, payable in 8 months. It was expressly stipulated that these notes should be secured by mortgage on the machine, buildings, and real estate on which they were to be erected, or by personal indorsements satisfactory to the plaintiff. The machine was delivered in May or June, 1891, and was accepted by the defendant on April 26, 1892. Thereafter, in September, 1891, the Bridgeport Electric & Ice Company was organized. The capital stock of the defendant consisted of 301 shares at \$100 per share. On October 10, 1891, the directors of the company, who held a majority of the stock, ratified the contract of May 7, 1891, made by Soulard, the promoter, and attempted to provide for its payment as follows: They executed and delivered five promissory notes of \$2,190 each, bearing interest at the rate of 6 per cent. per annum, payable to the Blymer Ice Machine Company, A. B. Meader, trustee, in 3, 5, 7, 9, and 11 months. These were to be secured by delivery to the trustee of bonds, of the par value of \$13,500, of an issue of 6 per cent. bonds of the defendant of the face value of \$25,000. These bonds were to be secured by a mortgage upon the entire property of the defendant at Bridgeport, Ala. It was intended to place the bonds with Meader, trustee, for payment of the notes. In the event, however, that the bonds should not be issued on or before November 15, 1892, it was proposed to issue to the Blymer Ice Machine Company, A. B. Meader, trustee, a mortgage upon the building containing the ice machinery, the land upon which it stood, and the plant, machinery, and fixtures, as originally agreed by Soulard,—this to secure the payment of said last-mentioned notes. It resulted that the bonds were not issued, nor was personal security satisfactory to the plaintiff given, as contemplated by the contract of May 7, 1891. On the contrary, the Bridgeport Electric & Ice Company became insolvent. This insolvency was conceded on March 18, 1892. The plaintiff claims that he was entitled, by the agreements hereinbefore set forth, to a mortgage or lien on the real estate and personal property of the defendant situated in the town of Bridgeport, Ala., known as the "Bridgeport Electric & Ice Company Plant"; and the prayers of his bill are that the defendant be required to execute to him a first mortgage upon the plant as of the date when the balance of purchase price of the ice-making machine became due, and that plaintiff be decreed to have a lien of first dignity, and prior to all others, for said balance with interest thereon, and that the plant and real estate be sold under

the order and decree of the court in satisfaction of the same. The plaintiff filed his bill on January 27, 1893. A subpoena thereon was issued the 30th day of January, 1893, and two days previously, i. e. the 28th day of January, 1893, an order of injunction was granted in the circuit court of the United States for the Northern district of Alabama by the Honorable John Bruce, Judge. The order granting the injunction is as follows:

"Application for writ of injunction, as prayed for in the foregoing bill, upon the averments contained in the bill, which are sworn to, being made this day to me at chambers, in vacation, at Montgomery, Ala. Upon consideration, it is ordered that the 10th day of April, 1893, be set for hearing of said motion at Huntsville, Ala., of which the defendants shall have 30 days' notice, to be issued by the clerk of said court, and served by the marshal thereof upon the defendant. It is further ordered that, pending the hearing of said application, and until the same is disposed of, the defendant be, and it is hereby, restrained from making or executing any mortgage or incumbrance upon this property, or doing anything prejudicial to the rights of the complainant, as set up and averred in said bill. Let copy of this order be served on the defendant."

On January 28, 1893, the plaintiff brought an action at law in the circuit court of the United States for the Northern district of Alabama for the amount due on the original contract, and on April 29, 1893, judgment was confessed by the defendant. When the judgment was rendered the plaintiff tendered the notes, executed on October 10, 1891, to the defendant, as he had formally offered to do in the bill hereinbefore described. These notes were accepted by the defendant. On March 18, 1893, nearly two months after the bill in the circuit court of the United States was filed, and after the decree for injunction above set forth had been granted, the Bridgeport Land & Improvement Company, alleging itself to be a creditor, filed a proceeding in the state chancery court of Jackson county, Ala., against the defendant, the Bridgeport Electric & Ice Company. This proceeding sought the appointment of a receiver to take charge of the properties of the ice company, and a receiver was appointed. It appeared that the officials and directors of the Bridgeport Land & Improvement Company were, to a large extent, identical with those who were the officials of the Bridgeport Electric & Ice Company, and that, in the dual capacities, and personally, they had notice of the pendency of the suit in the circuit court of the United States, and of the injunction granted therein. Meader, trustee, the plaintiff, some months after the bill now before us was filed in the circuit court, made application to the state chancery court for leave to enforce his judgment, obtained at law on April 29, 1893, hereinbefore mentioned. The state chancery court granted him leave. Subsequently he caused the property in dispute to be sold under execution, in pursuance of said permission, and himself became the purchaser. Thereafter the supreme court of Alabama issued an order of mandamus vacating and annulling the order of the state chancery court which had authorized this sale. The proceedings at law in the circuit court, as well as in the state chancery court, were brought to the attention of the circuit court in equity by a supplemental bill.

The answer of the defendant, admitting the purchase of the ice-



making machine at the price and on the terms alleged in the bill, and the balance that was due thereon, denied that the plaintiff was entitled to the mortgage or other lien he sought to enforce. Further, the answer states that the Bridgeport Electric & Ice Company was organized for the purpose of running an electric lighting plant, and, as well, an ice-making machine; that the machinery for the electric plant was furnished by the Thomson-Houston Electric Company, and was purchased on the 24th of February, 1892, for \$14,886, no part of which had ever been paid; that this purchase was evidenced by a written contract; that sundry services rendered by the Thomson-Houston Electric Company had increased the defendant's indebtedness to them to \$20,000; that the defendant stipulated and agreed to deliver to the electric company \$8,000 in first-mortgage 6 per cent. bonds, to be made payable in 10 years, to be secured by a mortgage on the property; and that the Thomson-Houston Electric Company had a lien on the property and franchises for its debt co-ordinate with that of the plaintiff. The answer further alleged that the bonds proposed were intended to be in lieu of the statutory mechanic's lien afforded by the laws of Alabama; that the Thomson-Houston Electric Company waived its right to enforce such lien on the faith of this agreement; that the plaintiff agreed to all this, and agreed to take \$12,500 of such bonds as collateral security for the payment of the five notes of \$2,190 each, hereinbefore described. Thereafter, while the plaintiff received the notes, he refused to receive the bonds, and filed his bill; that this was a waiver, on his part, of the right to insist on the specific performance of the original contract with the Bridgeport Ice Company; that defendant is otherwise indebted in large sums, amounting to more than \$15,000, and is insolvent; and that the Bridgeport Land & Improvement Company, in behalf of itself and other creditors, had obtained a receivership, above mentioned, which receivership is still pending and undetermined in the chancery court, and that for these reasons plaintiff's prayers should be denied.

On the hearing, the circuit court of the Northern district of Alabama (the Honorable Alex. Boorman, judge presiding) decreed that the plaintiff was entitled to a lien for the balance due him; that the lien should relate back to and commence from the date of the original contract, to wit, May 17, 1891; that the amount due of the purchase price on the ice machine was \$11,385.87, with interest from the 26th day of April, 1893. And upon the failure of the defendant to pay this debt, with interest and costs, within 30 days from the enrollment of the decree, it was ordered that a special master, appointed in the decree, should sell the property on which the lien was established at public outcry, for cash, and for the satisfaction of the debt. From this decree the appeal is taken.

It is well settled that an agreement to give a mortgage, for a valuable consideration, upon property which is sufficiently specified, is in a court of equity regarded as the creation of the mortgage itself. This is held, for the reason that equity will treat that as done which ought to be done. 1 Jones, Mortg. § 163; Ketchum v. St. Louis, 101 U. S. 306; Gest v. Packwood, 39 Fed. 525; Will. Eq. Jur. pp. 48, 298;

O'Neal v. Seixas, 85 Ala. 80, 4 South. 745; 2 Story, Eq. Jur. § 1231. It is insisted, however, that the contract of the parties in this case was in the alternative,—that the purchaser had the right either to execute the mortgage in pursuance of the terms of the original contract of May 17th, or that he might secure the debt by personal indorsement satisfactory to the vendor. It seems a sufficient reply to this to point out the fact that the defendant company made no offer of personal indorsement, satisfactory to the plaintiff, or otherwise, and the plaintiff was therefore remitted to such remedy for the total noncompliance with the contract as the doctrine above stated will afford him. With this view, he brings his bill, not, strictly, to enforce the specific performance of the contract, but, rather, to have the court declare its legal effect, considered in connection with the further fact that the plaintiff has performed all that he agreed to do, and defendant, while receiving and accepting the ice machine, has not only not paid the debt, but even refused to give the evidence of the debt which it had promised. Nor is it a sufficient reply to this proceeding to say that, by suing at law, complainant waived his right to foreclose the equitable mortgage which the conduct of the parties had created. The owner of a note and a mortgage to secure the same can sue on the note, and thereafter foreclose the mortgage. The remedies of law and equity are concurrent for the enforcement of the demand. Nor did the plaintiff, after seeking this jurisdiction, while retaining his bill here, forfeit any of his powers by attempting, in the state courts of Alabama, to secure payment of the judgment which the circuit court of the United States at law had granted. It is true that he went through the forms of a purchase of the property in question by permission of the state court, but since the supreme court of Alabama afterward annulled and vacated this sale, it is now as if there had been no sale. Nor does it matter that the contract of the promoter of this corporation with the ice company preceded the creation of the company itself. After the ice company was organized, it was fully informed as to the terms of the contract. It received, tested, and accepted the machine, and paid a portion of the purchase money. It must, therefore, be held to have ratified the agreement of its promoter. "It is well settled that a party may, by express agreement, create a charge or claim in the nature of a lien on real as well as on personal property of which he is the owner or in possession, and that equity will establish and enforce such charge or claim, not only against the party who stipulated to give it, but also against third persons, who are either volunteers, or who take the estate on which the lien is agreed to be given with notice of the stipulation. Such agreement raises a trust which binds the estate to which it relates, and all who take title thereto with notice of such trust can be compelled in equity to fulfill it." *Pinch v. Anthony*, 8 Allen, 536. Moreover, the contract itself simply attempted to express, in this case, the purpose of the state of Alabama to create, expressly, a lien on the plant and real estate upon which it is erected for the purchase price of machinery. Acts Ala. 1890-91, p. 578. It is said, however, that by the law of Alabama, 30 days' notice must be given to the stockholders before the property

of the company can be mortgaged. In this case, however, the mortgage was created before there were any stockholders, and before the company had the property, and the company thereafter adopted the contract previously made. Besides, this statute seems to be made for the benefit of stockholders, and no stockholder is before the court objecting to the validity of the contract. The stockholders might waive a compliance with these formalities, as well expressly as by their failure to object, and by continuing to use the property thus obtained. *Nelson v. Hubbard*, 96 Ala. 252, 11 South. 428; *Ft. Worth City Co. v. Smith Bridge Co.*, 151 U. S. 294, 14 Sup. Ct. 339; *Zabriskie v. Railroad Co.*, 23 How. 397, 398; 2 Mor. Priv. Corp. §§ 635, 675; *Wood v. Water-Works Co.*, 44 Fed. 146. The notice to all is ample and unquestioned, and the ratification by the defendant company of the contract of the promoters is binding. 4 Am. & Eng. Enc. Law, p. 201, note 3; *Id.* p. 202, note 1; *Moore & H. Hardware Co. v. Towers Hardware Co.*, 87 Ala. 206, 211, 6 South. 41; Mor. Priv. Corp. § 549. All the stock was represented when the contract was ratified, and all the stockholders knew that the machinery was in actual use.

As to the contention that the plaintiff prevented, by his injunction, the issue of the bonds contemplated by the resolution of October 10, 1892, it is enough to say that the bonds were not issued at the time agreed upon. This was November 15, 1892. And when the plaintiff thereafter, on December 6, 1892, after declining to accept the bonds, and demanding the execution of the mortgage, agreed to extend the time to January 10th, he did so very reluctantly. But on the 10th of January the bonds were not issued. These propositions were considered in a spirit of indulgence and compromise, and they failed. The bill was filed, as heretofore stated, on January 27, 1893. In the effort to secure this large indebtedness from an insolvent company, the plaintiff did all in the way of compromise and adjustment that his creditor could hope for. Besides, from subsequent developments, the bonds themselves would have been utterly valueless, and the plaintiff, as a man of business, exercised a judicious discretion in availing himself of the opportunity to refuse them which the defendant's dilatory and disappointing conduct afforded him. The plaintiff's contract for a mortgage was made long anterior to the contract of the Thomson-Houston Electric Company. The costly machine was in process of erection on the lands of the defendant company at the time the Thomson-Houston Electric Company gave credit to the defendant. The statute of the state of Alabama, *supra*, creating the lien for the machinery, it seems, should at least have provoked inquiry, and inquiry would have ascertained the character of the contract between the Blymer Ice Machine Company and the Bridgeport Electric & Ice Company. It is, however, enough to hold now that the Bridgeport Electric & Ice Company are not in any sense charged with the duty of enforcing the lien, actual or supposititious, of the Thomson-Houston Electric Company.

Finally, it is insisted that this property is now in the custody of a receiver appointed by the state court, and for that reason the decree of sale in the circuit court of the United States is improper. That a court of the United States may, upon a bill filed, with proper parties

and with proper averments, go forward to a final decree, we think, is now generally conceded; nor does it seem that this procedure will be, ordinarily, defeated by litigation subsequently instituted in a court of concurrent jurisdiction. The decision here must depend upon the validity or invalidity of the decree rendered in the circuit court on the bill pending. We, of course, presume that the courts of the state will be quite as solicitous as we are to avoid any steps which may transgress the boundaries of that admirable comity which has always existed between those courts and the courts of the United States. In this case it is observable that the persons who are the controlling officials of the Bridgeport Electric & Ice Company are identical with the persons who are the controlling officials of the Bridgeport Land & Improvement Company. In the former capacity they were enjoined by the circuit court from doing anything prejudicial to the rights of complainant in his effort to enforce his lien. In the latter capacity they filed a bill in the state court which they now insist should wholly defeat that lien and the proceeding for its enforcement. This was done after they were served with the injunction, and fully comprehended the character of the proceedings in the circuit court. George N. Messiter, who was secretary and general manager of the Bridgeport Electric & Ice Company, testifies that "the suit in the state chancery court and the appointment of the receiver were all due to the beginning of the suits of the complainant in the United States court, in the prosecution of an injunction which restrained the company from making the proposed settlement with its creditors." The general manager of the defendant and enjoined corporation became the solicitor for the receiver in the state court. These facts would seem to distinguish this case from those cited by the learned counsel for the complainant in support of his contention that the decree of sale was improper. In no event, however, is the validity of the decree itself affected, and therefore the decision of the court below is affirmed.

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CLYDE et al. v. RICHMOND & D. R. CO. et al. (PATTERSON, Intervener).

(Circuit Court of Appeals, Fourth Circuit. February 4, 1896.)

No. 125.

1. EQUITY PRACTICE—ISSUE FOR JURY—EFFECT OF VERDICT—REVIEW ON APPEAL.

The verdict of a jury on an issue out of chancery is merely advisory, and the chancery court may grant a new trial, or dismiss the bill, in opposition to the verdict. On a motion for new trial, the party submitting it must procure, for the use of the chancellor, notes of the proceedings and the evidence. These then become a part of the record, and are subject to review on an appeal taken from the decree entered by the chancery court.

2. MASTER AND SERVANT—INJURY TO RAILROAD BRAKEMAN—CONTRIBUTORY NEGLIGENCE.

A railroad brakeman, who, in his contract of employment, stated that he had had three years' experience in that capacity, and knew it was dangerous to climb up the side of a box car by the ladder while the train was mov-

ing, was killed while attempting, without any urgent necessity therefor, to climb up a ladder whose grab iron he knew was defective, and which it was part of his special duty to examine. *Held*, that he was guilty of contributory negligence, and there could be no recovery.

**Appeal from the Circuit Court of the United States for the Eastern District of Virginia.**

The appellant, administrator of C. C. Patterson, deceased, filed his petition in the case of W. P. Clyde vs. Richmond & Danville Railroad Company, wherein receivers had been theretofore appointed by the circuit court. His petition set forth, in substance, that his intestate had been employed by the receivers as a brakeman on one of their trains, and that on 21st June, 1892, while in the discharge of his duty as brakeman, the said Patterson met his death by an accident caused by the negligence of the said receivers or their agents. The prayer of the petition was, either that he be allowed to sue the receivers for damages in the circuit court for the Eastern district of Virginia on its law side, or that he be made a party in the main cause, and thereupon an issue be directed out of chancery to settle the facts and to award damages, pursuant to the provisions of a statute of the state of Virginia in such case made and provided. Hearing the petition, the circuit court (his honor, Judge Goff, presiding) directed an issue out of chancery to ascertain the facts of the claim and award damages if proper. The petitioner was made the actor in these proceedings, and the issues were directed as follows: (1) Whether C. C. Patterson came to his death through the negligence of the receivers of the court in this cause, or their agents, as averred in the petition. (2) What damages, under the Virginia statute, the petitioner is entitled to recover from the receivers, and to whom and in what proportions said damages should be awarded.

These issues were made up, and were tried in the circuit court before his honor, Judge Hughes, and a jury. A verdict was found for the petitioner in the sum of \$5,000. The proceedings in the cause, with the testimony, requests to charge, rulings of the presiding judge, and his charge, were certified to the court of chancery; and, upon consideration thereof (his honor, Judge Hughes, presiding), the verdict was set aside, and a new trial granted. The issues were again tried in the circuit court before his honor, Judge Hughes, and a jury, and a verdict again rendered for the petitioner for \$5,000. This verdict was set aside by the trial court, and all of the proceedings on the trial of the issue, with the testimony, the exceptions taken at the trial, requests to charge, and charge of the trial judge, and his ruling as to the verdict, were certified to the court of chancery. In that court (his honor, Judge Goff, presiding), the petitioner moved the court to confirm the verdict. The court, having considered the petition, all the evidence adduced at the two trials heretofore ordered, and the verdicts and other proceedings had at said trials, held that the petitioner had no cause of action against the receivers because of the death of his intestate, and dismissed his petition. Thereupon the petitioner appealed to this court to reverse the decree.

S. S. P. Patteson, for appellant.

Beverly B. Munford, for appellees.

Before SIMONTON, Circuit Judge, and BRAWLEY, District Judge.

SIMONTON, Circuit Judge (after stating the case). No question has been made, and, indeed, none could have been made, as to the right of the court ordering the issue to disregard the verdicts of the jury. "A verdict upon an issue ordered by a court of equity is in no just sense final upon the facts it finds, or binding upon the judgment of the court. The court may, at its pleasure, set it aside, and grant a new trial; or, disregarding it, may proceed to hear the cause, and decide in contradiction of the verdict; or it may adopt the verdict

sub modo, and give it a limited effect." Story, J., in *Allen v. Blunt*, 3 Story, 742, Fed. Cas. No. 216; 2 Daniell, Ch. Prac. (3d Am. Ed.) 1115. "The verdict upon an issue which a court of chancery directs to be tried at law is merely advisory. A motion for a new trial can be made only to that court, and the party submitting it must procure, for the use of the chancellor, notes of the proceedings at the trial and of the evidence there given. The evidence and proceedings become then a part of the record, and are subject to review by the appellate court, should an appeal be taken from the decree." *Watt v. Starke*, 101 U. S. 247.

This leads to an examination of the evidence. The testimony of the witnesses taken at both trials is in the record. The uncontradicted facts are these: The intestate, C. C. Patterson, a young man, 21 years of age and able-bodied, sought employment with the receivers on 18th May, 1892. In answer to a series of printed questions, he wrote, among other things, that he had had experience in railroad service on the Louisville & Nashville Railroad Company for 3 years, and that he knew that it was dangerous to climb up the side of a box car, by the regular ladder or otherwise, while the train is moving. He was accepted, and put on duty as a train-hand, and was so engaged on the 21st June, 1892. The train upon which he was employed was what is known as a "ragged train," consisting of box cars and flat cars. There were two other brakemen on the train besides Patterson. One of them had charge of the forward part of the train, another of the rear of the train, and Patterson was in the middle of the train. Each had special duties assigned to him. It was a part of the duty of Patterson to inspect the tops of the trains, in order to see if any of the cars were out of order, in any respect, as to their top hamper, and also to assist in coaling when they reached a coaling station. One of the box cars, No. 1,510, was in the forward part of the train,—not in that part of it where Patterson was stationed, but between him and the locomotive. It had a ladder on the side, but the grab iron at the top of the ladder was not in order. The grab iron, as described by a witness, and its uses, are these:

"On this car (1,510), and on other cars with a tin roof, we have a footboard at the end of the car; and the grab iron is a piece of iron about that long [witness indicates], I suppose as large as your thumb, a foot on each side of it, and fastened on with a flat, just the same rod as used on a ladder. On some cars that is fastened to a board, and this board is screwed to the top of the car, and, with a grab iron, is used, in going up and down the ladder, to pull yourself up. It is on the top of the car, about a foot or 18 inches from the level of the car."

When the train was about two miles from Barksdale, a coaling station, Patterson ran on the flat cars and up the ladder on 1,510. He fell, the train passed over him, and he died from the effects of the wound he received. There was found on the ground the grab iron, adhering to the plank, which had the screws in it, and also showed that nails had been driven in it. This, evidently, was the grab iron on that car. Patterson had advised other men on the train to be careful of this car, as the grab iron was loose, and one

of the witnesses says that he had told him, at South Boston, a station on the road, that he "had like to have fell off that car" at Clover, another station, beyond South Boston, passed during that trip. There was no positive evidence that this car had been inspected and thoroughly overhauled. The witnesses knew that it had been inspected, and that their general practice is to overhaul a car on inspection. But they cannot remember any more.

It is evident, from this testimony, that the deceased, there being no urgent necessity for his act, climbed up a ladder whose grab iron was dangerous, within his own knowledge, and whose condition it was a part of his special duties to examine; that he knew that it was dangerous, under any circumstances, to climb a ladder on a car while the train was moving. It is impossible to escape the conclusion that he, without necessity, took a known risk, and that he contributed to the accident by his own act. *Railroad Co. v. Herbert*, 116 U. S., at page 655, 6 Sup. Ct. 590. Under any circumstances, and in a doubtful case, the concurrent opinion of two judges, who heard and examined this case, would be entitled to great weight. A review of the testimony induces us to concur with them.

Decree of the circuit court is affirmed.

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#### ABRAHAM v. LEVY.

(Circuit Court of Appeals, Fifth Circuit. January 28, 1896.)

No. 441.

#### 1. PLEADING—AMBIGUOUSNESS—MISSISSIPPI STATUTE.

Under section 671 of the Annotated Code of Mississippi, providing that "the declaration shall contain a statement of the facts \* \* \* in ordinary and concise language, \* \* \* and it shall not be an objection to maintaining any action that the form thereof should have been different," a declaration is not demurrable, as ambiguous, which states, in substance, a cause of action for money paid for the defendant at his request, with a history of the circumstances, though references are made therein to notes given and to an account rendered.

#### 2. PRACTICE ON APPEAL—REVIEW OF RULINGS—JURY WAIVED.

Where a case has been tried by the court without a jury, but no stipulation under Rev. St. § 649, appears in the record on appeal, the appellate court has no authority to review the rulings of the court on the trial as to the exclusion and admission of evidence or on propositions of law.

#### 3. PRACTICE—TAKING CASE UNDER ADVISEMENT.

An order made by the court, after hearing a case without a jury, taking such case under advisement, does not work a discontinuance of the suit, though a provision is added that the case is to be decided in vacation.

#### 4. SAME—ENTERING JUDGMENT.

After hearing a case without a jury, the court took it under advisement, and, during vacation, entered judgment. Afterwards, at the next term, the court vacated such judgment, as void because entered in vacation, and entered a new judgment to the same effect. *Held*, that the last judgment was regular and valid.

**In Error to the Circuit Court of the United States for the Northern District of Mississippi.**

"Declaration.

"In the United States Circuit Court for the Eastern Division of the Northern District of Mississippi. To the October Term, 1894.

"J. H. Levy, Plaintiff, vs. S. Abraham, Defendant.

"The plaintiff, J. H. Levy, a citizen of the state of Louisiana, complains of S. Abraham, defendant, a citizen of the Eastern division of the Northern district of Mississippi, of a plea of trespass on the case upon promises, for that whereas heretofore, to wit, on the 7th day of December, 1891, the said S. Abraham was the indorser upon, and liable to pay, two certain promissory notes, dated Durant, Mississippi, February 28th, 1891,—one payable December 15th, 1891, for the sum of \$2,674.77, the other dated at the same time and place, payable January 15th, 1892, for \$2,694.63,—both payable to the Union National Bank at New Orleans, and payable in the city of New Orleans at their respective maturities, signed by L. Simon & Co., indorsed as aforesaid by S. Abraham, and which paper was then, on the 7th of December, 1891, held by said bank; and for the payment thereof, with interest after maturity, the said S. Abraham was bound, and, being so bound, he, the said S. Abraham, on said last-mentioned date, requested plaintiff to pay off and protect said paper for him, the said S. Abraham, and promise to pay to plaintiff on demand the amount so paid out by plaintiff in paying said notes, and any loss or expense that he, the said plaintiff, might sustain in the effort to collect said indebtedness, or any loss that he might sustain in consequence of taking up said loan and the steps necessary to reimburse himself. Plaintiff now avers that, upon such request of defendant, plaintiff, on the 18th of December, 1891, paid to the Union National Bank, on account of the note maturing 15th of December, 1891, the sum of \$2,674.77, and on the 18th of January, 1892, at defendant's said request, plaintiff paid the other notes, maturing the 15th of January, 1892, to the Union National Bank, the sum of \$2,694.63; that in order to collect the indebtedness represented by said notes from the said L. Simon & Co., and thus protect the defendants, he brought suit against L. Simon & Co., and prosecuted the suit with due diligence, and received and collected from such suits on said indebtedness, on the 21st of February, 1894, \$330.84, and no other sum; that L. Simon & Co. are insolvent, and no more can be made from them upon said judgments. Plaintiff further avers that defendant was to pay 8 per cent. per annum interest upon the amount thus expended and paid out by plaintiffs from the date of such payments until the defendant should reimburse him; and so it is that, under and pursuant to said request and promise made by defendant to plaintiff, he has paid out the aforesaid sums, and on the 21st day of February, 1894, rendered a statement to defendant, which is hereto attached, marked 'Exhibit A,' exhibiting a balance then at that time due by defendant to plaintiff of \$5,966.21. The same consisting of the amounts paid to said bank, and interest thereon from dates of payment, calculated to March 1st, 1894, less the credit, \$330.84, proceeds of collection on the judgment against L. Simon & Co., plaintiff stated and represented said account, exhibiting such balance due, and demanded payment thereof from defendant; but the said defendant, though admitting the indebtedness thus due by his express contract, and promising to pay the same, has not paid said sum, or any part thereof, but wholly fails and refuses so to do; and thus it is that plaintiff has now incurred the other and further loss and expense of an attorney's fee of 10 per cent. upon the amounts due, such attorney's fee being \$596.62, in order to collect said balance from the defendant by bringing this suit. Plaintiff therefore demands judgment against said defendant for the balance thus due him, and said attorney's fee, with interest and costs of suit. Said notes, or copies thereof, are hereto attached, marked Exhibits 'B' and 'C,' and a copy of said promise and request is marked 'Exhibit D,' and each and all thereof made parts of this declaration. Plaintiff demands a trial and judgment at first term.

"July 21st, 1894.

W. V. Sullivan, Plaintiff's Atty."



## "Exhibit D.

"Kosciusko, Miss., Dec. 7, 1891.

"Mr. J. H. Levy, New Orleans, La.—Dear Sir: I now confirm a request to be delivered to you in person through Mr. Mose Shlenker, as follows: That you protect the two notes made by L. Simon & Co. to Union National Bank, maturing December 15-18, 1891, and Jany. 15-18, 1892, for \$2,674.77 and \$2,694.63, respectively, on which I am indorser; and I hereby waive protest and notice of protest on same, and ratify any action of yours in the payment of the two notes to the bank and in their collection, obligating and binding myself to be responsible to you, and to pay on demand any loss or expense that you may sustain in the premises.

"[Signed]

S. Abraham."

## "Demurrer to Declaration.

"The United States of America, Circuit Court, Northern District of Mississippi. October Term, 1894.

"J. H. Levy vs. S. Abraham. 273.

"And the said defendant, by his attorneys comes, and demurs to plaintiff's declaration in this cause, and prays judgment if he shall make any other or further answer thereto. And he assigns the following grounds of demurrer, to wit: (1) Because the said declaration sets out no specific legal grounds of action. (2) Because the declaration fails to state any cause of action in ordinary and concise language. (3) Because it does not appear from said declaration whether the plaintiff is suing upon promissory notes, or upon an account stated, or in assumpsit for money paid. (4) Because the defendant is impeded and hindered in his defense by the vague and indefinite character of the said declaration. (5) Because said declaration asks for eight per cent. interest upon a verbal contract. (6) Other good grounds of demurrer."

## "Order Overruling Demurrer.

"J. H. Levy vs. S. Abraham. 273.

"Came the parties by attorneys, and thereupon came up to be heard, and was by the court heard, defendant's demurrer to the declaration in this cause; and, after hearing the same and due consideration thereof by the court, it is considered by the court that said demurrer be overruled."

## "Plea.

"In the Circuit Court of the United States for the Eastern Division of the Northern District of Mississippi. October Term, A. D. 1894.

"J. H. Levy vs. S. Abraham. 273.

"And the said defendant, by his attorneys, comes, and defends the wrong and injury when, etc., and says that he did not undertake and promise in manner and form as the said plaintiff has above complained in his said declaration, and of this he puts himself upon the country.

"Sykes &amp; Bristow,

"W. A. Haden,

"Attys."

## "Defendant's Notice to Plaintiff.

"And the said defendant now gives notice that under the above plea, and on the trial of said cause, he intends to give in evidence the following: That at and before said plaintiff paid the amount of the two notes to the Union National Bank as alleged in his declaration, to wit, on or about December 5th, 1891, L. Simon & Co., the makers of these notes, paid to said plaintiff the sum of five thousand dollars in cash, for the express purpose and with the agreement and understanding that plaintiff would apply said sum of money so handed him to the payment of said notes, the note falling due December 15th, 1891, to be fully paid off out of said money by said plaintiff; and whatever was lacking to pay off said note maturing January 15th, 1892, was to be furnished by plaintiff under the agreement made by and between

him and said L. Simon & Co., at said time. It being further agreed and understood between plaintiff and said L. Simon & Co. that this defendant, S. Abraham, who is and was a mere accommodation indorser on said notes, should be fully protected and suffer no loss or inconvenience on account of same. And said defendant will further prove that at the time he made the writing Exhibit D, attached to plaintiff's declaration, he had no knowledge that the above sum of money had been paid to or deposited with the said plaintiff, as above set forth by the said L. Simon & Co., or that the agreement and understanding aforesaid for his protection in the premises had been made and entered into between said plaintiff and L. Simon & Co."

"Order Taking Cause under Advisement.

"J. H. Levy, Plaintiff, vs. S. Abraham, Defendant. 273.

"This cause having been tried and heard on a former day of this term of this court, the 5th inst., by the court, a jury being waived or dispensed with, by consent of parties, and the court, as yet not being fully advised in the matter, hereby orders and takes the same under advisement, to be decided in vacation as of the date of the trial as stated."

"Judgment Court, as of 5th April, 1895.

"In the United States Circuit Court for Eastern Division of Northern District of Mississippi. April Term, 1895.

"J. H. Levy, Plaintiff, vs. S. Abraham, Defendant. 273.

"This day came on this cause to be heard, and issue being joined, and a jury being waived, the court heard all the evidence and the argument of counsel pro and con, and, being satisfied in the premises, doth consider and so adjudge that the plaintiff, J. H. Levy, do have and recover of and from the defendant, S. Abraham, the sum of six thousand and eighty-three dollars and eighty cents, and all costs in this behalf expended, for which execution may issue. To which action of the court defendant then and there excepted, and was allowed sixty days in which to file his bill of exceptions.

"H. C. Niles, Judge."

And on the 8th day of October, 1895, a day of the regular October term, 1895, of said court, a judgment of said court was rendered in said cause, and entered on the minutes of said court, in the words and figures following, to wit:

"Judgment Court, at Oct. Term, '95.

"J. H. Levy vs. S. Abraham. 273.

"In this cause, it appearing to the court that at the last term of this court this cause was heard upon the pleading, proof, and argument of counsel by the court, a jury being waived, and all questions by consent being submitted to the judge, H. C. Niles, sole presiding for decision, and the issue being joined, and all proof heard and argument of counsel, the court took the cause under advisement; and the judge having filed on the 5th day of June, 1895, with the clerk of this court, a written opinion herein, and a judgment thereon having been improperly entered herein, on the — day of June, 1895, as of the 5th day of April, 1895, as appears of record on page 291 of the minutes of this court, said judgment is hereby set aside as invalid and void, and the court, being now fully advised, and both parties being in court, doth consider that the plaintiff, J. H. Levy, do have and recover of and from the said defendant, S. Abraham, the sum of \$6,083.80, and all costs in this behalf expended, for which execution may issue."

F. O. Sykes, E. H. Bristow, and W. A. Haden, for plaintiff in error.  
W. B. Sullivan and J. Weiner, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and BOARMAN, District Judge.

PARDEE, Circuit Judge (after stating the facts). The first assignment of error is that "the court erred in overruling the demurrer of the defendant to the plaintiff's declaration." The demurrer specifies six grounds. The first, third, and the last amount to no more than the proposition that the declaration does not state any cause of action, the second and fourth are to the effect that the defendant is impeded and hindered in his defense by the vague and indefinite character of the declaration; and the fifth objects to the prayer for interest.

Section 671 of the Annotated Code of Mississippi, relating to pleading and practice in the state courts, provides as follows:

"The declaration shall contain a statement of the facts constituting the cause of action in ordinary and concise language, without repetition, and if it contain sufficient matter of substance for the court to proceed upon the merits of the cause it shall be sufficient, and it shall not be an objection to maintaining any action that the form thereof should have been different."

This section governs the practice and pleading on the law side of the courts of the United States in the state of Mississippi.

A careful reading of the declaration leads us to the conclusion that it is in direct accord with the section of the practice act above quoted, except, perhaps, that the language is not as concise as it might have been.

The main argument in this court on this assignment of error is on the contention found in the fourth ground of the demurrer, which is that the defendant was impeded and hindered in his defense by the vague and indefinite character of the said declaration. We have given attention to the forcible argument at the bar and in the brief of counsel on this objection to the declaration, and we have no doubt from this argument that counsel really believed that the vague character of the declaration impeded the defense; but we fail to find the basis in the declaration itself. We fail to perceive in the declaration anything but a case where the plaintiff sues to recover money paid out by the plaintiff for the defendant on his request, with a history of the circumstances under which the request was made and the money paid.

The sixth ground of demurrer is that the declaration asks for 8 per cent. interest upon a verbal contract. As the contract sued on was in writing, we do not see any merit in this ground. Besides this, we may say that claiming more than the defendant is willing to admit is due, or more interest than the defendant admits, is no sufficient cause for demurrer.

The second to ninth assignments of error, inclusive, and the twelfth, relate entirely to rulings of the court on the trial as to the exclusion and admission of evidence, and on propositions of law arising on the merits. As the record shows that the case was tried in the court below before the judge, without the intervention of a jury, but does not show any stipulation in writing to that effect, as required by section 649, Rev. St. U. S., we have no authority to review the rulings covered by these assignments. *Bond v. Dustin*, 112 U. S. 604, 5 Sup. Ct. 296, and cases there cited and reviewed.

The tenth, eleventh, thirteenth, and fourteenth assignments of error

attack the judgment of the court below. First, it is said that the court erred in rendering any judgment in vacation; second, that the court erred in rendering any judgment at the October term, 1895; third, that the order taking the case under advisement at the April term of 1895 was a final discontinuance of the suit; and, fourth, that when the judgment of October 8, 1895, was entered, the cause was *coram non judice*. The trial judge held that the judgment rendered in vacation was void, and, at the term in October following, set it aside, and then proceeded to render a judgment the same as if at the trial term in April the order entered was one simply taking the case under advisement, treating all that was said with reference to rendering a judgment in vacation as surplusage, evidently going upon the proposition that he had the right to take the case under advisement; therefore the order to that effect was valid, but had no authority to decide the case in vacation, and therefore that part was wholly void. As to the contention that the order of the April term operated a discontinuance of the cause, it is to be noted that no such effect results from the language used, nor was contemplated by the judge making the same. If it was not a discontinuance of the cause, then it must be considered as an order simply taking the case under advisement, to be decided thereafter when the court should be ready and have power to act. Assuming that the judgment rendered in vacation was wholly void (although there is respectable authority supporting the proposition that, where, by consent of parties, such judgment is entered, it is valid, and that, where parties do not object at the time of the entry of such order, they are presumed to consent. See *Black, Judgm. § 179*), it seems to us clear that as the case was heard at the April term, but no judgment rendered at that term, because the judge took the same under advisement, thereafter, at the succeeding term, the judge had full jurisdiction to then give his opinion and render valid judgment. See *Insurance Co. v. Francis*, 52 Miss. 467; *Moore v. Hoskins*, 66 Miss. 496, 6 South. 500.

The judgment of the circuit court is affirmed.

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#### WILSON v. PAULY.

(Circuit Court of Appeals, Sixth Circuit. January 13, 1896.)

No. 300.

#### 1. PRACTICE ON APPEAL—EXCEPTIONS APPEARING IN RECORD.

It is not indispensable that an exception to a ruling of the court on the trial of an action should be brought before an appellate court by a bill of exceptions, if it fully appears upon the record proper.

#### 2. BANKS—NOTICE—KNOWLEDGE OF OFFICERS.

The receiver of the C. National Bank brought an action against one W. on certain promissory notes, made by him directly to the bank. W. defended the action on the ground that the notes were given for the purchase money of an interest in a brickyard, which W. had been induced to purchase by the misrepresentations of C., the president of the bank. It appeared that the bank held sundry notes of the principal owner of the brickyard, which notes were worthless; that the notes made by W. were substituted for these; and that C. pretended to be in-

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interested, himself, in the brickyard, and to enter into a partnership with W. and the former owner of the yard, for the purpose of inducing W. to make the notes to the bank, which would replace the worthless notes it then held. There was also evidence tending to show that C. was the active party in the transaction, and misrepresented the facts to W. Held, that the bank, being the payee of the notes, could not be held to have been without notice of the fraud, or unaffected by C.'s knowledge thereof, and that it was error to direct the jury to render a verdict against W.

**In Error to the Circuit Court of the United States for the District of Kentucky.**

This was an action at law, brought in the court below by Frederick N. Pauly, defendant in error, as receiver of the California National Bank of San Diego, against William H. Wilson and Annie E. Wilson, upon four promissory notes, for the sum, in all, of \$22,575, executed by them at San Diego, Cal., to the above-named bank on the 24th day of March, 1891, and payable in six months after that date. During the progress of the suit William H. Wilson died, leaving a will, and Annie E. Wilson was appointed executrix thereof, and the suit was thereupon revived against her as such.

Separate answers were filed in her behalf, personally, and as executrix. As executrix she pleaded: (1) That the notes sued on were executed as the price of the one-third interest in the Rose Canyon brickyard and kiln, situated at San Diego, Cal., of which one C. H. Hill claimed to be lessee from one A. G. Gasson, containing eighty acres, and the one-third interest in certain patents on kilns for burning brick, and the plant and personal property situated on said leased premises at the time (except brick which had been burned and finished), with the stipulation that the said Hill, J. W. Collins, and W. H. Wilson should enter into a coequal partnership for the manufacture and sale of brick at said yard and kiln. (2) That said Collins had for a long time been president of said California National Bank, of San Diego, Cal., and theretofore been associated with the said Hill in operating said yard and kiln, in the manufacture of brick at said yard and kiln for sale, upon an agreement to divide the profits of said business, and said Hill and Collins were partners in said business. (3) That said Collins had agreed with said Hill, for carrying on said business, to furnish the capital necessary, which he did by discounting the notes of said Hill in said bank, secured by the pledge of said patents, and there was, at the time of said agreement, an indebtedness existing against the said Hill to said bank, secured as aforesaid, to the amount of about \$32,000. (4) That said Hill and Collins falsely and fraudulently represented to said Wilson, in making said agreement of purchase and partnership, that large profits had been made by them in the sale and manufacture of brick at said yard and kiln, and falsely and fraudulently represented that they had already unfilled orders for 6,400,000 bricks for the erection of a college building at or near San Diego, about 250,000 or 300,000 to be pressed, and the remainder common brick, the latter at \$11 per 1,000, and the former at \$35 per 1,000, and also orders from other sources, making, altogether, enough to run the yard for about 12 months, assuming the annual product would be 10,000,000 bricks,—all of which said representations, so made, were false and untrue, and so known to be by said Hill and Collins when so made. (5) That said notes were, at the request of said Collins, then the president of said bank, made payable to said bank, to be used in the payment of so much of the indebtedness of the said Hill to said bank, already existing and owing by him, and so much of the said debt of the said Hill was satisfied to the said bank, which was the only consideration moving from said bank for the execution of the said notes to it. (6) That during all the time while these transactions were going on, said Collins was the president of said bank, and that said bank had full notice and knowledge of the said contracts, and of the false and fraudulent representations of said Collins and Hill in the procurement of the execution of said notes, and is bound thereby. (7) That, not only were all of said false and fraudulent statements, stated in said representations, made to said W. H. Wilson by the said Collins and Hill, but were so made by them for the purpose of inducing him to believe and rely upon them, and that he did rely on said statements in making

said contract for the said interest in said yard and kiln, and also in the execution of the said notes, and each of them. That said interest in said property was and is valueless, and she prays that said contract may be vacated and held for naught.

To this the plaintiff replied, denying the principal matters set up as a defense by the plea. In her personal defense Mrs. Wilson pleaded similar matters of defense, and for a further defense she alleged that, at the time of the signing by her of the notes sued on, she was a married woman, the wife of the said William H. Wilson, and that she did not receive any part of the consideration for which said notes were executed; that they were given in the execution of a copartnership agreement in which her husband, William H. Wilson, C. H. Hill, and J. W. Collins were concerned, and were employed by William H. Wilson in the purchase of an interest in a brickyard and appurtenances, to be used for the purpose of carrying on the business of manufacturing brick, as stated in her answer as executrix.

The case was tried before a jury. At the conclusion of the evidence, counsel for the plaintiff moved the court to instruct the jury to find a verdict in his favor for the amount of the notes sued on, with interest, against the defendant as executrix and against her personally. The court instructed the jury to find a verdict in favor of the defendant personally, and against her as executrix. The record states that the defendant, as executrix, "objected and excepted" to such instruction. The jury returned the verdict directed, and assessed the damages at \$27,044.84. Judgment was entered accordingly, and Mrs. Wilson, as executrix, brings the case here on writ of error.

J. O'Hara, for plaintiff in error.

D. W. Fairleigh and George W. Jolly, for defendant in error.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

SEVERENS, District Judge (after stating the facts). Substantially the merits of the controversy on this writ of error are involved in the direction given by the court to the jury upon the trial to return a verdict against the plaintiff in error as executrix. But a preliminary question is raised by counsel for the defendant in error upon the sufficiency of the mode of saving the exception claimed to have been taken to the direction complained of; and it is urged that, in fact, no valid exception is exhibited by the record, and that, therefore, this court is not empowered to review the action of the circuit court in giving such direction. The bill of exceptions states that, at the close of the testimony, the plaintiff moved the court to instruct the jury to render a verdict against the defendant in her personal, as well as in her representative, character; that the defendant objected thereto; and that the court denied the motion as to the defendant personally, but sustained it against her as executrix. It then states that "the jury returned into court their verdict herein, and the court thereupon rendered the judgment set out heretofore in this record." But the bill states no exception to the action of the court in sustaining the plaintiff's motion for directions to the jury. However, the record proper shows that the above-mentioned motion of the plaintiff was filed, stating it in terms. It shows further, that the court took it under advisement until the following day, and then, "being fully advised," sustained it so far as it prayed for peremptory instructions against the defendant as executrix, and denied it as against her personally; that the defendant objected to that portion of the order sustaining the motion; that the court thereupon instructed the jury, in

accordance with the order thus settled, to find a verdict for the defendant personally, and against her as executrix, "to which instruction the defendant, Annie E. Wilson, executrix, objected and excepted."

It thus appears that, contrary to the usual course, all these proceedings in reference to the plaintiff's motion for positive instructions to the jury, the action of the court thereon, and the objection and exception of the defendant were made matter of record by entry upon the journal of the court. The position of the defendant in error is that it is indispensable that the exception should appear by the bill of exceptions, and that it cannot be shown by anything else. Numerous cases are cited in support of this proposition from the decisions of the supreme court of the United States and elsewhere. But those decisions were made in cases where the exceptions relied upon were shown by the transcript to have rested in the clerk's or judge's minutes, which had never become any part of the record. They were private memoranda, made at the moment, as a help to the recollection in future action, when it might become necessary to put the matter in authoritative form. *Pomeroy v. Bank*, 1 Wall. 596; *Thompson v. Riggs*, 5 Wall. 663; *Insurance Co. v. Lanier*, 95 U. S. 171; *Hanna v. Maas*, 122 U. S. 26, 7 Sup. Ct. 1055; *Bank v. Eldred*, 143 U. S. 298, 12 Sup. Ct. 450. The necessity for a bill of exceptions rests upon the fact that according to the customary course of practice in common-law cases, only the outline of proceedings at the trial is entered of record, such as that the case came on for trial, that the parties appeared, a jury was sworn, the evidence adduced, counsel were heard in argument, the jury instructed, and, after deliberation, rendered a verdict. Upon the transcript of such a record, sent up on the writ of error, the rulings and exceptions made or taken on the trial would not appear. This defect was supplied by the certificate of the judge, in the form of a bill of exceptions, which, when settled and filed, becomes an addition to the record, and part thereof, having equal authenticity with the record proper. Thereupon the court of review has the matter of the exceptions before it. As before stated, the judge's and clerk's minutes are no part of the record. They are not intended to be. *Young v. Martin*, 8 Wall. 354, and the cases above cited. The practice in the courts of the different districts, in the keeping of their records, and the extent to which the proceedings during trials are recorded, as well as in the form and style of entries, varies greatly. The court has a wide discretion, and quite ample authority to determine in what form the proceedings before it shall be recorded, provided, always, the rights of the parties are preserved. While it is true that the form in which the principal exception in this case was preserved is not the form employed in the old common-law practice, we cannot say that it was beyond the power of the court below to exhibit the exception in this way. It is nothing but a matter of form, and we do not think the court would be justified in ignoring a vital exception by standing on a rule the substantial reason for which, as we have shown, does not exist in the circumstances of the case.

Upon consideration of the evidence which was introduced by the parties, we think the court erred in taking the case from the jury

and directing a verdict for the plaintiff. There was evidence tending to prove, and, if believed, to have warranted the jury in finding, that Collins, who was the president of the bank of which Pauly was receiver, was the active, and, in all probability, the efficient, party in effecting the sale of the one-third interest in the brickyard property, and in procuring the notes given by W. H. Wilson therefor to be made directly to the bank. There was evidence tending to prove, and from which the jury might have found, also, that the sale of the property to Wilson was effected by means of grossly untrue representations in regard to the value of the business in which the property was employed. The value of the purchase depended largely upon the volume and the profits and the good will of the business. According to some of the evidence, representations were made that the business was large, that the profits of the business were also large, and that the owner already had orders for 10,000,000 of brick,—enough to keep the works occupied in very profitable business for at least a year. The jury might reasonably believe that such representations, made by persons of standing and character, who lived there, and might be supposed to be familiar with the subject, would have decisive effect in leading a stranger, sojourning there, and having no knowledge of the facts, into the making of such a purchase. These representations, according to the defendant's contention (and there was evidence tending to support it), were relied on by Wilson, and were without any substantial foundation in fact. It was competent to find, further, that the purchase was of trifling value as compared with the price, or its value if it had been as represented. It turned out that the machinery and the bed of clay from which the material for bricks was taken were not on the land, as supposed, but on land of another party. It is argued by counsel for defendant in error that nothing of these representations was embodied in the written contract (which is true), and that they were, therefore, collateral to it. But there is no ground for any argument on this point. If the representations had been embodied in the contract, they might also establish part of the obligations thereof, besides being, if fraudulently made, the ground for an action for deceit, or for an abatement of damages, or recoupment, in a suit brought for the purchase price.

It was not necessary, as contended for defendant in error, that Wilson should have rescinded the contract. If this were a suit by Wilson to recover back the purchase price, a rescission would be necessary. But here the defendant seeks to have the deduction made of the damages resulting from the fraud from the damages which the plaintiff may recover. The authorities support the right to do this. *Withers v. Green*, 9 How. 213; *Van Buren v. Digges*, 11 How. 461, 476; *Winder v. Caldwell*, 14 How. 444; *Boggs v. Wann*, 58 Fed. 686. Objection is made by counsel for defendant in error upon the ground that the answer does not demand a recoupment. If the recoupment proved were equal to the whole amount of the notes, probably no pleading was necessary. But it is a sufficient answer to the objection that no such ground was



taken at the trial, which proceeded upon its merits. If the objection had been taken, it is quite possible the court would have obviated it by permitting an amendment of the pleadings.

But the main contest made here in support of the ruling of the court below is upon the ground that, as counsel claim, the bank had no notice of the fraud which the plaintiff in error says was perpetrated upon Wilson in obtaining these notes, for the reason, it is argued, that Collins, the president of the bank, was not its agent in the transaction, but was engaged in his own affairs, and, therefore, the bank is not affected by his knowledge. It appears that the bank held about \$32,000 in amount of Hill's notes for money theretofore loaned to him while carrying on the manufacture of brick on the premises in question, which he could not pay; that Hill had previously owned the property into which Wilson bought; and that, in effect, the latter's purchase was part of Hill's interest therein, and consequently the purchase price was due to him. If the notes had been executed to him, and had been by his indorsement transferred to the bank in payment of his own notes lying in the bank, and which were surrendered at the time of this transaction, there would be ground for the contention that Collins' participation in the original transaction on his own account would not affect the bank with notice of its character. *Thomson-Houston Electric Co. v. Capital Electric Co.*, 12 C. C. A. 643, 65 Fed. 341; *Kennedy v. Green*, 3 Mylne & K. 699; *In re European Bank*, 5 Ch. App. 358; *In re Marseilles Extension Railway*, 7 Ch. App. 161; *Stratton v. Allen*, 16 N. J. Eq. 229; *Innerarity v. Bank*, 139 Mass. 332, 1 N. E. 282; *Stevenson v. Bay City*, 26 Mich. 44. But that is not this case. There is abundant reason, upon the evidence, for saying that Collins had no substantial private interest in the transaction; that his participation in it as a pretended party in interest was a mere disguise, by which Wilson should be lured into an arrangement whereby the bank should get substantial paper in lieu of Hill's paper, which the bank held and was of little or no value. Collins gave his own notes for a third interest at the same time, but he afterwards declined to recognize them as good for their face, and nothing was ever paid on them, except by the surrender of the balance of Hill's worthless notes. Wilson's notes were made directly to the bank, and there is no question in the case such as arises between the holder by indorsement of commercial paper taken by a bona fide holder for a valuable consideration. In a suit of the payee against the maker of a promissory note, the consideration and the equities of the transaction on which they rest may be inquired into. *Daniel*, Neg. Inst. § 174. It is not our duty or purpose to express any opinion as to the inferences which ought to be drawn from the facts disclosed by the evidence. It is sufficient to say, upon this branch of the case, that the jury would have been justified in finding that Collins' connection with the transaction, as a pretended associate of Hill, was taken up and continued in the interest and for the purposes of the bank, in the procuration of a good paymaster for a poor debt, and that these notes of Wilson are the fruits of his efforts.

If that be so, the bank holds the proceeds of the transaction charged with the notice of what occurred during the progress which its president had.

Extended argument is made to show that a national bank, such as the plaintiff below represents, is not bound by the acts of its president in its financial affairs; that his duties do not include those matters; and that they belong to other officers of the bank. In an attempt to fasten upon the bank a liability for an act of its president in reference to its financial concerns, it might be very true that the bank could successfully defend upon the ground of the president's lack of authority. *Bank v. Atkinson*, 55 Fed. 465; *Bank v. Armstrong*, 13 C. C. A. 47, 65 Fed. 573; *Smith v. Lawson*, 18 W. Va. 212; *Hodge v. Bank*, 22 Grat. 51; *Olney v. Chadsey*, 7 R. I. 224; *Morse, Banks*, § 143b. But here, by bringing suit upon the notes, the agency by which they were obtained is adopted in an emphatic way, and the act is ratified as effectually as if the agency was expressly created beforehand or expressly ratified afterwards. The doctrine contended for has no application to such a case. In an action to enforce against the principal a contract made by an agent acting without authority, but which has subsequently been ratified by the principal, it is necessary to show that the ratification was made with knowledge of the circumstances. But, when the principal brings the action, and the circumstances are proven in defense, he is not entitled to judgment in disregard of them. In that case he continues to ratify the act of the agent, notwithstanding the facts proven, by pressing his suit for judgment.

Some criticism is made by counsel for defendant in error upon the form of the record, in respect to its sufficiently showing what evidence was produced upon the trial; but we see no difficulty in that respect, and cannot appreciate the obscurity which is said to exist in the record upon this subject. The record proper states the coming on of the cause for trial, the impaneling of the jury, the submission of the evidence, and so on,—showing the dates. The bill of exceptions states, also, the date of the transactions in the case, and gives a detail of the evidence, by whom given, and by what counsel the witnesses were examined, and, at the conclusion of the evidence, it is said, "counsel for plaintiff announced that they had no further testimony to take." "And this being all the testimony heard by the jury on behalf of either party, the plaintiff moved the court to instruct the jury" as hereinbefore stated. This is a clear identification of the evidence which was submitted.

We think the judgment should be reversed, and the cause remanded, with instructions to award a new trial.

MASTERSON v. BROWN.<sup>1</sup>

Circuit Court of Appeals, Fifth Circuit. February 4, 1896.]

No. 421.

**LIMITATIONS—LIBEL—STATEMENTS IN JUDICIAL PROCEEDINGS.**

A cause of action for libel, founded upon publications made in the course of judicial proceedings, does not accrue until the final determination, in favor of the party libeled, of the proceedings in which the publication is made, and the statute of limitations accordingly does not begin until then to run against such cause of action. Pardee, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Western District of Texas.

B. T. Masterson, S. R. Fisher, and J. C. Townes, for plaintiff in error.

W. L. Walton and T. W. Gregory, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and BOARMAN, District Judge.

McCORMICK, Circuit Judge. On April 6, 1891, J. Gordon Brown, the defendant in error, brought a suit against Archie R. Masterson, the plaintiff in error, and other parties. That suit was tried and came to final decree in the circuit court in favor of the defendants on November 18, 1893. Brown appealed, and the decision of this court affirming the decree was rendered June 5, 1894, and is reported in 10 C. C. A. 532, 62 Fed. 519. On September 10, 1894, this action for malicious prosecution and for libel was brought. On July 12, 1895, the plaintiff below filed his amended original petition, which, under the practice in Texas, took the place of the original petition. To this pleading Brown opposed (1) a general demurrer, specifying several grounds; (2) a special demurrer in varying forms, setting up the statute of limitation. The circuit court overruled the first of these demurrers, and sustained the one setting up the limitation of one year.

It is suggested by counsel that the circuit court in ruling on the demurrers held that the plaintiff's pleading was not good as an action for malicious prosecution, but was good as an action for libel; that the publications complained of were not absolutely privileged, though made in the progress of judicial proceedings, but that the entire cause of action arose on April 6, 1891, and was barred by the statute of limitation before the institution of this suit. The plaintiff, not being able by amendment to avoid the demurrer as thus grounded, declined to amend, and judgment of dismissal and for costs was entered against him. The recorded judgment on the demurrers does not expressly show all that counsel suggests, but clearly implies it, for it is settled and conceded that a cause of action for malicious prosecution is not complete until the malicious prosecution is finally disposed of in favor of the defendant, which cannot be claimed to have occurred in this case before November 18, 1893, if before June 5, 1894. It is, we think, settled, though not conceded, that plaintiff's original

<sup>1</sup> Rehearing pending.

amended petition as to this suggestion of limitation took the place of the original petition, related back to the institution of the suit, and is no more subject to the defense of limitation than if it had been filed September 10, 1894. While this is not conceded in the argument of the defendant's counsel, it appears to be substantially admitted by this language of the demurrers: "Because it appears on the face of the petition that the alleged libelous matter charged therein against defendant happened, occurred, and took place more than one year before the institution of this suit on the 10th day of September, 1894." Nor is this substantial admission qualified by this language, used in another subdivision of the grounds of the demurrers: "Because the cause of action, if any, arising out of and from the matters and things stated in said repleader bill, appears on its face to be barred by the statute of limitation of one year at and before the institution of this suit." The whole of the demurrer, general and special, in all of its specifications, is necessarily interposed to the amended original petition. And, while the plaintiff in his assignment of errors has embraced six specifications to which he invites the careful consideration of the court, relying on and urging each as a ground for reversal, it is plain that the assignment resolves readily into this: that the circuit court erred in sustaining the defense of limitations to the plaintiff's action.

Originally, that is to say from a time whereof the memory of man runneth not to the contrary, it was the common law of England that the party aggrieved had an action on the case for malicious prosecution in a civil suit. And at a later period, in lieu of this remedy, or possibly in addition to it (it is not quite clear in the traditions), parties were in a measure protected against malicious prosecutions in civil suits by the requirement that all plaintiffs in civil actions should give pledges or sureties for the effective prosecution of their suit, on failure to establish which the plaintiff and his sureties became liable to be amerced by the judges in favor of the king for troubling his courts with a false claim. As yet no costs were taxed or adjudged in favor of a successful defendant, though an addition to his damages on account of his trouble and expense in having to go to law for his rights was always allowed by the jury, under the instruction of the judges, in favor of a prevailing plaintiff. The English common law had its origin and early growth in royal edicts and statutes, the text of which has perished, and the substance of which, so far as it was preserved at all, was for ages in most part transmitted by tradition through their application to cases as they arose in the king's courts. The practice of amercement proving to be clearly inadequate to protect parties from false or frivolous suits, statutes began to be proclaimed allowing successful defendants in certain kinds of actions to recover costs. One of the earliest of these is the statute of 52 Hen. III. c. 6 (A. D. 1267), often referred to in connection with the subject we are now discussing as the "Statute of Marlbridge." It was framed to meet a single case or cases of a single class. Other statutes followed after many years, but

no statute of general application allowing costs to be taxed or assessed in favor of all successful defendants was proclaimed until 23 Hen. VIII. c. 15,—300 years after the statute of Marlbridge. After this, statutes on this subject became more frequent, and their cumulative provisions more comprehensive, allowing costs to be taxed to some extent before a prothonotary or other officer of the courts, but also authorizing judges in the law courts, like the chancellor sitting in equity, to assess for and against the respective parties such costs as, in the discretion of the judge, the rights and conduct of each required. Thus a defendant who was sued out of malice, falsely and without probable cause, had his adequate remedy in that suit; and, while such was the law of costs, it began, certainly as early as the time of Elizabeth, to be held that, with exceptions in favor of cases showing special injury, a subsequent action for malicious prosecution in a civil suit would not be entertained. By the more recent statutes in England the allowance of costs is under a general rule, but in a majority of cases is a complete satisfaction to a successful defendant. 3 Bl. Comm. 399; Co. Litt. (19th Lond. Ed.) note to 101a; Institute Bac. Abr. tit. "Costs." Our examination has not gone far enough to enable us to say that no similar or equivalent provisions for adjudging costs are of force in any of the different states. In some of the older states the law of costs seems, to a nonresident, to be so abstruse and complex as to require the training of a specialist to master it. No equivalent provisions are, or have ever been, in force in Texas. On the question whether an action for the malicious prosecution of a civil suit will be allowed no rule of decision has been adopted by the national courts, and on it there is no uniformity in the state decisions. The highest courts of two states in this circuit, both of which have adopted the common law of England, seem to hold opposite views on the question. *Mitchell v. Railroad Co.*, 75 Ga. 404; *Johnson v. King*, 64 Tex. 228. As the action for malicious prosecution and for libel in this case seems to be identical in all the elements of the damages claimed, it is not necessary for us to decide between these conflicting authorities in our own circuit. Nor is it necessary or useful for us to inquire whether the special damage the plaintiff avers does not bring his case within the recognized exceptions to the English rule denying a right of action for the malicious prosecution of a civil suit. These exceptions or qualifications of the rule are so fully recognized, though not exhaustively or very distinctly defined, that the qualifications are a part of the rule itself; so that, to speak more accurately, certain actions for malicious prosecution of a civil suit do not come under the rule. The plaintiff contends that this is one of those that are not obnoxious to the rule; but for the reasons just stated, and because the question is not expressly raised by the recorded rulings on the demurrers, we express no opinion on this contention.

The plaintiff also contends that the libelous matter laid was published from day to day, successively, from September 6, 1891, to November 18, 1893, during all of which time the actionable char-

ges were constantly addressed to the court, averred to be true, and the plaintiff continuously proclaiming himself ready to prove them to be true. And if this contention is not sustained, he then urges that every reiteration of the charges in an amended and in supplemental bills and in original and supplemental replications was a new publication on the days that they were respectively filed, some of which were within the year next before the bringing of this action, and on each of which he counts in his petition. If driven from this contention, he by no means surrenders, but submits that in making up and printing and publishing the transcript on appeal the defendant in this action embraced all of his libelous pleadings, and that the filing of it in this court, and the pressing of it in open court on the hearing of his appeal, were new publications of the libel. But, superseding all of these contentions, so far as they touch the question of limitation, he submits:

"Upon the question of limitation we earnestly insist that legal principles and analogy alike require that a cause of action for libelous proceedings and statements in court proceedings cannot arise until the final determination of the cause in which such pleadings are filed. That such is the rule in all jurisdictions as to malicious prosecutions is undisputed, and this consensus of opinion is not due to any statutory provision on the subject, but to the application of the general principles of common law, every one of which is equally potent with reference to cases for libelous pleadings. It is just as essential to the due and orderly administration of justice that the issues presented in the libelous pleadings should be determined in the court in which they are tendered, and the truth or falsity of such pleadings be therein adjudged without interference by any other tribunal, as it is that right of action for a malicious prosecution should be deferred until the issues joined in the malicious suit are determined in favor of the defendant. It is quite as inconsistent with the orderly administration of justice for the party against whom libelous charges are made in judicial proceedings to go at once into another tribunal, and there controvert the matters set out in such libelous pleadings, and to have two courts trying the same issues of fact between the same parties at the same time, as it would be to pursue a similar course in a suit for malicious prosecution. And so with every reason given by the courts and elementary writers for deferring the right to sue for damages for malicious prosecution until the adjudication of the issues therein. All apply with equal force to cases of the character of the one under consideration."

In an action for malicious prosecution "the plaintiff must charge and prove that he has been prosecuted by the defendant, that the prosecution was malicious, that it was instituted without probable cause, that the prosecution has terminated in his favor, and that he has sustained damage. \* \* \* The reasons why an action should be terminated in favor of a defendant before the defendant can commence action for malicious prosecution would seem to be as follows: First, if the action is still pending, the plaintiff therein may show in that action that he had probable cause for commencing the suit by obtaining a judgment therein against the defendant, and he should not be called upon to show such a fact in a second action until he has had this opportunity of showing it in the first; second, and if the action has terminated against the defendant, then there is already an adjudication against him, showing conclusively that the plaintiff had probable cause for commencing the action." *Marbourg v. Smith*, 11 Kan. 554. The defendant in the

suit will not be permitted to thus put his antagonist on the defensive, and the courts will not be forced to entertain and dispose of two suits between the same parties about the same matter, at the same time, while it appears that the matter may be settled by and in the first suit. The courts do not favor suits for malicious prosecution, for it is necessary that the avenues of justice should not be narrowed; but, as civil suits are not, like criminal prosecutions, carried on for the benefit of the public, less favor and indulgence is to be shown to the plaintiff who maliciously arrests another than to the prosecution of an indictment. 2 Cooley, Bl. Comm. 126, note 1. The doctrine is old that the action complained of must be terminated in favor of the defendant before he can have his action for malicious prosecution. If the first suit is adjudged against him, it will not be tolerated that this judgment shall be "blown off by a side wind," as was said by Hale, C. J., in *Vanderbergh v. Blake*, Hardr. 194. Even in cases where no appeal is allowed from the judgment against the defendant in the first suit, his action cannot be allowed, for the courts cannot grant an appeal where the legislature has refused it. In *Rice v. Coolidge*, 121 Mass. 393, it is said in the opinion of the court:

"It seems to be settled by the English authorities that judges, counsel, parties, and witnesses are absolutely exempted from liability to an action for defamatory words published in the course of judicial proceedings. [Citing cases.] The same doctrine is generally held in the American courts, with the qualification as to parties, counsel, and witnesses, that, in order to be privileged, their statements made in the course of an action must be pertinent and material to the case. [Citing cases.] We assume, therefore, for the purposes of this case, that the plaintiff cannot maintain an action against the witnesses in the suit in Iowa for their defamatory statements, though they were false."

The suit of *Rice v. Coolidge* was not against the witnesses, hence it was not necessary for the court to announce its doctrine, as, for the purposes of that case, assuming the witnesses were not liable, it did not follow that the defendants were not liable. In *White v. Nicholls*, 3 How. 266, the supreme court settle the question for this court thus:

"The investigation has conducted us to the following conclusions, which we propound as the law applicable thereto: (1) That every publication, either by writing, printing, or pictures, which charges upon or imputes to any person that which renders him liable to punishment, or which is calculated to make him infamous or odious or ridiculous, is *prima facie* a libel, and implies malice in the author and publisher toward the person concerning whom such publication is made. Proof of malice, therefore, in the cases just described, can never be required of the party complaining beyond the proof of the publication itself. Justification, excuse, or extenuation, if either can be shown, must proceed from the defendant. (2) That the description of cases recognized as privileged communications must be understood as exceptions to this rule, and as being founded upon some apparently recognized obligation or motive, legal, moral, or social, which may fairly be presumed to have led to the publication; and, therefore, *prima facie* relieves it from that just implication from which the general rule of the law is deduced. The rule of evidence, as to such cases, is accordingly so far changed as to impose it on the plaintiff to remove those presumptions flowing from the seeming obligations and situations of the parties, and to require of him to bring home to the defendant the existence of malice as to the true motive of his conduct. Beyond this extent no presumption can be permitted to operate, much less be made to sanctify the indulgence of malice, however wicked, however express, under

the protection of legal forms. We conclude, then, that malice may be proved, though alleged to have existed in the proceedings before a court or legislative body or any other tribunal that may have been the appropriate authority for redressing the grievance represented to it; and that proof of express malice in any written publication, petition, or proceeding addressed to such tribunal will render that publication, petition, or proceeding libelous in its character, and actionable, and will subject the author and publisher thereof to all the consequences of libel. And we think that, in every case of a proceeding like those just enumerated, falsehood and the absence of probable cause will amount to proof of malice."

It thus appears that the privilege is not absolute, that the action for such a libel will not be rejected, but the plaintiff will have to show that the matter laid as libelous was false, and was published maliciously, and without probable cause. If the words complained of are such as impute crime to the plaintiff, and therefore, if spoken elsewhere than in the course of judicial proceedings, would import malice, and be actionable in themselves, requiring only proof of publication, yet, if they are applicable, and pertinent to the subject of the inquiry, they are not thereby rendered absolutely privileged, but are only privileged so far as to put on the plaintiff in the action for the libel the burden of showing that they were false, and were uttered out of malice, and without probable cause. If the words were not pertinent and material, they would be stricken out at the cost of the pleader on motion as impertinent and scandalous. If not subject to be thus summarily dealt with, because pertinent and material to the issue in the suit, it seems clear that a determination of that suit against the defendant would conclusively establish as to him the existence of probable cause. If it is suggested that in the original suit this issue may be involved with many other issues between the libeler and the defendant or between the libeler and other associated defendants, so as to protract that litigation to a great length, like the celebrated suit of Mrs. Myra Clark Gaines, which outlived two generations, and survived all of the original actors in it except the indomitable little woman who was the plaintiff, it may be answered: What if her original pleading had contained libelous matter, charged against one of the defendants, pertinent and material to the issues with that defendant in connection with which it was used; would she, the libeler, have ground of complaint that the defendants were not permitted to or did not sue her thereon until the close of her 50 years' struggle to establish their truth? All of her time and means and energies were being taxed to their uttermost to establish at least probable cause for her averments. With more apparent plausibility it might be argued that it was a denial of justice to the libeled defendant to have to wait so long for his cause of action to mature. As already suggested, if the libelous matter was impertinent, the defendant had the right to have it stricken out on motion, and thus obtain judgment in his favor thereon; but the plaintiff would not be heard to say that he should set the statute of limitation running in her favor when she could, on her own motion, have the matter stricken out if she chose to abandon it.

Without further consideration of analogies which appear to us to be so close as to lose their character of analogies and become



identical, we conclude that every reason which has been advanced or which we can perceive for holding that a cause of action for malicious prosecution does not exist until the malicious prosecution is terminated in favor of the defendant, applies with equal force to a suit by the defendant for libel founded on publications made in the course of the judicial proceeding in the first suit. It follows that the circuit court erred in sustaining the defendant's demurrer suggesting the limitation of one year. It is ordered that the judgment of the circuit court be reversed, and the case remanded, with directions to that court to overrule the demurrer setting up prescription, and award the plaintiff a venire.

PARDEE, Circuit Judge, dissenting.

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LUDTKE et al. v. HERTZOG et al.

(Circuit Court of Appeals, Fifth Circuit. January 7, 1896.)

No. 425.

1. EVIDENCE—BEST AND SECONDARY—SUBSTANTIVE FACT.

Upon the trial of an issue involving the identity of a person to whom a Texas land certificate had been issued under the name of J. L., for services rendered in the Texan war of independence, a commissioner of the land office was called, and testified that, while the name of J. L. appeared on the muster roll of a certain company in the Texan army, the bounty warrant for the same term which J. L. served was issued to J. C. L., the latter being the true name of the person claimed by one of the parties to be the J. L. to whom the land certificate was issued. *Held*, that such evidence was neither immaterial, nor secondary, nor a conclusion of the witness, but a substantive fact, which the witness' connection with the records enabled him to show.

2. EVIDENCE—IMPEACHING WITNESS—CONTRADICTORY STATEMENTS.

Upon the trial of the same issue, a witness, having testified to certain facts as to the residence and occupation of one J. G. W. L., tending to show that he was the person to whom the land certificate was issued, was asked, on cross-examination, if it was not the fact that J. G. W. L. had resided at a different place, and if the witness had not so informed one B. at a certain time and place, to which the witness replied in the negative. B. and another person afterwards testified that the witness had made the statements referred to. *Held*, that such testimony was material, and that the foundation laid for it was sufficient.

3. EVIDENCE—TESTING RECOLLECTION—HISTORICAL FACT.

Evidence of a person, familiar with the particular department of history, as to the date of a historical fact, of which the court will take judicial notice, may be received for the purpose of testing the recollection of another witness who has testified to various facts and dates, material to the pending issue, some of which were fixed by the date of such historical fact.

In Error to the Circuit Court of the United States for the Northern District of Texas.

M. L. Morris and W. M. Crow, for plaintiffs in error.

A. T. Watts and W. S. Simkins, for defendants in error.

Before PARDEE and McCORMICK, Circuit Judges, and BOARMAN, District Judge.

"No. 2. County of Harrisburg. Republic of Texas.  
"Class 2.

"Given under my hand, at Houston, the 24th day of February, 1838.

"Wm. T. Harris,

"Thos. W. Ward,

"Associate Commissioners."

The intervener Rosina Ludtke, a citizen of Texas, is the heir of one Julius George Washington Lecomte, who, she alleges, was the person to whom the certificate issued, and, as such heir, she claims title to the land. The defendants are citizens of Texas. They plead the general issue and limitations. The material issue is the identity of the person named in the certificate. The evidence offered by the intervener tends to prove her claim. The evidence offered by the defendants tends to contradict the evidence offered by her, and to defeat her claim, and to show that one Julius Camille Lecomte, who was for a number of years resident in Harris county, Tex., was the person to whom the certificate issued. The trial resulted in a verdict and judgment for the defendants, and the interveners, said Rosina Ludtke, joined by her husband, August Ludtke, brought this writ of error. Thirteen errors are assigned. The first six of these relate to rulings of the trial court in admitting certain evidence over objection of interveners, and in sustaining objection to certain evidence offered by them.

"In fact, while the name of Julius Lecomte appears on the muster roll of Capt. Durocher's Company A, First Regiment of Artillery, commanded by Col. J. C. Neill, the bounty warrant for 640 acres was issued to J. C. Lecomte for the same term of service that the muster roll shows Julius Lecomte to have served."

On the issue of identity, and in view of the state of all the other proof, it was not immaterial. It is not secondary evidence, or a mere conclusion of the witness, but is a substantive fact, which the

witness' relation to the archives in the land office and his examination thereof, with the view to answering the interrogatories propounded to him, enabled him to show. There was no error in admitting the copies of records in the comptroller's and in the commissioner's offices in reference to the purchase by Julius Lecomte of the lot on Galveston Island.

The objection to the evidence of the witness Brown as to a historical fact was not well taken. The fact in question was a matter of public history, of which the court had judicial knowledge, and the judge of the court did not err in permitting one so conversant with Texas history as this witness is known to have been to testify as to the time when Dr. Branch T. Archer returned from his public mission to the United States, in 1836. The office of this testimony was to test the recollection and memory of the witness, Green, a colored man, who had been a body servant of Dr. Archer, and who had testified in this case that he "first came to Texas with Dr. Branch T. Archer, who was a surgeon of Thomas Jefferson Green's brigade, which came on the same steamer with me. After I landed in Texas, about April 27, 1836, I left Velasco, Texas, and went to New Orleans, on the steamer Rights of Man. About May 6th or 7th I left New Orleans to return to Texas, and landed at Velasco about four days thereafter." These dates, and the date (25th of June) given by witness Brown, being all within the time between the 2d of March, when independence was declared, and August 1, 1836, when the war for independence was practically closed,—the time in which immigrants arriving and taking service were made the subjects of this special bounty,—the difference as to the dates was wholly immaterial, except as it might test the veracity or the memory of the witness Green. He was, at the most, only 14 years old in April, 1836. His testimony was taken by deposition after the lapse of nearly 60 years, and the common sense and common experience alike of courts and common people warrant and require that the memory of a witness testifying under such circumstances should be tested by all reasonable means within the reach of the inquirers.

The witness Green also testified:

"I knew a man by the name of Julius Lecomte. I first met him at Columbia, Texas, in May, 1836. He was with an artillery company. After the war, I next met him about 1837, at Harrisburg, Texas, and was intimate with him until 1854, and often during that time worked with him on boats on Buffalo Bayou. His full name was Julius George Washington Lecomte. In January or February, 1854, he married a German girl at Harrisburg. I saw him last in Galveston, in 1854, shortly after his marriage. I then left the state, and on my return, in May, 1857, I heard he was dead."

The defendants asked this witness:

"Is it not a fact that the Lecomte of whom you testify lived in or near Corpus Christi in the years 1837, 1838, and 1839, with Wilson, on the stock farm of Kennedy, and did you not so state to C. P. Boles at the Capitol Hotel, in Houston, on January 8, 1895?"

—To which the witness answered:

"I made no such statement to any one, but I did state that Lecomte and Wilson spent one season on the ranch of H. L. Kennedy, during the yellow fever at Houston, in 1840 or 1841, for three or four months of the latter part of the summer."

On the trial the court admitted, over the objection of interveners, the testimony of R. S. Nebbitt and C. P. Bates that at the Capitol Hotel, in Houston, Tex., on January 8, 1895, James Green had told each of them that in the years 1837, 1838, and 1839 Julius George W. Lecomte and John T. Wilson lived on the Kinney ranch, near Corpus Christi, Tex. This testimony was material, and, if it was necessary to lay a predicate for its introduction, we are of opinion that the predicate laid was sufficient.

We do not deem it profitable to notice separately the other specifications of error embraced in the assignment. None of them point out any error requiring the reversal of the case. The judgment of the circuit court is affirmed.

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GERMANIA BANK OF NEW YORK v. LA FOLLETTE et al.

(Circuit Court, S. D. New York. December 28, 1895.)

BILLS AND NOTES—DEFENSES—BONA FIDE HOLDER.

One L. made a note, and delivered it to the payee, upon an express agreement that it should be sold and discounted by the payee for cash, which should be paid over to L. Instead of so doing, the payee diverted the note; which passed through the hands of several parties, who had notice of the diversion, and who severally indorsed the note. The last of these parties, the D. Co., had the note discounted at its bank, which had no notice of the diversion, and received and used the proceeds. The note not being paid, the bank, at the request of the D. Co., sued the maker and all the indorsers except the D. Co. *Held*, that the fact that the bank had discounted the note solely in reliance on the credit of the D. Co., and that it had omitted to sue that company, in reliance upon the company's paying the note, if not collected from the maker or prior indorsers, though it enabled the D. Co. to obtain an unfair advantage, was not a defense to the action.

This is an action on a promissory note against Harvey M. La Follette, as maker, and the New England Milling & Manufacturing Company, United States Oil & Tallow Company, and Edward Records, as indorsers. Issue was joined by La Follette only, and, upon stipulation duly filed, the case was tried by the court without a jury.

George E. Mott, for plaintiff.

David W. Armstrong and F. R. Kellogg, for defendants.

LACOMBE, Circuit Judge. La Follette, on August 10, 1894, made his promissory note, in writing, dated on that day, whereby, for value received, he promised to pay to the order of the New England Milling & Manufacturing Company, five months thereafter, at No. 54 Wall street, in the city of New York, the sum of \$5,000. This note he delivered to said company, through its president, the defendant Records, upon an express agreement and understanding that the same was to be sold and discounted by said company for cash only, and the proceeds thereof paid over and accounted for to La Follette. The note was fraudulently and wrongfully diverted from this purpose by the holder, and, without any valuable consideration passing to La Follette, was transferred by indorsement

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successively to the United States Oil & Tallow Company, of which Records was president, thence to Records himself, and by him to the Delavergne Refrigerating Company, in payment of a prior indebtedness. All these persons had notice that the note was being diverted. Prior to maturity the note was offered for discount or sale to the plaintiff by the Delavergne Company, and was discounted, the proceeds placed to the credit of the Delavergne Company, and subsequently drawn out of the bank, before maturity of the note. The evidence leaves no doubt that, so far as the bank was concerned, this discount or purchase of the note was bona fide. It paid full value for it, and had no notice of its diversion, or of any equities existing in favor of the maker. The fact that the bank bought the note without knowing anything of La Follette, or making any inquiries as to his financial standing, relying solely on the solvency of its customer, the Delavergne Company, is immaterial. If it was satisfied that its customer was perfectly good for the amount advanced, that customer's indorsement enabling the bank to recover from the company if the maker defaulted, it was under no obligation to investigate as to the other names on the note. And when it bought the note it bought it out and out, with the right to enforce it against any or all of the persons liable upon it, whether as maker or indorsers.

The note was not paid at maturity. It was held in the bank for a few days, and then sent to its attorneys, with instructions to begin this suit, to which all parties to the note are made defendants, except the Delavergne Company. This was done by the bank officers at the special instance and request of the company. The company has not secured the bank, otherwise than by its original indorsement of the note, nor has it even agreed to keep its bank account good for \$5,000 during the pendency of this suit. The bank officers, however, are satisfied that the company is entirely solvent, and that, if they fail to collect the amount of the note and interest in this action, they will be able to obtain it from the company, and do not expect to be put to any expense for costs or lawyer's fees in the event of failure, as the customer whom they are thus accommodating will undoubtedly reimburse them. It is upon these facts that defendant relies, but they do not constitute a defense to this action. The bank, as bona fide owner of the note, had the right to choose whom it would sue. It does not lose the right so to choose because the motives which induce it to make such choice may be reprehensible. No doubt, the arrangement whereby its customer is secured an unfair advantage through the instrumentality of the bank, which such customer could not have obtained without its subservient action, was a mean and iniquitous transaction; but this action is brought on the law side of the court, and must be determined as principle and authority require. Judgment for plaintiff.

## UNION SWITCH &amp; SIGNAL CO. v. JOHNSON.

## JOHNSON v. UNION SWITCH &amp; SIGNAL CO.

(Circuit Court of Appeals, Third Circuit. February 4, 1896.)

Nos. 36 and 37.

## 1. RES JUDICATA—CONTRACTS—INDEPENDENT STIPULATIONS.

An inventor and owner of patents made a contract with a corporation, containing, in separate clauses, the following provisions, among others: That he should be appointed general manager of the company at a fixed salary; that he should grant to it the exclusive use of his inventions, for which he was to be paid license fees of \$3,000 a year; that, in case the contract were terminated, the company should have a license to use all of the inventions theretofore used, on paying therefor \$6,500 a year. The contract was to continue ten years, subject to termination by either party, by giving one year's notice in writing. After operating under the contract for something more than a year, until the latter part of 1887. It was then mutually agreed (as evidenced by letters in writing) that "the present contract" should be terminated on July 1, 1888. But, on March 1, 1888, the company peremptorily discharged the inventor from its service. *Held*, that the several clauses of the contract contained independent agreements, and that a recovery of damages for breach of the contract of service was no bar to a subsequent action for license fees at the rate of \$3,000 per annum up to July 1, 1888.

## 2. TERMINATION OF CONTRACT.

The agreement to terminate the contract on July 1, 1888, embraced the whole contract, so that, even if the company continued to use the inventions after that time, it was not liable for license fees at the rate of \$6,500; but the only remedy against it was a suit for infringement.

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

S. Schoyer, Jr., for Union Switch & Signal Co.

George W. Miller, for Georgina M. Johnson.

Before DALLAS, Circuit Judge, and BUTLER and WALES, District Judges

WALES, District Judge. This was an action brought by Charles R. Johnson, in his lifetime, against the Union Switch & Signal Company to recover the amount of certain moneys alleged to be due to him under the terms of a written contract which had been executed by the parties on the 20th of September, 1886. The action was begun on the 19th of April, 1893. On November 13, 1893, on suggestion of the death of the plaintiff, Georgina M. Johnson, the executrix of his last will and testament, was substituted as plaintiff on the record and the cause continued. The clauses of the contract which are involved in the present controversy are as follows:

"First. Said Charles R. Johnson is hereby appointed general manager of the said company. He shall have an equal voice with the vice president in all matters relating to the details of the company's business; and, in case of disagreement between him and the vice president, the matter in dispute shall be submitted to the president or board of directors for final and conclusive decision.

"Second. As general manager of said company, said Johnson shall receive pay at the rate of five thousand dollars per year, exclusive of traveling expenses, which are (as in the case of other officials) to be considered as a part of the expenses of the operation of the company.

"Third. Said Charles R. Johnson hereby grants, sells, and conveys to the said company the exclusive right, except as hereinafter provided, to the use of all the inventions that he (the said Johnson) now has relating to the signal business, or that he may hereafter make or acquire, and also the right to use the present inventions of Mr. Henry Johnson relating to signals and switches, and any other which he may hereafter make, or may hereafter so acquire.

"Fourth. Said company hereby covenants and agrees to pay, for the use of said inventions, the sum of three thousand dollars per annum, settlements to be made quarterly."

"Sixth. Said company further hereby agrees to pay to said Charles R. Johnson, in addition to the aforesaid compensation for patents and salary, a sum equal to ten per cent. of the net profits of the company, after having provided for all the expenses of the operation of the company; but, in reckoning these expenses, it is understood that the interest charge for the company's bonded and present floating debt shall not in any case exceed nine thousand dollars per year, nor shall the salaries of the other officers be increased without the consent of the said party of the second part.

"Seventh. It is mutually agreed that this contract shall continue for a period of ten years, subject to termination by either party, however, by one year's notice, in writing, to the other party at any time after the second year, or by the death of Charles R. Johnson, or his permanent inability to perform his duties as general manager.

"Eighth. It is further mutually covenanted and agreed that, in the event of the termination of this agreement, the said company, by reason of the expenditures that shall have been made during the continuance of this agreement, shall have a license, not exclusive, to use all the inventions that may have been used in carrying on the business of the company, on the payment of sixty-five hundred dollars per year, said sum to be paid quarterly, and shall be entitled to purchase from the said Charles R. Johnson, or his executors, the exclusive right to use all the inventions upon as favorable terms as he or his executors may be willing to grant to any other parties."

Charles R. Johnson had been in the employment of the defendant company prior to the 20th of September, 1886, and it was stipulated in the contract that the payments under it should date from July 1, 1886. No change was made in the terms of the contract, and both parties continued to act under it until on or about the 1st of January, 1888, when, after several letters had passed between Charles R. Johnson and the president of the defendant company in reference to some new arrangement, it was finally agreed by them that the contract should cease and determine on July 1, 1888. This action on the part of the president was ratified by the directors of the company, and notice of the fact given to Mr. Johnson. On the 1st of March, 1888, the defendant peremptorily dismissed the plaintiff's decedent from its service, on the ground of his alleged unfaithfulness to its interests.

In his statement of demand, the plaintiff's decedent claimed—First, that under the fourth clause of the contract there was due to him, on the 1st day of July, 1888, the sum of \$1,500 for license fees for the six months ending June 30, 1888, being two quarters' dues, at the rate of \$3,000 per year; and, secondly, that by virtue of the eighth clause of the contract, the defendant, having continued, after the 1st day of July, 1888, to exercise the license to use the inventions mentioned in the contract, and to make, use, and sell

appliances thereunder, there were justly due to him 19 quarterly payments of royalties or license fees, of \$1,625 each, from the 1st day of July, 1888, to April 1, 1893, with interest on each payment from the time it fell due.

The circuit court directed the jury to render a verdict for the first, and to disallow the second, claim of the plaintiff. Both parties have filed exceptions to the charge of the court.

1. At the trial below the defendant company produced an exemplified copy of the record of the proceedings had in an action in the superior court of the city of New York, brought by Charles R. Johnson against the Union Switch & Signal Company, and which terminated in a judgment for the plaintiff in the action for the sum of \$4,155.67, which was fully paid and satisfied by the defendant. This judgment having been obtained for a breach of the contract of September 20, 1886, the defendant's counsel requested the circuit court to instruct the jury that it was a bar to the recovery by the plaintiff in the present action, of any sum of money now claimed under the fourth clause of the agreement; and the refusal of the court to so charge is assigned for error. The position of the defendant company is that the judgment obtained in the New York court was in full satisfaction and discharge of all claims and demands growing out of the fourth clause. An inspection of the record shows that the complaint in the New York action originally embraced two causes of action,—the first one being for royalties or license fees alleged to be due under the fourth clause of the contract, from the 1st of January to the 1st of March, 1888; and the second one being for damage for a breach of the contract by the wrongful discharge of Johnson. At the trial of the New York case the plaintiff was compelled by the court, on motion of the defendant's counsel, to elect which cause of action he would prosecute, and he chose to proceed with the second one. These royalties were not claimed or recovered in that action, and they have never been paid. The contract of September 20, 1886, contained several independent agreements, and the breach of one of them did not constitute a breach of all. The discharge of Mr. Johnson from the service of the company did not necessarily constitute a breach of the stipulation to pay royalties mentioned in the fourth clause, which remained in force until July 1, 1888, when the whole contract was to terminate by the agreement of the parties. Whether Mr. Johnson had or had not remained in the service of the defendant until July 1, 1888, he would still have been entitled to receive payment of the royalties until that date. The royalties were analogous to rent accruing and falling due at the end of a fixed term, and it is not denied that the company continued to use the patented inventions during the two quarters sued for. The services of Mr. Johnson had been dispensed with on March 1, 1888, but the contract in other respects remained in force until the 1st of July, 1888. The judgment in the New York case was for damages sustained by the wrongful discharge of Mr. Johnson from the employment of the company, and in no manner affected the payment of the royalties mentioned in the fourth clause, which, at the date of his discharge, were not due.



On this point the learned judge of the circuit court, in his charge to the jury, said:

"From an examination of the record in the New York case, I am of opinion that these royalties were not claimed or recoverable in that suit under the second cause of action, upon which the verdict and judgment were based."

And in this instruction there was no error.

2. The other cause of action in the present suit relates to the license dues which are claimed under the eighth clause of the contract of September 20, 1886. In the statement of claim it is alleged:

"That, prior to said 1st of March, 1888, and in about the month of January, 1888, it had been agreed by and between the plaintiff and the defendant that the contract hereinbefore set forth should be and become and be considered as duly terminated on the 30th day of June, 1888, without any written notice or other notice, and that plaintiff's connection with defendant's business should cease at that time the same as if a notice of one year had been given under and according to the provisions of the seventh clause of said contract, and that from and after said 1st of July, 1888, the license to use the inventions specified should continue as provided in the eighth clause of said contract, and defendant should thereafter pay said license dues, as provided in the eighth clause of said contract, quarterly, at the rate of six thousand five hundred dollars (\$6,500.00) per year."

No evidence was produced at the trial to establish this averment, and no such expressed agreement was proved, nor was any evidence offered from which it could be implied. The proof that the parties agreed to terminate the contract was furnished by the correspondence between Mr. Johnson and the president of the company. Under date of November 25, 1887, Mr. Johnson wrote to the president:

"Dear Sir: Replying to your favor of the 24th inst., you are right in supposing that I should prefer to have the present contract terminate not later than the 1st day of July next, and we will have it so mutually understood unless other arrangements are made."

To this Mr. Westinghouse, the president, replied, on the 29th of November, 1887:

"Dear Sir: I am in receipt of your letters of the 24th and 25th. According to the letter of the 25th, we are agreed that your present contract with the company shall terminate the 1st of July next."

In January, 1888, as already stated, the board of directors of the company ratified the action of its president in consenting to the termination of the contract, and Mr. Johnson was notified of the fact. The circuit court held that this correspondence, together with the subsequent ratification by the board of directors, rescinded the contract, in toto, from and after the 1st of July, 1888, and further, that the eighth clause of the contract—

"Did not impose a liability upon the defendant company on the termination of that contract, but merely gave the defendant the right to secure a license to use the Johnson patents, if it elected to take a license. \* \* \* The agreement of the parties, as embodied in their correspondence, is simply that the agreement of September, 1886, should terminate on the 1st of July, 1888. No license was ever taken by the defendant company from Johnson."

Further on in the charge the court said:

"There is evidence in this case tending to show that, after the 1st of July, 1888, and running through the balance of that year, some use was made by

the defendant company of some of the Johnson patented devices. There is no evidence, however, that any of the devices were manufactured by the defendant after the 1st of March, 1888, and such user as was made by the defendant, after that date, of any of these Johnson devices was of articles that had been manufactured while Charles H. Johnson was manager of the concern, and had gone into the stock of the company. In certain instances, some minor parts were made by the defendant company to put the old manufactured devices into complete and operative working order; but substantially all the Johnson devices which the company used after March 1, 1888, were taken out of the old stock of the concern. The company claims that it had a right so to use these articles. Whether the company had such a right it is not necessary for us now to decide. If that use was not rightful, the defendant company is answerable to the plaintiff in an action for the infringement of the patents; but damages for such infringement are not recoverable in this action."

The several assignments of error which have been filed by the plaintiff below may be found in the following objections to the charge of the court: Finding (1) that there was a rescission of the contract, in toto, on the 30th of June, 1888; (2) that clause 8 gave to the defendant merely an option to have a license upon the termination of the contract; (3) that the question of fact whether the defendant had exercised the option should have been left to the jury; (4) that the intention of the parties in agreeing to terminate the contract on the 30th of June, 1888, should have been left to the jury. It is claimed on the part of the plaintiff that the agreement to terminate the contract was intended to be, and was, in legal effect, the same as if the written notice had been given, as provided for in the seventh clause, and that, consequently, under the provisions of the eighth clause, the defendant was bound to pay the license fee from and after the 30th of June, 1888, at the rate of \$6,500 per year. It is also contended by the plaintiff that the original contract provided for just the case shown, and that, upon a total or absolute termination, without any further agreement, the eighth clause would come into operation.

The intention of the parties and the meaning of the agreement to put an end to their former contract are to be gathered from the correspondence which was had between the plaintiff's decedent and the president of the defendant company; and from this it is plainly evident that their purpose was to annul the contract entirely. That they had the power to do this cannot be disputed. It would be a novel doctrine to hold that the parties to a contract, where the interests of third persons are not concerned, are incompetent to alter or rescind it. It was in reply to Mr. Johnson's proposal that Mr. Westinghouse wrote: "We are agreed that your present contract with the company shall terminate not later than 1st of July next,"—thus making a new agreement, which would repeal the old contract on a future day, and release both parties from the terms of the latter. This was the only evidence before the court in reference to this particular matter, and there was no error in the refusal to leave the question of intention to the jury.

The construction which was given to the eighth clause was that it did not impose upon the defendant company the burden of the specified royalties unless it elected to take a license. The same interpre-

tation had been placed upon this clause by the court of appeals of the state of New York, in *Johnson v. Signal Co.*, 129 N. Y. 653, 29 N. E. 964. If this construction be the true one, and we see no reason to doubt its correctness, the termination of the contract according to the manner provided for in the seventh section could have made no difference in the liability of the defendant. The right to take a license would have remained an optional one in any event.

It was insisted upon that the jury should have been permitted to determine whether the defendant had exercised the option of using any of the Johnson inventions after the 30th of June, 1888. The circuit court very properly refused this request. The voluntary agreement to terminate the contract of September 20, 1886, wiped out the whole of it, including the optional clause; and, if the defendant company had, after the date fixed for the termination, used the inventions, it would not have been liable under the terms of a contract which no longer existed, but perhaps might be subjected to suits for infringement.

We have found no errors in the record, and the judgment of the circuit court is therefore affirmed.

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#### TEXAS & P. RY. CO. v. SPRADLING.

(Circuit Court of Appeals, Fifth Circuit. January 21, 1896.)

##### 1. NEGLIGENCE—PLEADING AND PROOF.

Upon the trial of an action against a railroad company for personal injuries caused by collision of a train with plaintiff at a crossing, the negligence alleged being a failure to give the signals required by law, together with general allegations of careless and rapid approach to the crossing, it is not error to admit evidence, developed on the trial from defendant's witnesses, and showing that the engineer and fireman saw plaintiff approaching the crossing in time to have avoided the injury, such facts having been previously unknown to the plaintiff, nor to charge the jury that if they believed that the defendant's employes saw the plaintiff in time to avoid the injury, and did not avoid it, the defendant was guilty of negligence; the charge having elsewhere fairly submitted the question of negligence resulting from failure to give the signals.

##### 2. RAILROADS—SIGNALS AT CROSSINGS.

The statute relating to signals at railway crossings provided that every locomotive should have a bell or a whistle; that the whistle should be blown or the bell rung at least 80 rods from a crossing; and that such bell should be kept ringing until the engine crossed the public road or stopped. The court charged the jury that the statute provided that the whistle should be blown or the bell rung at least 80 rods from a crossing, and be kept ringing or blowing until the engine crossed the road or stopped. *Held* no error.

##### 3. SAME—RECIPROCAL DUTIES.

The court instructed the jury that a person attempting to cross a railroad track has a right to expect that the railroad will give the signals required by law, and if he is without fault, and the neglect of the railroad results in his injury, he can recover, and declined to instruct the jury that neither plaintiff nor defendant had a right to rely upon the other's exercising the care required by law, but it was the duty of each to use the care which a person of ordinary prudence would use. *Held* no error.

**In Error to the Circuit Court of the United States for the Northern District of Texas.**

Mrs. Clara Spradling brought an action in the judicial district court of Dallas county, Tex., against the Texas & Pacific Railway Company, for personal injuries sustained by the alleged negligence of the employes of the defendant company. The cause was removed to the circuit court of the United States for the Northern district of Texas; whereupon the plaintiff filed an amended petition, with the following features: She claimed damages in the amount of \$15,000. She alleged that she was a citizen of Texas; that the railroad of the defendant intersected the public highway from Dallas to Kaufman, about five miles east of Dallas, at a public crossing maintained and recognized by the defendant. On the 15th day of November, 1892, the plaintiff, with "Dock" Brock and a child named Jessie Rogers, was going along the Dallas and Kaufman Road in a two-horse wagon. They were going from Dallas to the home of the plaintiff. It is alleged that the plaintiff, with proper caution, attempted to cross the railway track of the defendant at the crossing above named; but, before she could do so, a westward-bound passenger train of the defendant struck the vehicle. This was totally demolished, and the plaintiff was thrown violently to the ground, and greatly bruised, injured, and shocked. This crossing, on account of the topography of the surrounding country and the conditions and grades of the public road and railroad, is described as dangerous and unsafe. This was well known, the petition states, to the defendant, for often theretofore at that crossing the trains had collided with and injured divers and numerous vehicles and persons. On the occasion when the plaintiff was injured, it is further stated that the employes in charge of the train rang no bell, and blew no whistle, but negligently and carelessly and at a very rapid rate approached the crossing, without giving a warning signal of any kind whatever, to apprise the plaintiff of its approach and her danger. The plaintiff describes her injuries as consisting of two ribs crushed and broken on her left side, two ribs crushed and broken on her right side, her left arm broken below the elbow, her nose broken and crushed, and serious injuries, cuts, and bruises on her head and face, side, and hip, and serious and painful internal injuries in her side and chest. She suffered much pain, and was compelled to take medicine costing \$25. Her medical attendance cost her \$50, and the hire of a nurse \$150. She is a widow, and was 40 years old at the time the petition was filed; and she states that prior to her injuries she was a remarkably strong and healthy woman, attended to her household duties, managed and superintended her farm and stock, earned, by such attention and management, \$500 per annum, and her attention and services were well worth that sum. Since her injuries, she has been an invalid, confined to her bed most of the time, and is wholly unable to attend either to her household duties, or to her farm and stock. She is dependent upon her own exertions for support. All of her injuries are in their nature permanent, and for the rest of her life she will be unable to do any work of any kind for her support, because of said injuries. She will be an invalid, and will require the constant attention of a nurse. She avers that she was guilty of no negligence or want of care herself, but that the negligence and carelessness of the defendant was wanton, gross, regardless of duty to the public and to the plaintiff, and she therefore asks exemplary damages. These are the material averments. For answer, the defendant denies the allegations in the plaintiff's petition, and, by special plea, contends that the plaintiff's own negligent conduct, concurring with the negligence of her companion, one Dock Brock, was the immediate occasion of the accident, which otherwise would not have occurred, and she would not have been injured.

The following evidence was introduced: The plaintiff testified: "I did not hear the passenger train that struck the wagon I was in. In approaching the railway crossing, I heard a whistle. We were then about forty or fifty yards from the railroad crossing when I heard the whistle, and I had the wagon stopped until the train passed, thinking that was the only train that was to pass. The dirt road there is below the grade of the railroad, and

runs parallel with the railroad track to the crossing. After that train passed, we immediately drove onto the crossing, and, just as the wagon got on the railroad crossing, I looked around, and the train struck the hind wheels of the wagon. I did not have time to speak or think. They did not ring a bell or blow a whistle. I had no knowledge of the approach of the train, and thought the train that had just passed was the only train to pass. \* \* \* We had to go up hill to get to the crossing. The crossing is almost right at the end or mouth of that cut. You cannot see an approaching train from the side of the track we were on, coming from the east out of that cut, until you get right on the crossing. The train that had just passed made noise, but this one I did not hear at all. \* \* \* I heard the whistle of the train that passed, and I had the wagon stopped before we went on the crossing, and we waited until it passed. I did not dream of another train, and could not see and did not hear the train that hit the wagon until it was just on us." Dock Brock was driving. He testified that, when he and the plaintiff were about 200 yards from the crossing, they heard a train coming from the east, going to Dallas. They stopped within 75 yards of the crossing for about a minute, and waited for that train to pass. As soon as it passed, they at once drove upon the crossing, going at an ordinary rate of speed, when they happened to turn their heads to the left, and saw an engine of another train coming from the east, and within about 4 or 5 yards of the wagon. The witness stated that when he first saw the engine, the front wheels were just at the south rail of the track; that he struck the horse, and got the front wheels off the track. The train struck the hind wheels, tore them up, turned the wagon over, threw them out, and injured the plaintiff. The first train, which consisted of an engine and caboose, was about two minutes ahead of the passenger train which struck them. "I heard no noise of an approaching train," he states, "until it struck the wagon. I could not possibly have gotten out of the way after I saw it. I used every effort to get the team and wagon off the track. I was crossing said track somewhat slowly until I saw said train. I then made the horses move as rapidly as I could." William Wilcox, the locomotive engineer, a witness for the defendant, testified that it was in violation of the rules of the railway company to run one train after another over the railroad in less than 10 minutes apart. He also stated that the train that struck the plaintiff's wagon gave the usual signal for crossings. He was the engineer in charge of the train. He stated that the train was running 20 or 25 miles an hour, down grade, and it was about dark. He says: "We were about one hundred and fifty feet from the crossing when we first observed the parties on the crossing. I was on the right side of the engine, on the side the parties approached the crossing, and did everything I could to stop the train as soon as I saw them approach the crossing, not only for their safety, but my own. I suppose the cut is about eight hundred feet long." The fireman testified that he saw a two-horse wagon coming up on the track about 1,000 feet from the crossing; that, when they came by the front of the engine, he could see the people; that they did not stop, but that the driver was whipping the horses. Bohannon, Tom Davis, and E. Davis, witnesses for the plaintiff, testified that the view of the train east from the cut is obscured by the cut; that a traveler on the highway cannot see it until he gets directly on the track at the crossing.

The jury found damages for the plaintiff in the sum of \$2,250. The circuit court overruled a motion made by the defendant for a new trial; whereupon the defendant filed its bill of exceptions, with the following assignments of errors: (1) The court admitted, over objection of defendant, evidence tending to show that the engineer and fireman in charge of the engine and train which struck the wagon in which plaintiff was riding saw the plaintiff and the wagon approach the crossing, and that the employes might have stopped the train thereafter in time to have avoided the injury, to all of which defendant excepted, for the reason that there were no allegations in the petition to authorize such evidence, and then and there preserved its bill of exceptions. (2) The court, after instructing the jury correctly, as conceived by defendant, on the issues raised by the pleadings, gave the following charges hereinafter complained of by the defendant, and refused special charges

hereinafter complained of, which were tendered by defendant, as follows: The court charged as follows: "The statute of Texas provides that each locomotive engine shall have on it a bell or steam whistle, and the bell shall be rung or the whistle blown at a distance of at least eighty rods from the place where a railroad shall cross any road or street, and be kept ringing or blowing until it shall have crossed said road or stopped." Defendant excepted to the same, on the ground that the statute provides as follows: "A bell of at least thirty pounds' weight or a steam whistle shall be placed on each locomotive engine, and the whistle shall be blown or the bell rung at a distance of at least eighty rods from the place where the railroad shall cross any public road or street, and that such bell shall be kept ringing until it shall have crossed such public road or stopped." (3) The court charged as follows: "A person attempting to cross a railroad track has the right to expect that the railroad will give the signals required by law, and if he is without fault, and such neglect on the part of the railroad results in his injury, then he can recover;" and thereby committed error, to which defendant excepted, because the use of the expression "has the right to expect" in connection with the words quoted, was a clear error of law, and was most likely misleading to the jury, in that the rights of the parties and their obligations as to the use of a crossing are reciprocal, and call for the exercise of care on the part of each, in no way predicated upon the expectation that the other will not be negligent. (4) The court refused to give defendant's special charge No. 4, as follows: "You are instructed that neither the plaintiff nor the defendant had the right to rely upon each other exercising the care exacted by law of both in the use of the crossing, but it was the duty of each in the use of the crossing to use that care that a person of ordinary prudence would have used under similar circumstances,"—to the refusal to give which charge the defendant excepted, and says the same was material error, in view of the charge hereinafter complained of. (5) The court gave the following charge, requested by the plaintiff: "If the jury believe from the evidence that the agents, employes or servants of the defendant did see the plaintiff at a distance sufficiently remote from the place of the accident; that, by the use of the means and appliances in their hands, they could have stopped the engine they were running before reaching the crossing where the accident occurred, so as to have avoided injuring plaintiff; and further find that they failed to so stop said train,—then and in that event you are instructed that defendant is guilty of negligence, and you should find for the plaintiff,"—to which defendant excepted, because the same tendered an issue nowhere raised by the pleadings or justified by the evidence, and submitted an incorrect proposition of law, in this: those in charge of the engine were, if the issue had been properly tendered, under no obligation to stop the train or engine until the danger of collision was apparent, and the charge contained no such qualification. (6) The court refused defendant's special charge No. 5, as follows: "You are instructed that, in the consideration of whether or not defendant was guilty of negligence, you should confine your deliberations to the issues presented, namely, whether or not defendant failed to give the signals required by law and presented in the general charge of the court, and whether such failure was the proximate cause of the injury. If you conclude that the proximate cause of the injury is to be attributed to any other cause than the failure to ring the bell or blow the whistle, or that plaintiff's negligence contributed thereto, you will find for the defendant,"—to which refusal the defendant excepted, as the said request to charge properly limited the consideration of the jury to the issues presented by the pleadings.

Alexander, Clark & Hall and T. J. Freeman, for plaintiff in error.  
Kearby, McCoy & Hudson, for defendant in error.

Before McCORMICK, Circuit Judge, and BOARMAN and SPEER, District Judges.

SPEER, District Judge (after stating the facts as above). The statute of Texas by which it was intended to avoid casualties at

crossings where the roads of the country intersect railways provides as follows:

"A bell of at least thirty pounds weight, or a steam whistle shall be placed on each locomotive engine, and the bell shall be rung or whistle blown at the distance of at least eighty rods from the place where the railroad shall cross any road or street, and to be kept ringing or blowing until it shall have crossed such road or street, or stopped." Rev. St. Tex. art. 4232.

There was no dispute as to the fact of the accident or the extent of the injuries sustained by the plaintiff, and the controverted issues were: First. Did the defendant disregard its duty as defined by the statute above quoted, and, indeed, the common law? And, secondly, did the plaintiff fail to exercise the ordinary care which might have avoided the accident? The jury determined both of these issues in favor of the plaintiff, and, unless there were, in the conduct of the trial, such errors on the part of the court as will necessarily compel a resubmission of the cause to a jury, the verdict must be sustained. The law relating generally to both of these issues has been recently discussed and defined by the supreme court of the United States in a valuable decision,—*Railroad Co. v. Griffith* (decided November 18, 1895) 16 Sup. Ct. 105; Mr. Chief Justice Fuller delivering the opinion. The statute alleged to have been disregarded, the averments of negligence, and the grounds of defense were in that case substantially the same as in this. There the finding of the lower court in favor of the plaintiff was sustained. It is superfluous to do more than refer to the reasoning of the chief justice and the conclusions of the court in that case.

The exception of the plaintiff in error, to the effect that the court erred in admitting evidence to show that the engineer and fireman saw the plaintiff with the wagon approaching the crossing, and that these employes of the defendant might then have stopped the train in time to have avoided the injury, is not, in our opinion, well taken. It is true that there were no averments in the petition charging the defendant with negligence on that account, but the evidence objected to was given by the defendant's witnesses. From its nature it could not have been known to the plaintiff. The facts were a part of the *res gestæ*, and were therefore admissible, and were otherwise admissible under the several general allegations of negligent, careless, and rapid approach to the crossing.

Nor is the criticism of the charge of the court in the second assignment of error important. The court instructed the jury that the statute provided that the bell shall be rung, or whistle blown, at a distance of at least 80 rods from the place where a railroad shall cross any road or street, and be kept ringing or blowing until it shall have crossed. The plaintiff in error points out that the true language is that the whistle shall be blown or the bell rung at a distance of at least 80 rods from the place where a railroad shall cross any public road or street, and that such bell shall be kept ringing until it shall have crossed. The court merely added the words "or blowing" after "ringing." This inadvertence, if it be such, was favorable to the defendant, for it afforded the railway the choice of two signals where the statute only permitted one;

namely, the continued ringing of the bell. The jury, it seems, found that the defendant did neither.

Exception is also taken to the instruction of the court expressed as follows:

"A person attempting to cross a railroad track has a right to expect that the railroad will give the signals required by law, and if he is without fault, and such neglect on the part of the railroad results in his injury, then he can recover."

This is unobjectionable. It is indeed, stated with more careful regard to the rights of the defendant than seems to have been thought necessary by the supreme court of Texas. In the case of *Railway Co. v. Graves*, 59 Tex. 332, that court declared:

"A person, in approaching a railway crossing, has the right to expect that the railway company will give such signals of an approaching train as prudence and the law require; and if, relying upon this, he attempts to cross the track without knowledge or means of knowledge of the approach of the train, and is injured by reason of the failure of the employes of the railway to perform a duty prescribed by law, then he is entitled to recover."

This is substantially the charge as complained of, save that the instruction of the presiding judge in this case required that the plaintiff herself be without fault. That was a clear indication of the reciprocal duty of ordinary care on the part of the plaintiff.

The plaintiff in error further insists that the court should have given the jury the following request to charge:

"You are instructed that neither the plaintiff nor defendant had the right to rely upon the other exercising the care exacted by law of both in the use of the crossing, but it was the duty of each, in the use of the crossing, to use that care that a person of ordinary prudence would have used under similar circumstances."

This is the converse of the instruction of which complaint is made in the assignment of error last discussed. Since we think the instruction there complained of was proper, it follows that this request was erroneous. Since both parties are charged, we think, with the mutual duty of keeping a careful lookout for danger, and since the degree of diligence to be exerted on either side is such as a prudent person would exercise under the circumstances of the case endeavoring fairly to perform his duty, each has the right to expect that the other will do his duty. This language does not import that either is absolved from the duty of ordinary care. To illustrate, an engineer may perceive a person driving a wagon approaching a crossing. His train, let us say, is running at a high speed, to conform to the requirements of the schedule for trains as prescribed by the company. When he gives the appropriate signal for the crossing, he has the right to expect that the person in control of the team will not drive on the track, but will stop. The engineer surely need not stop every time he sees an approaching team. And if, without fault on his part, collision results, the railway company will not be liable for the damage. It follows that one driving the wagon has the right to expect that the engineer will give the signal. If care is taken to listen to the signal, and none is heard, and, not aware of the approaching train, the wagon is driven on the track,



and the collision results, the railway company will be liable. Besides, in this case the duty of each party was elsewhere distinctly set forth, in the general charge of the court.

In the fifth assignment of error, complaint is made that the court charged the jury:

"If the jury believe from the evidence that the agents, employés, or servants of the defendant did see the plaintiff at a distance sufficiently remote from the place of accident that, by the use of the means and appliances in their hands, they could have stopped the engine they were running before reaching the crossing where the accident occurred, so as to have avoided injuring the plaintiff, and further find that they failed to so stop said train, then and in that event you are instructed that the defendant is guilty of negligence, and you should find for the plaintiff."

It must be observed that this instruction is to be construed in connection with other portions of the charge, which, in our opinion, fairly submitted to the jury the question of negligence resulting from the failure, to give the signals for the crossing, required by law. In the absence of specific allegations of negligence based upon the failure to stop the train after the wagon of the plaintiff was seen, the defendant might with more propriety complain of this charge, were it not for the fact, that the plaintiff's case is primarily based on the failure to give the signals as the proximate cause of the injury. It is to be observed that the facts upon which this charge was based were brought out in the defendant's testimony, namely, in the evidence of the engineer and the fireman. The plaintiff could by no possibility have foreseen that this feature of the case would be presented, and therefore should not be deprived of its legal effect on the minds of the jury because she omitted to refer to it in her petition. This feature was an unforeseen contingency of the trial. If the defendant having failed to give the signals at the time and place required, and its employés, at a distance of 1,000 feet from the crossing, perceived the plaintiff going on the track, a double duty devolved upon the employés to do all in their power to stop the train. If, then, they could stop the train, and did not, it was negligence of the gravest character. They were obliged to conclude that the danger was apparent, because they must have concluded that, in the absence of the danger signals, the persons in the wagon were satisfied of their own safety. If, then, the engineer neglected this duty, it was an incident of negligence which the jury might consider in view of the general averment as to the very rapid, reckless, and careless manner in which the crossing was approached.

For the same reason, we have concluded that the sixth assignment of error is not of sufficient importance to reverse the action of the court below, which, in its entirety, sufficiently conserved the rights of the defendant, and accorded only moderate compensation for the painful and permanent injuries sustained by the plaintiff. For these reasons, the judgment of the court below is affirmed.

## UNITED STATES v. McCORD et al.

(District Court, W. D. Wisconsin. November 26, 1895.)

## 1. CONSPIRACY UNDER FEDERAL STATUTES.

The statutes of the United States do not define what a conspiracy is, or create any new offense. They merely recognize the crime of conspiracy as known to the common law, and the courts must go to the common law to determine what it is. The statutes, however, impose one limitation upon the common-law crime, namely, that there must be some overt act.

## 2. SAME—STATUTE OF LIMITATIONS.

A conspiracy to defraud the United States by making unlawful entries of public lands cannot, for the purpose of avoiding the statute of limitations, be split up into different conspiracies for each section of land entered or for each overt act done; nor can it be held that there is a new conspiracy by the parties to the original conspiracy, whenever a new party is brought into the scheme, so as to make the statute of limitations begin to run from that time.

This was an indictment against Warren E. McCord, Arthur R. Osborn, Harry J. Box, Robert C. Heydlauff, Gussie L. Andrews, and James B. Murray, charging that, on the 23d day of October, 1891, the said defendants unlawfully conspired together, and with divers other persons, to defraud the United States of its title and possession and dominion over certain unappropriated lands belonging to the United States, which are fully described in the indictment. There was also joined in this indictment a count for a conspiracy to commit perjury, but this count was nolle by the prosecution. The indictment was filed October 13, 1894. At the trial, after the evidence for the government was completed, the defendants moved the court to direct a verdict for the defendants, mainly upon the ground that the prosecution was barred by the three-years statute of limitations, prior to the filing of the indictment.

The proof introduced by the government showed that in December, 1890, or January, 1891, the defendant McCord had an interview with the witness Day, to the effect that the latter should obtain homestead settlers to go to the land office at Ashland, in April, 1891, when the lands were to be offered for homestead entry, and have them make applications for homestead entries, and that McCord would furnish the money to pay their expenses, cost of living, cost of necessary homestead improvements, and for land-office fees, and necessary fees in case of contest, and for these sums was to have security upon the land when obtained by the homesteader.

In the latter part of March, 1891, defendant McCord wrote a letter to Mr. Day, as follows:

"I am interested in the lands that are coming in at Ashland April 17th, and can get you a homestead in this way: You go there Tuesday, April 7th, and I will get you a place in the line, and then I will pay half of all the expenses, and you pay half, and let your family go and live on it, and when you prove up you have half the profits and I half. We will allow the family so much a month to live on while they are there, and charge so much to get the estimates,—about \$25, I think,—then the expense of making out papers and your expenses while filing, and then divide in the end."

In the early part of April, 1891, the defendant Box went to the house of the witness Hobbs, and represented to Mrs. Hobbs that if her husband would take up a homestead when the lands should be offered at Ashland, in April, 1891, McCord would pay the expenses, and would expect to have one-half

the land and timber in return for the payment of such expenses. Mr. Hobbs, however, did not make any homestead application. In April, 1891, Mr. Day went to Ashland, in pursuance of the understanding had with McCord, and procured homesteaders to get into line at the windows of the Ashland land office, for the purpose of making applications for homesteads. This was done expressly under the previous understanding with McCord, and these men so procured to stand in line were expected to come into the arrangement which McCord had made with Day. Before the time of entry arrived, the secretary of the interior suspended the sale, on the ground that violence and bloodshed were apprehended, and later the lands were again opened for settlement, on the 2d day of November, 1891. In the latter part of September or first part of October, 1891, Mr. Day arranged with the defendant James B. Murray to go to Iron River, Wis., in the vicinity of the lands in question, and make an entry upon land that would be pointed out to him by Day, and under which arrangement Murray was to be furnished with the entry fee, to be paid for his living expenses while on the land, for his improvements, and also for contest fees in case of a contest, and was then to give security to McCord upon the land so entered. Murray accordingly went to Iron River about the 23d of October, 1891, and thereafter made the homestead application mentioned in the first count of the indictment, which was forwarded to Ashland, and filed November 2, 1891. Murray made a settlement upon the land, and improvements, and a contest was had in May, 1892, in the land office, the expense of which was paid by the defendant McCord, and which was decided in favor of Murray. On May 18, 1892, the following written agreement was entered into between McCord and Murray:

"This agreement, made and entered into by and between James B. Murray, of Bayfield county, Wisconsin, party of the first part, and A. R. Osborn and W. E. McCord, parties of the second part, is as follows: The first party hereby agrees and binds himself to build a house and make such other improvements upon as may be necessary, and move onto and maintain a residence on [here follows description of lands], and as soon as he receives a final receipt on the same to pay to the party of the second part the sum of two hundred and fifty dollars for the numbers, and ten per cent. interest on all moneys furnished him to live, etc., or to give second party security for same on above-described land. And the second party agree to furnish fifty dollars to build a house, five dollars per month to live on, and to pay the attorney fees and land-office fees in Ashland and Washington.

"James B. Murray."

In 1893 the defendant Murray relinquished to the government his homestead rights under his settlement, and the land was entered under the stone and timber act by one Hoover. No testimony was given on the part of the defendants, but, at the close of the case made by the government, a motion was made on the part of the defendants to direct a verdict for the defendants, on the ground that the statute of limitations of three years had run upon the prosecution before the filing of the indictments.

H. E. Briggs, U. S. Atty., and James G. Flanders, for the United States.

Spooner, Sanborn, Kerr & Spooner, Chas. Felker, and Lamoreux, Gleason, Shea & Wright, for defendants.

BUNN, District Judge (charging jury). Had not the questions raised by the evidence in the case made by the prosecution been very thoroughly argued, and abundance of authority produced, the court would hesitate to decide finally upon them at this stage of the trial, but would submit the case to the jury, and reserve the questions for further and more elaborate consideration; but according to the view which the court takes of the case, it would be very doubtful whether the court would get any further light

if these questions were to be reserved for further consideration upon a motion for a new trial, in case a verdict should go against the defendants, or any of them. The case has been argued with much thoroughness and ability on both sides, and I do not know but the court is about as well prepared to dispose of the case now as it would be at any time in the future. The separate and distinct motions in favor of the defendants Heydlauff and Mrs. Andrews will be overruled, on the ground that, while the evidence is not so strong against them or either of them as against the other defendants, the court cannot say but what there is some evidence which ought to be submitted to the jury, if the case is to go to the jury at all. However, I may say this: that as far as the case of Mrs. Andrews is concerned, the evidence showing that she was a mere clerk or secretary of Mr. McCord in this whole transaction,—nothing to show that she had any interest in it herself, or was to share in the proceeds, or that she was originally a party to the conspiracy, except as acting there as clerk for the defendant McCord,—I should have considerable doubt about the evidence being sufficient to support a verdict against her, and if her case rested upon that proposition alone, I should wish to look a little further into the evidence, to see whether there was evidence which should go to the jury or not. I would want a little further light on the question how far a clerk, or person acting as a mere secretary, and perhaps knowing something about the unlawful intent, but having no interest in the conspiracy, and not being an original party to it,—how far she could act with guilty knowledge, if the transactions of her principal were unlawful, without connecting her with the case. But, as the court said, it will overrule the motion, so far as these two defendants are concerned,—the separate motion in favor of discharging them,—on the ground that they are not sufficiently connected with the conspiracy, because I think the case may be satisfactorily disposed of upon the other motion, which is to direct a verdict in favor of all the defendants, on the ground that the government has not made a case under the law. That is my deliberate judgment,—that the government has not made a case under the law.

It is incumbent upon the prosecution in a criminal case to show that a criminal act has been committed within the time limited by the statute of limitations,—that the statute of limitations has not run upon it. It is incumbent upon the government to show,—and the rule is different in criminal cases from what it is in civil cases, where the statute of limitations is held to be a defense, and must be pleaded,—it is incumbent upon the prosecution, as an affirmative proposition in a criminal case, to make a case that is satisfactory to the jury, on which the statute of limitations has not run. In a criminal case under the United States statutes it is incumbent on the prosecution to show that an offense has been committed within the three years immediately preceding the finding of the indictment or the commencement of the prosecution, by information or otherwise. Now, in the judgment of the court, that has not been done in this case. Even if you allow that what

is claimed here on the part of the government attorneys is true,—and I cannot concede it; I think they are all wrong on that,—I do not think this thing can be split up, and make a dozen or a hundred conspiracies out of one, so that for every overt act a separate indictment for conspiracy can be filed or maintained; that is not my idea of conspiracy at all. But allowing that to be so,—allowing that this evidence is all introduced as bearing (this evidence of the conspiracy in the spring of 1891),—allowing that that is all introduced, and intended to be introduced, on the part of the prosecution, simply as bearing on the question of the intent of these parties in reference to the entry of this land by Murray in the fall,—allowing that to be so, it seems to me that the case for the government is not brought within the requirement of the law. It is true that the witness in one place says that this was in October, 1891. The indictment was found on the 13th of October, 1894. It ought to appear affirmatively by the government, before it can ask a verdict at the hands of this jury, that Murray was brought into this matter after the 13th of October, 1891. Now, that does not appear from any of the evidence. Some of the evidence, on cross-examination, shows that it was in September. The witness says it was either in September or October, and in another place in October, he cannot tell what time; he thinks it was about the 20th. Now, that is not evidence that it was after the 13th of October. The best that can be said in favor of the government is that it has left it in extreme doubt as to whether the statute of limitations has not run upon this case; and that ought not to be so. The witnesses ought to have known—somebody ought to have been able to testify—that this conspiracy was formed and entered into, and an overt act committed, after the 13th of October, 1891. It is maintained on the part of the government attorneys that this evidence—the principal evidence in regard to the conspiracy, relating to the winter and the early spring of 1891—was introduced as simply bearing upon the question of the intent of these parties in forming a distinct conspiracy in the fall, about the time these lands came into market for homestead entry. Certainly the court did not understand that this evidence was introduced for any such purpose, and if it had been offered for that purpose, and objection had been made to it, it seems quite clear to the court that it must have been ruled out. You cannot prove one conspiracy in order to show that another has been committed. It is said that the evidence was admitted without objection. Suppose it was. I think the court must presume that it was admitted to prove (what it evidently tends to prove) that defendants formed a general conspiracy in the spring of 1891 to enter these lands, without regard to any particular description,—to enter these Omaha reserved lands, fraudulently, against and in violation of the statutes of the United States. If it does not show that,—if the government case does not show that,—I do not know what it does show. That is what the court has had in mind ever since this trial commenced,—that the evidence was directed to show that this conspiracy was formed

in the spring of 1891. Now, then, it is very doubtful in my mind, if you take the position that the counsel for the government takes,—that this was introduced merely for the purpose of bearing upon the question of intention,—whether there is sufficient evidence in the case to show a distinct conspiracy in regard to this particular quarter section of land that Murray made application to enter in the fall of 1891. I hardly think there is; but it is perfectly clear to my mind that the counsel are wrong in their propositions of law. It seems to the court pretty clear that the statute of limitations, under the evidence, had already run upon this case when the indictment was found; the three years had already run. It is not the fault of the attorneys for the government that this is so. They made all of this case that anybody could make; they have made all the case that the law and the facts warranted; but it seems to me that the facts and the law are against them.

There is no doubt in the mind of the court—the authorities are all to that effect—that the gist of an action for conspiracy under the statutes of the United States is the same as it always was at common law. The statutes of the United States do not undertake to define what a conspiracy is, or to create any new offense. They merely speak of the crime of conspiracy as a crime already recognized by law, and we have got to go to the common law and the decisions of the English and American courts to find out just what a conspiracy is, and what the limitations are. All the provision extra is that in order to complete the offense, so that an indictment will lie, there must be some overt act. The congress of the United States, as well as the legislatures of most of the states, have modified the common law to that extent,—that in order to be indicted and punished for conspiracy, the gist of the offense being an unlawful combination, there must be an overt act. Such grace is allowed by the statutes of several states and by the law of congress to the defendant,—that there must be some overt act. Any overt act, however slight, intended to effectuate the object of the conspiracy, and whatever its character may be, whether it is itself criminal or perfectly innocent in its nature, is sufficient to fix the offense and to make it indictable. Now, it seems to me the material question in this case is, when the statute of limitations commenced to run, whether these defendants might have been indicted, under the evidence of this conspiracy, in the spring of 1891; and that they might, seems to me quite clear from the testimony. In fact, the most damaging testimony in the case—nearly all the testimony in the case tending to show any original conspiring together or illegal combination between these different defendants—relates to a time prior to the three years previous to the filing of this indictment; that is, it relates to the late winter and early spring of 1891, when it was supposed that this land was to come into market, and lines of men were formed to homestead it. The letters of Mr. McCord to Mr. Day, who was acting as his principal agent in regard to the matter,—perhaps the most damaging evidence that has been introduced in the case against these defendants,—were written in March, 1891, and near-

ly all the other evidence tending to show the formation of a conspiracy for this illegal object of entering land contrary to law, and dividing the profits, relates to the spring of 1891. Now, then, the court cannot presume that this evidence was not introduced for the purpose of showing that a conspiracy existed then, when that is the evident effect of the evidence, and all the effect that it does have. If it was not introduced for that purpose, it is difficult to see why it should have been introduced at all. It is perfectly clear to the court that the evidence tends to show a conspiracy in the spring of 1891, and various overt acts in March and April, 1891, such as hiring men to go into line, hiring agents to procure them, and getting the men in line, and getting other men out of the line to put their men in, and all that kind of thing, that showed acts intended to effectuate the object of the conspiracy. Now then, it seems to me very clear that the statute began to run some time in March or April, 1891, on this offense, and it is a proposition that the court cannot give its assent to, that this transaction can be divided up into different conspiracies. It is admitted by plaintiff's counsel that these men might have been prosecuted, and that an indictment might have properly been found, in April, 1891. At the same time, they maintain that these acts of conspiracy in bringing in different persons to enter this land at subsequent periods may be divided up, and a separate prosecution maintained for every quarter section or piece of land that was entered; and for every man that was brought in there was a new conspiracy. I think the more rational doctrine is that the evidence shows, so far as it shows anything, that there was a conspiracy formed in the spring of 1891, and that overt acts various in number were committed or done under it to effect the objects of the conspiracy, and that the statute, as to these defendants, commenced to run at that time, and that the bringing in of Murray after the land was brought into market in the fall of 1891 was a mere carrying out of the original conspiracy,—a mere additional overt act in furtherance of the original illegal combination. That is all it amounts to. It did not amount to a separate conspiracy.

I have no doubt that the statute of limitations has stood in the way of this prosecution from the first, and that counsel for the government have felt the difficulty. They admit that the indictments may properly have been found in March, 1891; that the conspiracy to defraud the government was then formed by the defendants, and various overt acts performed intended to effectuate its objects. If this be so, it is difficult to see why the statute did not then begin to run. Otherwise, you would have a different period of limitation in conspiracies from what you have in other offenses against the government, which could not have been the intention of the law. The purpose evidently was to make a uniform rule, applicable to all offenses of the same grade. Counsel no doubt anticipated this difficulty, and sought to avoid it by alleging an overt act committed on October 23, 1891, so as to avoid the claim of the running of the statute. Now, to make good this contention, it is claimed that a conspiracy is a continuing offense.

No doubt a conspiracy is a continuing offense in this sense: that whenever an individual comes into the conspiracy, however late, he is considered as adopting all the previous acts of his co-conspirators, and is liable in the same degree with them. But that it is a continuing offense in the sense that, as to the first and original parties to the conspiracy, this statute begins to run anew from the time of the commission of every overt act, is a contention that the court is unable to affirm. It may be true that, as to Murray, who it is alleged was brought in to homestead a quarter section on October 23, 1891, the statute would not begin to run until he became a party to the conspiracy. The court does not decide that question, because it is not before the court, Murray not being on trial; but as to the defendants who the evidence for the prosecution is directed to show originated the conspiracy in March and April, 1891, and committed overt acts to effectuate its object, it seems pretty clear that the statute began to run from the time the first overt act was committed, some three years and eight months previous to the finding of the indictment. They would, of course, still be liable to prosecution for any distinct illegal act, like causing an entry to be made contrary to law, by which the government was defrauded, or procuring false affidavits to be made. The statute would run upon such distinct acts from the time of their commission, independent of when the conspiracy was originated and formed.

It is maintained here by counsel, but I do not think with much plausibility, that this is a question of fact that ought to be submitted to the jury. That might be so, if the evidence was conflicting. That rule would apply if the defendants' evidence was in, and there was a conflict of testimony upon these different points. Of course, then it would have to be submitted to the jury, but that is not this case. The whole case rests upon the testimony made by the prosecution. There is no conflict of testimony in the case made by the prosecution. It would not be proper for the counsel to claim that there is any conflict in the testimony, the defendants not having put in any testimony at all. It would not be for the interest of the prosecution to maintain that, and they do not claim it. Then the question is simply a question of law, and however much the court might be willing to shift the responsibility of deciding this case upon the jury, the court does not feel that it ought to do so. The responsibility must be taken and met wherever it properly belongs, and in the mind of the court the motion raises a pure question of law. Suppose this question should be submitted to the jury, and they should find that there was a separate conspiracy made in the fall of 1891, on which the statute of limitations had not run. Could the court say, on a motion for a new trial, that there was sufficient evidence to support such a verdict as that? I think not. I think the whole tendency of the evidence (and there is no conflict in it) is to show that the conspiracy was one indivisible thing, and was formed in the spring of 1891. Of course it was not consummated. It may never have been consummated. It is not necessary, in order to punish for a conspiracy, that it should be con-



summated; and while the counsel maintain the proposition that there can be no punishment until the object of the conspiracy is effected, that proposition is not maintainable. That is a contention that cannot be allowed for a moment, because there is nothing clearer, under the authorities, than that it is not necessary, to maintain an indictment for conspiracy, to show that the object of the conspiracy has been accomplished. All that is necessary to show is the illegal combination, and an overt act intended to effectuate the object of the conspiracy. I think it is the clear duty of the court to direct a verdict in favor of all the defendants, on the ground that the government has not made a case against any of them, and it will be so ordered.

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SHAW, Collector, v. DIX et al.

(Circuit Court, D. Maryland. January 22, 1896.)

CUSTOMS DUTIES—DESTRUCTION OF SPECIFIC ITEMS OF INVOICE—COCOANUTS IN BULK.

Two cargoes of cocoanuts in bulk were imported, invoiced at specified prices per thousand. On discharging, the number of cocoanuts fell short of the number stated in the invoice, the missing quantity appearing to be contained in a mass of broken and rotten cocoanuts not countable. *Held*, that such shortage, resulting from the entire destruction of specific items of the invoice, was not a damage to the merchandise, under section 23 of the act of June 10, 1890, for which no allowance could be made unless it amounted to 10 per cent. of the total quantity of the invoice, but that duties could be exacted only on the number of cocoanuts actually received as merchandise, excluding the worthless debris. *U. S. v. Bache*, 8 C. O. A. 258, 59 Fed. 762, distinguished.

Appeal by the United States from a Decision of the Board of General Appraisers Reversing a Decision of the Collector of the Port of Baltimore.

William L. Marbury, U. S. Dist. Atty., and H. Snowden Marshall, Asst. U. S. Dist. Atty., for the collector.

M. Starr Weil, for appellees.

MORRIS, District Judge. *Dix & Wilkins*, the appellees, imported into the port of Baltimore, in 1884, two cargoes of cocoanuts in bulk, invoiced at specified prices per thousand, according to sizes. On the discharge of the cargoes the number of cocoanuts fell short of the number stated in the invoices, and this shortage the government officers accounted for by an estimate that the missing quantity was contained in a mass of broken and rotten cocoanuts, not countable. This mass of offensive, decaying vegetable matter was of no value, and the importers were required to have it carted off and thrown away. The collector exacted duties on the whole number of cocoanuts specified in the invoices, deciding that section 23 of the act of June 10, 1890, was applicable, and that under the ruling in *U. S. v. Bache*, 8 C. C. A. 258, 59 Fed. 762, the shortage was a damage to the merchandise for which no allowance could be made, as it did not amount in either case to 10 per cent. of the total quantity of the in-

voice, and there could, consequently, be no abandonment to the United States, as required by that section. The importers duly protested, claiming that they asked for no allowance for any damage to the cocoanuts which actually arrived, and desired to pay for all cocoanuts discharged from the vessels, whether sound or damaged, but that the mass of matter which remained after discharging the cargo represented cocoanuts which, having rotted and been broken up during the voyage, ceased to be merchandise of any kind, and should be treated as lost or destroyed by accident during the voyage. Gen. Reg. §§ 906, 922.

It is quite true that the allowance for damage to imported goods is expressly regulated by section 23 of the act of June 10, 1890; but it is true now, as it was before that act was passed, that duty is not to be assessed on an article which does not arrive in this country. *Marriott v. Brune*, 9 How. 619. As to perishable fruits, imported in boxes, cases, or bags, and of which some in each package decay during the voyage, it may be held that the loss cannot be ascertained except by an estimate of the loss of value to each package by the decay of some of its contents, and as the invoice would call for so many packages, it might fairly be said that all the packages were imported, but in a damaged condition, and of an impaired value. In such a case, no doubt, section 23 would apply. But if any packages were broken up, and the contents reduced to a worthless mass, it could not be fairly said that those packages arrived at all, or that duty could be exacted in respect to them. With respect to cocoanuts imported in bulk, it would appear that those which rotted and were broken up on the voyage, and became mere worthless debris in the hold of the ship, are a total loss. They are not a damage to the value of what remains, but they lessen the number which the importer receives. If this worthless material could be separated from the cargo while at sea, and thrown overboard, the importer would be better off, because he would be saved the expense of having the stuff hauled away to the dump after the cargo is discharged.

In *U. S. v. Bache*, 8 C. C. A. 258, 59 Fed. 762, the facts presented raised a very different issue. The importation was glass in cases or packages, and a considerable breakage of glass in the cases occurred during the voyage. The cases all arrived. The contents were not destroyed, but were damaged. It was clearly a case within the language of section 23, and no question would have arisen but for the fact that "broken glass fit only to be remanufactured" was by law exempt from duty, and admitted free. The importer claimed that as, during the voyage, a portion of each case became broken glass, its character as merchandise was changed, and it became an article specifically exempted from duty, and entitled to come in free, and that it made no difference that the dutiable and nondutiable goods happened to come into this country in the same box. He claimed that he was chargeable with duty on the merchandise as it came into this country and not as it was when it was put aboard the ship in the foreign port. It was held by the circuit court of appeals for the Second circuit that, congress having enacted a general statutory system for the ascertainment of the damage to imported goods, and for allow-

ance in respect to such damage, it could not be supposed that damages to importations of glass were to be exempted out of that general system simply because importations of broken glass had been put on the free list, and held that there was nothing indicating an intention by congress to take the one article of glass out of the general system. The general system provides that, if the damage amounts to 10 per cent. of the total invoice, the importer may abandon any portion of the invoice and be relieved from the duties on the portion so abandoned.

I think it is clear that the board of general appraisers was right in holding, in deciding the present case, that this section contemplated a case where there remains something to be abandoned, in the sense of being impaired in value, but that it is not applicable to a case where specific items of the invoice have been so entirely destroyed as that, in reckoning up to the items of the invoice, they cannot be counted, and where the destroyed items are valueless, and there remains nothing which can be the subject of abandonment. Section 23 of the act of 1890 is not inconsistent with the general provisions of section 2921 of the Revised Statutes, nor with sections 906 and 922 of the General Regulations, providing that, if the quantity which arrives is less than the invoice, there may be an allowance for the deficiency. In the present case it was not possible for the appraisers to say what number of cocoanuts was contained in the mass of debris remaining after the discharge of the cargo. It was estimated that this mass contained the difference between the number discharged and the number stated in the invoice. But the number specified in the invoice is not the result of an accurate count, the nuts being often brought on board in small boats through the surf, so that it is not possible to say with any accuracy what number the mass of debris did represent. It is quite manifest that there is no ground for the contention that section 23 is applicable to this case. The decision of the board of general appraisers is sustained.

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J. L. MOTT IRON WORKS v. CLOW et al.

(Circuit Court, N. D. Illinois. February 18, 1896.)

COPYRIGHT—ILLUSTRATIONS IN TRADE CATALOGUE.

Under Act Cong. 1874, limiting the right of copyright to such cuts and prints as are connected with the fine arts, there can be no copyright on cuts contained in a trade catalogue, and not offered for copyright or to the public as works of fine art.

In Equity. On demurrer to bill.

Suit for injunction by the J. L. Mott Iron Works against J. B. Clow & Son.

Hamline, Scott & Lord, for complainants.

Newman, Northrup & Levison, for defendants.

GROSSCUP, District Judge. The bill is to enjoin infringement by defendants of complainants' copyright. The complainants, who

are manufacturers of bath tubs, have issued, from time to time, advertising sheets containing a description of their porcelain baths, the dimensions and prices of the same, and such other information as people in that trade are interested in. The sheets also contain cuts or prints of such baths as are offered to the trade. The defendants, engaged, among other things, in a like business, have also, from time to time, issued advertising sheets or books containing like information, and, in some cases, closely copying the prints or cuts of baths contained in complainants' sheets. A comparison of the exhibits makes it pretty manifest that some of these cuts or prints of the defendants have been copied by photographic processes, or otherwise, from the complainants' cuts or prints; and it is so averred in the bill. The defendants demur to the bill, for the reason that the matter therein set forth is not, in law, a proper subject-matter of copyright.

The cuts or prints shown in complainants' sheets, in connection with their ornamental settings, may have such artistic merit as would support a copyright if offered as a work of fine art. The statutes, as amended by the act of 1874, limit the right of copyright to such cuts and prints as are connected with the fine arts. But the bill does not show that the author or designer intended or contemplated these cuts and prints as works of fine art. No copyright was asked upon them separately from the advertising sheet of which they are a part. They are not offered to the public as illustrations or works connected with the fine arts, but are adjuncts simply to a publication connected with a useful art. The court will not supply an intention that the author or designer has not avowed, or give to the cuts or prints a character and purpose different from what their surroundings indicate.

The demurrer will therefore be sustained.

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#### INTERNATIONAL TOOTH-CROWN CO. v. BENNETT.

(Circuit Court, E. D. New York. February 14, 1896.)

1. ASSIGNMENTS OF PATENTS—ADMISSIBILITY OF COPY OF PATENT-OFFICE RECORD.

A certified copy of the patent-office record of an assignment taken on notice, but in the absence of defendant's counsel, will not be excluded on final hearing, where no objection was made to its admissibility when offered, and no motion was afterwards made to suppress it.

2. VALIDITY OF PATENTS—PRIOR USE—ARTIFICIAL TEETH.

The Low patent, No. 238,940 for a method of permanently fixing artificial teeth to the mouth, by bands around the natural teeth, *held* invalid on proof of prior knowledge and use.

This was a bill in equity by the International Tooth-Crown Company against Allen G. Bennett for alleged infringement of a patent relating to artificial teeth.

James C. Chapin and Edwin H. Brown, for plaintiff.

Charles K. Offield, for defendant.

WHEELER, District Judge. The bill alleges ownership by the plaintiff and infringement by the defendant of patent No. 238,940,

dated March 15, 1881, and granted to James E. Low, for a method of permanently fixing artificial teeth to the mouth by bands around the natural teeth, in dentistry. The answer, among other things, denies knowledge, and prays strict proof, of ownership; and sets up various anticipations. At one place, a certified copy from the record of an assignment in the patent office was put in evidence taken on notice, but in absence of defendant's counsel. This is objected to now as insufficient. It would have been inadmissible on objection then, and perhaps have been suppressed, on motion, afterwards (*City of New York v. American Cable Ry. Co.*, 9 C. C. A. 336, 60 Fed. 1016); but, as it has been left as evidence in the case, its inadmissibility has been waived, and on that waiver it seems to be sufficient.

The patent was before WALLACE and SHIPMAN, JJ. (*Tooth-Crown Co. v. Richmond*, in the circuit court for the district of Connecticut, 30 Fed. 775), and sustained. Of course, everything decided there is to be considered as settled here.

The method is wholly mechanical, and is said now, in view of *Locomotive Works v. Medart*, 158 U. S. 68, 15 Sup. Ct. 745, decided since, not to be patentable; and defenses of prior knowledge and use by Dr. Day and by Dr. Beardsley, not before the court then, are relied upon now. When the method, and not the operating parts, is what is invented, that, of course, is what is to be patented. Here the natural teeth belong to the wearer, and are to be operated upon; they are not made by the inventor to operate, and cannot be brought within the patent. The bands were not new, in any sense, alone; nor were they, when combined with the artificial teeth merely; but the mode of attaching the artificial to the natural teeth permanently by the bands might have been; and, if so, that was what was invented, and what should be patented. This method is thus described in the specification:

"A band of gold or other suitable metal is first prepared and accurately fitted around the tooth adjacent to the vacant spaces to be supplied with an artificial tooth. This band is firmly secured in place by cement, which effectually excludes water or the fluids of the mouth, and is thus permanently attached to the tooth, so that it cannot be removed without an operation directly for that purpose. It is sometimes sufficient to prepare one of the adjacent teeth in this way; but generally it is desirable to prepare the adjacent teeth on each side of the vacant space. It will always be advisable to do so if the vacant place is to be occupied with more than one tooth." "The formation of the mouth, and the shapes and position of the teeth, are so various with different individuals that my invention may require modification in various particulars in applying it. I therefore do not propose to limit myself to the details as shown, but consider that my invention includes the permanent attachment of artificial teeth by securing them to continuous bands permanently attached to adjoining teeth supported upon natural roots, and supporting said artificial teeth by said attachments without dependence upon the gum beneath said artificial tooth."

The claims are for:

"(1) The herein-described method of inserting and supporting artificial teeth, which consists in attaching said artificial teeth to continuous bands fitted and cemented to the adjoining permanent teeth, whereby said artificial teeth are supported by said permanent teeth without dependence upon the gum beneath. (2) An artificial tooth cut away at the back, so as not to present any

contact with the gum except along its front lower edge, and supported by rigid attachment to one or more adjoining permanent teeth, substantially as and for the purpose set forth."

This method, as such, would be as well practiced and shown by the attachment in that way of one side of one tooth or one end of a block of teeth, to one natural tooth, as by so attaching each side of the single artificial tooth, or each end of the block, to a natural tooth. The method of each attachment to a natural tooth is, by the terms of the patent, precisely the same. A band extending upward so as to form a cap over the natural tooth would be none the less a continuing band of the patent, when used as such in carrying out this method. The alleged infringement was done only by such use of such a cap. Dr. Day testifies to soldering a silver cusp to a silver band, making a cap, which was permanently attached to a natural tooth of a patient, and to which an artificial tooth was attached. This testimony is supported by that of an assistant learning the profession, that of an intimate acquaintance of the patient, and the production in evidence of the work, kept after long wear. Dr. Beardsley testifies to making a similar cap of gold and attaching it to a natural tooth of a patient, wife of a clergyman, and to attaching at first an artificial tooth at one side of the cap, and afterwards another on the other side, which were worn, and gave satisfaction, several years. In this he is corroborated by an assistant, also learning the profession, and by the patient, her two daughters, and one of her Sunday school scholars. There is nothing so improbable about this testimony, which is left wholly undisputed, as to leave any fair doubt as to the occurrences, or their date, both of which preceded Low's invention. The method of either seems to be the method of the patent, and either seems to well have anticipated it. Let a decree be entered dismissing the bill.

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HAMMOND BUCKLE CO v. WELD et al.

(Circuit Court of Appeals, First Circuit. February 14, 1896.)

No. 145.

1. PATENTS—COMITY BETWEEN CIRCUIT COURTS OF APPEAL.

Quære: Whether, and how far, the circuit court of appeals of one circuit should be controlled by a decision of the circuit court of appeals of another circuit upon the question of the validity of a patent.

2. SAME—VALIDITY AND INFRINGEMENT.

The Hammond & King patent, No. 301,884, for an improvement in shoe clasps for arctic overshoes, must, in view of the prior state of the art, be limited, in respect to claims 1, 2, and 3, to the specific combination which is described in claim 4. *Held*, therefore, that these claims were not infringed by defendant's buckle; and *hæc*, further, that claims 2 and 3 are void for want of patentable invention.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

This was a suit in equity by the Hammond Buckle Company against George A. Weld and others, for alleged infringement of

letters patent No. 301,884, issued July 15, 1884, to Hammond & King, for an improvement in shoe clasps for arctic overshoes. The circuit court dismissed the bill; its action being apparently based upon the decision of the circuit court of appeals for the Second circuit in *Hammond Buckle Co. v. Goodyear Rubber Co.*, 7 C. C. A. 276, 58 Fed. 411, wherein the patent was given a narrow construction. The complainant appealed, and in this court one of the contentions was in respect to the effect which was to be given by this court to that decision.

George W. Hey (Arthur E. Parsons, on briefs), for appellant.

James J. Storrow, Jr. (William K. Richardson, on briefs), for appellees.

Before PUTNAM, Circuit Judge, and NELSON and WEBB, District Judges.

WEBB, District Judge. Whether, and how far, in a case like this, in which a patent has been held invalid by the circuit court of appeals in another circuit, this court should be controlled by such judgment, it is not important now to determine, inasmuch as we are entirely in agreement with the reasoning and the judgment of the circuit court of appeals for the Second circuit in *Hammond Buckle Co. v. Goodyear Rubber Co.*, 7 C. C. A. 276, 58 Fed. 411, the opinion in which case was made an exhibit of the defendants in this. It is true that opinion and decree dealt with the first claim only of the patent, while here the second and third claims, also, are in controversy. But everything said by Judge Lacombe about the first claim may with equal cogency be applied to the second and third claims. He goes on to say, speaking of certain elements in the fourth claim:

"As thus modified, however, the invention is described in claim 4 of the patent: '(4) In combination, the catch plate, the tongue plate provided with the laterally elastic bifurcations extending rearward of the pivot, and the tongue swinging in the bifurcations, with a broadened portion which passes between the elastic arms as the tongue is swung, all substantially as described, and for the purposes set forth,'—which is really all that the inventor was entitled to claim."

So we think, and it disposes of the second and third claims as effectually as it does of the first.

It is assigned as an error that the circuit court did not hold that the defendants herein were bound by the decision of the United States circuit court for the district of Connecticut, in *Hammond Buckle Co. v. Hathaway*, 48 Fed. 305. As it is not shown that the parties in that case were the same as in this, we think there was no error in so not holding; still, as this decision has been pressed in argument on the attention of this court, it is not inappropriate to direct the appellant's attention to the fact that, in *Hammond Buckle Co. v. Hathaway*, the circuit court held that the combination described in the second claim of the patent, "as an entirety, was not patentable," and of the third claim says, "This claim is not patentable." Without recognizing a duty to be controlled by that decision of a circuit court respecting the second and third

claims of the Hammond & King patent, No. 301,884, we think it was correct.

Decree of the circuit court affirmed, with costs.

CRAIG et al. v. MICHIGAN LUBRICATOR CO. et al.

(Circuit Court, E. D. Michigan. January 14, 1896.)

No. 2,324.

1. CRAIG PATENT NO. 398,583—LUBRICATORS.

This patent is clearly void for want of invention, in view of the state of the art and the limitations which the inventor has imposed upon himself in his specification as to the nature and extent of his improvement.

2. SAME—CONSTRUCTION OF THE PATENT.

The patent, if sustainable, must, under the proofs, be strictly construed, and limited to the precise construction shown.

3. SAME—LIMITATIONS BY PATENT OFFICE.

Craig, having accepted, without appeal, limitations and restrictions imposed upon his claim by the patent office while his application was there pending, cannot now obtain by construction what the patent office repeatedly denied, nor can he evade his own limitations upon his claims. His patent cannot thus be enlarged.

4. SAME—CONSTRUCTION OF CLAIMS.

In the light of the history of this application in the patent office, the phrases "within the lines of the lubricator" and "within the condenser" must be held merely equivalent expressions, which restricted Craig to the very arrangement of parts which his application described and delineated.

5. SAME—PRIOR USE AND SALE.

Craig's application was filed June 1, 1885. He testified that in March, 1883, he reduced his invention to practice, and operated it upon the Pillsbury engine, at Lawrence, under an agreement that, if satisfactory, it should be paid for by Pillsbury; that, after two or three weeks' use, it was altered, for the purpose of trying another experiment, and then, after proving satisfactory, was paid for by Pillsbury. Held that, "under the proofs in this case, it is clear that there was such a public use and sale of the Craig lubricator as to avoid his patent."

The bill of complaint in this cause is filed by Warren H. Craig and others against the Michigan Lubricator Company and Frank W. Marvin, as its president and individually, for an alleged infringement of claims 2, 4, 5, 6, and 7 of letters patent No. 398,583, dated February 26, 1889, and issued to Craig for "improvements in sight-feed lubricators." By stipulation, Max Nathan was made a party complainant, because of certain rights held by him under the patent.

James H. Raymond, F. P. Fish, and Edmund Wetmore, for complainants.

John B. Corliss, George S. Payson, and George H. Lothrop, for defendants.

SWAN, District Judge. The proofs in the cause fail to establish any individual liability for the matters charged in the bill upon Mr. Marvin, the individual defendant, and it is practically conceded that it should be dismissed as to him.

The defenses to the charge of infringement are: (1) That the



claims sued upon are invalid for want of novelty and invention, or are limited to the construction shown in the patent drawings, and admitted to be different from the defendants' construction; (2) that such claims are for nonpatentable aggregations; (3) that by limitation imposed by the patent office, and accepted by Craig without appeal, these claims are restricted to the construction shown in the patent drawings; (4) that a cup embodying Craig's alleged invention was publicly used and sold more than two years prior to his application; (5) that the defendants do not infringe.

The second of these defenses it is not necessary to discuss.

It is not claimed that the lubricator described in the letters patent is a pioneer invention, and it is clear that, in its general appearance and the principle of its operation, it strongly resembles, if it is not identical with, prior devices, for some of which Craig had obtained patents, and from several of which he had taken parts, and brought them into a combination which he claims is patentable. Lubricators of this general type have been so often the subject-matter of litigation within the last 20 years that it is unnecessary to enter into a full description of the patented and alleged infringing devices. The induct pipe, the educt pipe, the condenser, the oil reservoir, the sight-feed, the glass tube and observation chamber, and up-drop and down-drop, and an equalizing pipe connecting the steam delivery with the oil exit, are old. In this condition of the art, the first question is, has Craig added to it, either by a new and meritorious combination of familiar parts or the addition of a new feature to mechanism in use? Craig's departure from previous manufactures consists in locating the pipe which connects the steam inlet and oil exit within the condenser in a straight line between the two, instead of placing it outside of the lubricator, as in previous constructions. That this is the extent of his improvement under the letters patent sued upon is clear from their specification, which, after a general description of the device, states:

"The above-described lubricator is essentially like that exhibited in letters patent No. 277,464, dated May 15, 1883, and granted to me. I have made additions to it for the object or purpose hereinbefore mentioned; that is to say, I have provided the condenser with a pipe or conduit, p, to lead from it to the boiler, in order to conduct steam from the boiler into the condenser, such pipe having in it a stopcock, q."

Seibert, in 1876, Baker, in 1880, Harvey, in 1881, and Holland, in 1882, employed this pipe externally for the same purpose. There could be no invention in this arrangement of parts, which, upon Craig's own admissions, constitutes the sole feature which distinguishes his last from former patented devices.

The prior patent to Craig is as effectual to avoid the latter as if issued to another. *James v. Campbell*, 104 U. S. 356; *Roller-Mill Co. v. Coombs*, 39 Fed. 25, 38. The patent sued upon seems to me clearly void for want of invention in view of the state of the art, and the limitation which the inventor has imposed upon himself in his specification as to the nature and extent of his improvement.

2. But the magnitude of the interests involved compels the consideration of other defenses presented, which, whatever opinion may

be held of the patentability of Craig's improvement, equally avail, if valid, to repel the complainant's rights to relief. The patent, if sustainable, must, under the proofs, be strictly construed, and limited to the precise construction it shows. Craig filed his application June 1, 1885. It fully described his lubricator, stating that the "oil is intercepted by the steam passing from the condenser downward through the pipe g therein." His first claim included "a conduit to lead steam from the boiler into the condenser, and with a passage to lead steam into the oil-discharging conduit." This was in substance repeated in claims 2 and 3, which were held by the examiner to be alike, and for that reason were rejected. In this, he lays claim to the equalizing pipe. The alleged invention was held by the examiner, June 6, 1885, as anticipated in patent to Hodges & McCoy, of November 18, 1884, and the patent to Holland, of August 15, 1882. Then began a contest between Craig and the patent office, which waged until February 26, 1889, when his patent was issued, during which Craig amended his original claims no less than 14 times, in many instances canceling and recasting them entirely, and substituting wholly new matter for that discarded. The struggle on Craig's part was to maintain a broad claim for the equalizing pipe, and on the part of the examiners to keep him within the field of invention, and hold him to the device which he had described and illustrated. Again and again his amendments were rejected as unwarranted by his descriptions and drawings. Disclaiming the Holland lubricator (patent No. 262,774), he asked and obtained an interference with the Hodges & McCoy patent, of November, 1884. Upon the issue presented by this interference, the examiners in chief awarded priority to Hodges & McCoy, and their decision was affirmed on appeal by the acting commissioner, who, December 6, 1887, denied, after full argument, a motion for rehearing. That officer, however, May 19, 1888, granted a motion to reopen the case, and January 19, 1889, vacated his former decision, and declared priority of invention to be with Craig, and that he had not forfeited the same by public use, as claimed by his adversaries. During the four years of contention with the patent office, and upon the interference, from Craig's first application, June 1, 1885, to his final amendment, January 31, 1889, when he withdrew his entire specifications and claims, and substituted therefor an altogether new set, in which he made a last effort to obtain the permission of the patent office to locate the pipe g either within or without the condenser, as he might prefer, notwithstanding his persistent efforts to expand and vary his claims, Craig was rigorously held to a construction which described and located the pipe g as "another conduit within and to lead steam from such condenser into the said oil-discharging conduit." This phraseology he varied in the second claim of his last specification by substituting for the words "within \* \* \* such condenser" the phrase "another conduit wholly within the lines of the lubricator." In his persistence to enlarge his claims and depart from the construction set forth in his application, he had so involved the record in the patent office by ingeniously worded amplifications of his claims and contentions for alternative forms of

construction, which were as persistently rejected, that the examiner notified him as early as January 19, 1886, that if he still persevered in inserting such objectionable matter, which had been so often rejected, his only remedy was by appeal, "before which, however," the examiner added: "In view of the several erasures and interlineations throughout the specification and amendments, applicant is advised, in order to avoid confusion, to rewrite the description and claims."

Craig took no appeal from the rulings of the patent office restricting him to the location of the pipe *g* within the condenser. He was, however, permitted to describe it as located "wholly within the lines of the lubricator," instead of designating its position in terms as "within the condenser"; but in the light of the history of his application, as disclosed by the file wrapper, his own construction of his claims before the examiner of interferences, and upon his successive appeals to the examiners in chief and the acting commissioner, and exhibited in the drawings and specifications submitted in support of his application, which excluded the form of construction now claimed to be covered by his patent, the phrases "within the lines of the lubricator" and "within the condenser" must be held merely equivalent expressions, which restricted him to the very arrangement of parts which his application described and delineated. *Morgan Envelope Co. v. Albany Paper Co.*, 152 U. S. 425, 14 Sup. Ct. 627; *Sargent v. Lock Co.*, 114 U. S. 63, 5 Sup. Ct. 1021; *Roemer v. Peddie*, 132 U. S. 313, 10 Sup. Ct. 98; *J. L. Mott Iron Works v. Standard Manuf'g Co.*, 4 C. C. A. 28, 53 Fed. 819; *Temple Pump Co. v. Goss Pump, etc., Co.*, 7 C. C. A. 174, 58 Fed. 196; *Williams v. Shoe Co.*, 49 Fed. 245; *Shaw Stocking Co. v. Pearson*, 48 Fed. 234. To hold otherwise would be to give to the preferred form of expression a scope and elasticity which entirely contravene the construction which Craig accepted as the condition of his grant. Moreover, the second claim of the patent locates the conduit *g* "wholly within the lines of the lubricator"; and the phrase "as set forth," at the close of that and claims 4, 5, 6, and 7, by necessary implication, refers to the construction described in the specification, and qualifies each claim. It makes interior location of that pipe not merely a preferred form of construction, but the sole form permissible under the patent. *Corn-Planter Patent*, 23 Wall. 181, 218; *Brown v. Davis*, 116 U. S. 237, 251, 6 Sup. Ct. 379; *Burr v. Duryee*, 1 Wall. 579, 581. He cannot now obtain by construction what the patent office repeatedly denied, nor can he evade his own limitations upon his claims. His patent cannot thus be enlarged. *Burns v. Meyer*, 100 U. S. 671. *Manufacturing Co. v. James*, 125 U. S. 447, 463, 8 Sup. Ct. 967; *Railroad Co. v. Mellon*, 104 U. S. 112, 118.

Despite these rulings, it is argued in Craig's behalf that he is entitled to a broad construction of the patent, and should have the benefit, as against infringers, of the doctrine of equivalents. Waiving the assumption that his patent has been infringed, its character repels this pretension. The principle is well settled that "where an invention is one of a primary character, and the mechanical functions performed by the machine are, as a whole, entirely

new, all subsequent machines which employ substantially the same means to accomplish the same results are infringements, although the subsequent machine may contain improvements in the separate mechanisms which go to make up a machine. *Machine Co. v. Lancaster*, 129 U. S. 273, 9 Sup. Ct. 299. This case cited *McCormick v. Talcott*, 20 How. 402, 405, where the court, recognizing the doctrine just stated, as positively declared the rule applicable to the construction of patents for improvements in well-known devices as follows:

"But if the invention claimed be itself but an improvement on a known machine by a mere changing of form or combination of parts, the patentee cannot treat another as an infringer who has improved the original machine by use of a different form or combination performing the same functions. The inventor of the first improvement cannot invoke the doctrine of equivalents to suppress all other improvements which are not mere colorable evasions of the first."

This doctrine is stated still more positively in *Knapp v. Morss*, 150 U. S. 221, 230, 14 Sup. Ct. 81, where Mr. Justice Jackson, delivering the opinion of the court, said:

"If the Hall patent was a valid pioneer invention, the doctrine of equivalents might be invoked with regard to the sliding blocks and rests, and thus a different question would be raised; but, being confined to the specific elements enumerated by letters of reference, it is neither entitled to a broad construction, nor can any doctrine of equivalents be invoked so as to make the appellant's device an infringement of the second claim in controversy."

See, also, *Wright v. Yuengling*, 155 U. S. 47, 52, 15 Sup. Ct. 1; *Boyd v. Hay-Tool Co.*, 158 U. S. 260, 15 Sup. Ct. 837.

This rule must be applied to the Craig patent in view of the state of the art as evidenced notably by the prior patents granted to complainant, one of which confessedly is essentially reproduced with but a trifling variation, which was known and used by earlier inventors, whose devices long anticipated those of Craig. If any additional consideration were needed to confirm the construction herein given to the words "within the lines of the lubricator," it is found in the testimony of defendant's expert, Jesse Smith, who well says that, "if the claims of the Craig patent are to be construed broadly, \* \* \* so as to cover the defendant's device, it will also cover the device of the Mitchell patent as well as the device of the Clark patent, both of which are wholly within the Craig invention." The same may be said of the Seibert patent, which long antedated Craig's cup.

It is urged by defendants with much force that all of the claims here sued upon would be directly infringed by a lubricator constructed under letters patent No. 340,486, issued to Craig May 20, 1886, which under the case of *Miller v. Manufacturing Co.*, 151 U. S. 186, 14 Sup. Ct. 310, avoids the patent of February 26, 1889, or, at least, limits its novelty to the precise construction which it describes. Without deciding that the last patent is invalid because all of its claims might have been made in that of 1886, the claims and essential features of the lubricator in the earlier patent constitute a strong argument for the strict construction of the so-called

"improvement" in the patent of 1889. Craig's lubricator, therefore, if patentable, must be limited to the form which he has given it. *Railway Co. v. Sayles*, 97 U. S. 554. It is clear, beyond doubt, that, thus construed, the defendants do not infringe. Their device differs materially in appearance, structure, and parts, lacking essential features of the Craig lubricator, and possessing others not found in it.

3. Was there a public use or sale of Craig's cup two years before his application for the patent therefor? Hodges & McCoy's patent for locomotive lubricator bears date November 18, 1884. Their application was filed September 30, 1884. Craig's application was filed June 1, 1885. In order to successfully meet the issue upon the interference, it was necessary for Craig to carry his invention back of September 30, 1884, the date of the Hodges & McCoy application. The issue in controversy between these parties was defined by the examiner of interferences in his decision of March 12, 1887, as follows:

"The combination of a lubricator provided with a sight-feed or observation chamber in which oil rises through water in its passage to the discharging conduit for leading such oil to the part or parts of the engine to be lubricated, with a conduit to lead steam from the boiler into the condenser of such lubricator, and with another conduit within and to lead steam from such condenser into the said oil-discharging conduit."

Craig testified that he conceived the invention in issue in the latter part of 1882. His idea and aim were to make "a lubricator that could be adopted for use in an ordinary stationary engine, and one that could also be adapted for use upon an engine when there were differential pressures to guard against." He says that he completed such a lubricator in February, 1883. In support of this claim, he put in evidence, before the examiner, a drawing which he states was made October 5, 1882, showing a device capable of being made to embody the issue by the removal of a plug at the top of the condenser chamber, and the substitution therefor of a pipe connection with the boiler or steam pipe. He states that for the invention he obtained letters patent No. 281,241, July 7, 1883, on an application filed June 13th of that year. The lubricator of this patent and that of No. 277,264, he testifies, operate upon substantially the same principles. It will also be remembered that he admits the essential similarity of that patent to the one here sued upon, the difference between them, as above remarked, consisting in the addition of the pipe or conduit to lead from the condenser to the boiler, in order to conduct steam from the boiler to the condenser. In support of this contention that he had completed in January or February, 1883, the lubricator upon which the issue was joined, he put in evidence the bills for work done thereon by parties whom he had employed in its construction. He satisfied the examiner that he had perfected and reduced it to practice in March, 1883, and operated it upon the Pillsbury engine at Lawrence, Mass.; and, on the evidence, the commissioner awarded him priority of invention, affirming not only his conception of the device, but its actual reduction to practice.

The proofs show that on March 13, 1883, Craig attached to the Pillsbury engine a lubricator made under letters patent No. 281, 241, except that it had in addition to some minor and immaterial connections the pipe p leading from the top of the condenser to the boiler, in order to conduct steam from the boiler into the condenser. This addition made it identical with the lubricator described in letters patent No. 398,583, upon which this suit is founded. Craig insists that this was merely an experimental use, but he admits that it was placed on the engine under his agreement that when he had got through experimenting with it, if Pillsbury wanted to buy it, he would sell it to him. He further admits that the lubricator ran for a week or two (other testimony fixes the period at three weeks, at least), when he had it removed from the engine, and plugged up the interior pipe B which corresponds to the pipe g in the patent here involved. It is not claimed that this was done because of the inefficiency of the lubricator, or that its use had developed the necessity for any alteration, but Craig's purpose was to see how it would operate in that condition, which he stated "would make a different device of it." It thus ran successfully for some time. Having thus satisfied Pillsbury's engineer of its utility and effectiveness in both forms, April 16, 1883, he made out a bill for it to Pillsbury, who testifies that he paid the same on that day. No other change than this was made in the lubricator after it was attached to the engine, and Craig admits that its working did not seem to be materially changed thereby. There was no secrecy in this use, and the place where it was had was open to the tenants of the building. No complaint was made against the working of the cup before the closing of the interior steam tube B, and, if Craig is to be credited, no motive prompted the change but his desire to experiment, with a view to "make a different device of it." While it is possible that this change was made as Craig testified, it is highly improbable. The story is open to the suspicion that it is prompted by the necessity of avoiding the effect of this use and of the sale to Pillsbury. Craig says that in February, 1883, when he completed the lubricator, he was advised by his solicitor that it comprised two separate and distinct inventions, which could not be incorporated in one patent. A cup for use upon locomotives was evidently the most valuable; yet he did not apply for a patent for it until June 1, 1885. If he then had the invention which he now claims, this is remarkable, if not incredible. In the interval between its completion, in February, 1883, and June 1, 1885, he took out three patents for improved lubricators, neither of which, as he claims, embodies the improvement to which he alleges title under this patent. This approaches a demonstration that prior to June 1, 1885, he had not made the invention which he here claims. *James v. Campbell*, 104 U. S. 356.

In this condition of the proofs, the examiner in chief, to whom Craig had brought the issue by appeal, held that the earliest date which could be assigned to Craig for the conception and disclosure of this invention was June 1, 1885, when he filed his application. The file wrapper shows that the first presentation in the patent

office of Craig's claim for a lubricator operative under differential pressures was April 6, 1887, when he filed his amended specification, making oath that he was the original and first inventor of the improvement or invention as described and claimed in the above amendment (the locomotive lubricator), in addition to what was embraced in his original application. This at first was rejected, as inconsistent with the original application, but was subsequently permitted to come in under that instrument. This latter circumstance of itself suggests, at least, that when he filed his application, June 1, 1885, a fortiori in February, 1883, Craig had not completed, if he had conceived the idea of, such a lubricator as he now claims. But if we give him the benefit of the doubt against all of the opposing circumstances which tend to discredit his claim to invention, and assume that as early as February or March, 1883, he had made a lubricator capable of the double use which he describes, and took it to his attorney for the purpose of obtaining a patent for it, we must conclude that his device was then perfected, and "had received from its inventor every element necessary to its operation," to use the language of Mr. Justice Matthews in *Manufacturing Co. v. Sprague*, 123 U. S. 249, 8 Sup. Ct. 122; and that the sole purpose of attachment to the Pillsbury engine was to demonstrate its efficiency to Pillsbury, under the agreement that the latter should purchase it if its use established its utility. This use was for the purpose of trade and profit, and the test was merely ancillary to the sale. This, of itself, would defeat Craig's patent, as it constituted a public use of the invention (if it existed) two years before his application. If there is any doubt, however, as to the character of its use, and its effect upon the patent, there can be none whatever on the admitted fact of the sale to Pillsbury. The test had demonstrated the operativeness of the device, and the lubricator had met the conditions upon which Craig proposed to sell, and Pillsbury agreed to buy, and he bought it because it had met those conditions. It was upon these grounds that the examiner in chief, after a careful review of the transaction in the light of evidence, held that Craig's right to a patent was defeated under the statute (Rev. St. § 4886), although they awarded priority of invention to Craig. The assistant commissioner of patents, in an elaborate opinion, affirmed the conclusions of the examiner in chief. More than six months afterwards, he changed his views, and reversed his former decision. The reasons expressed for this action are not satisfactory. It was the contention in Craig's behalf in the various proceedings of interference that the use of his cup on stationary engines should not defeat his claim, as his lubricator was designed for use on locomotives. This is inconsistent with the claim of invention which specified the completion of a cup capable of use as a single or double connected lubricator. If it were true that only prior use on a locomotive could avail to anticipate Craig, it is difficult to see on what ground he should be accorded priority of invention as of March 13, 1883, the date of its use on the Pillsbury engine. It was upon this ground that the acting commissioner held that public use had not been proven against Craig. The examiner in chief had held that the cup used at Pillsbury's did not

embody the present invention, "the steam pipe leading down from the condenser being plugged up and without function; and, moreover, the engine being stationary, and not locomotive, no such functions were ever accomplished or carried out, and the invention was not made." This overlooked the three weeks' use of the cup prior to the closing of the interior pipe B. "Of course," said the examiner in chief, "Craig cannot now urge this identical Pillsbury experiment as proof of complete invention March 13, 1883. \* \* \* Craig cannot blow hot and cold with the same breath. He cannot plead that he had not the invention when public use is in question, and by the same evidence show that he had it when priority of invention is in question. He was given the benefit of the doubt on his own qualifications and distinctions, 'ut res magis valeat quam pereat,' to save forfeiture, but the invention cannot now be expanded to save priority."

Craig's position here is as clearly incongruous as that taken in the patent office. To make good his claim to invention, he insists that he completed and reduced to practice on the Pillsbury engine a device embodying his invention as early as March 13, 1883. To meet the defense that his alleged invention had been in public use and on sale more than two years before his application for a patent, he denies that the cup put on the Pillsbury engine contained the invention here claimed, because the interior pipe was plugged and functionless on the stationary engine. The fact, if it be a fact, that, after his cup had been in successful use for three weeks with its interior pipe open, Craig closed that pipe, in search of a different device, and that, thus changed, the lubricator was thereafter used by his vendee, does not avoid the effect of the first use. The article sold embodied both inventions, if he had two, and was sold without restriction or condition. There was nothing in the transaction which limited Pillsbury's use of it, with or without the plug. There is no evidence that Pillsbury knew of the change. Had he removed the plug, and used the cup as a double connection lubricator, he could not have been held an infringer. He had not bargained for the device which Craig's experiment might develop, but for that which he commended as his finished production. It became his property absolutely. It was a sale of the device in the course of Craig's business as a manufacturer. A conditional sale or a sale on approval as an offer to sell makes the device "on sale," within section 4886. *Henry v. Francestown Co.*, 2 Fed. 78; *Kells v. McKenzie*, 9 Fed. 284; *Lyman v. Maypole*, 19 Fed. 735. In order to constitute a public use of invention, it is not necessary that more than one of the patented articles should be publicly used. "One well-defined case of such use is just as effectual to annul the patent as many." *McClurg v. Kingsland*, 1 How. 202; *Fruit-Jar Co. v. Wright*, 94 U. S. 92; *Worley v. Tobacco Co.*, 104 U. S. 340; *Egbert v. Lippman*, 104 U. S. 333; *Manufacturing Co. v. Sprague*, 123 U. S. 249, 257, 8 Sup. Ct. 122.

In *Egbert v. Lippman*, *supra*, it is said, by way of illustration:

"For instance, if the inventor of a mower, a printing press, or a railway car makes and sells only one of the articles invented by him, and allows the vendor to use it for two years without restriction or limitation, the use is just as public as if he had sold or allowed the use of a great number."



Nor is the publicity of the use dependent on the number of persons to whom it is known where the device is given or sold for use without limitation or injunction of secrecy. A use or knowledge of the use, if confined to one person, is fatal to the patent. See, also, *Manning v. Glue Co.*, 108 U. S. 462, 2 Sup. Ct. 860.

In *Elizabeth v. Pavement Co.*, 97 U. S. 126, it is said that while abandonment of the invention to the public will not necessarily follow its public use or sale within two years before the inventor's application, "yet if the invention is in public use or on sale prior to that time, it will be conclusive evidence of abandonment, and the patent will be void."

The rule of judgment applied to cases where the question of public use arises is stated in *Manufacturing Co. v. Sprague*, 123 U. S. 249, 8 Sup. Ct. 122, as follows:

"In considering the evidence as to alleged prior use for more than two years of an invention, which, if established, will have the effect of invalidating the patent, and where the defense is met only by the allegation that the use was not a public use in the sense of the statute, because it was for the purpose of perfecting an incomplete invention by tests and experiments, the proof on the part of the patentee, the period covered by the use having been clearly established, should be full, unequivocal, and convincing."

The condition imposed by section 4886, Rev. St. U. S., does not require for the defeat of a patent, because of the sale or use of its subject-matter with the inventor's consent two years prior to his application, that such sale or use must have been continued during all that period. It is enough if the inventor has sold an article or permitted its use without restriction at any time over two years before he applied for a patent. *Andrews v. Hovey*, 123 U. S. 267, 274, 8 Sup. Ct. 101; *Id.*, 124 U. S. 694, 719, 8 Sup. Ct. 676; *Egbert v. Lippmann*, 15 Blatchf. 295, Fed. Cas. No. 4,306.

The object of section 4886, which before the revision of the statutes was section 24 of the act of 1870, as said by Mr. Justice Blatchford in *Andrews v. Hovey*, supra, was to "require the inventor to see to it that he filed his application within two years from the completion of his invention, so as to cut off all question as to the defeat of his patent by the use or sale of it by others more than two years prior to his application, and thus leave open only the question of the priority of invention." Under these rulings and under the proofs in this case, it is clear that there was such a public use and sale of the Craig lubricator as to avoid his patent.

For these reasons, without discussing other questions, the bill must be dismissed, with costs.

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TAYLOR BURNER CO., Limited, v. DIAMOND.

(Circuit Court, W. D. Pennsylvania.)

No. 24.

1. PATENTS—INVENTION—GAS HEATERS OR BURNERS.

The Taylor patent, No. 499,151, for an improvement in gas heaters or burners, consisting substantially in giving to the jet holes in a vertical

asbestos board an upward inclination, whereby the gas discharges itself more freely and evenly, *held* to show patentable invention, in view of the very beneficial results achieved, and of the fact that, while the desirability of these results was long recognized, no previous inventor or mechanic had conceived of the improvement.

2. SAME—ANTICIPATION.

An invention, consisting in giving to the jet holes of a vertical-faced gas burner an upward inclination, is not anticipated by the previous use of gas-log burners, which, on some part of their circumference, had upwardly inclined jet holes, as this was a mere accidental use, without recognition of its beneficial results. *Topliff v. Topliff*, 12 Sup. Ct. 825, 145 U. S. 156, applied.

Suit in equity for infringement of a patent.

Bakewell & Bakewell, for complainant.

John H. Roney, for defendant.

BUFFINGTON, District Judge. This is a bill in equity, filed by the Taylor Burner Company, Limited, against James H. Diamond, doing business as the Diamond Burner Company, for alleged infringement of letters patent No. 499,151, granted said company June 6, 1893, as assignees of William G. Taylor. The subject-matter of dispute is a gas heater or burner. Infringement of the first claim is alleged, and the defenses set up are denial of patentable novelty and anticipation. In burners for open fireplaces there are several desirable points, viz.: Efficiency, or the production and utilization of all the heat possible from the gas used; economy, or the doing so with a minimum consumption of fuel; safety in operation; and, lastly, uniting these in a fire and structure pleasing to the eye. The general type of burners in use before Taylor's present patent were those provided with vertical asbestos board or metallic face plates, through which the gas passed from a chamber formed on the rear of the plate. The asbestos board ones were provided with tufts of asbestos on the face, and beneath these tufts or rows the gas passed through the face by means of small horizontal jet holes. The ones with metallic face plates were also provided with rows or tufts of asbestos, and the plates themselves were corrugated. On the upper sides of these ridges were jet holes, which kept the flame closer to the face plate, and therefore with a resulting increased radiation. These burners were open to several objections. So long as there was a heavy pressure of gas (which, of course, meant increased consumption and expense), the flame was quite uniformly spread over the entire face surface; but, when pressure was reduced, the flame localized or burned in spots, thus presenting a ragged, scrawny appearance, or burned at the top of the face plate only, leaving unconsumed the lesser pressure of gas escaping at lower points. Sometimes the flames would back or run through the jet holes, causing puffs or slight explosions. In the asbestos board burner the greater the pressure the further the gas was driven from the face plate, and, consequently, there was less radiation and less brilliancy in the asbestos tufts. To obtain satisfactory results in heat and appearance, which latter is an important element in a fire which people sit facing, both types of burner had to be used, with a full pressure of gas, and this made them expensive.

These difficulties were overcome by Taylor by a device the simplicity of which is its chief merit. He took the common asbestos board face plate of the old construction, but, instead of piercing the jet holes horizontally, as had been done, he gave them a downward inclination, preferably of such an angle that the lower side of the external opening was higher than the upper side of the internal one. In his specification he says:

"By arranging the openings at an inclination as shown, I have found that, even with the lowest pressures, there is no danger of the air from the outside passing into the gas chamber, and causing an explosion, as whatever gas there may be in the passages, as at the moment the gas is turned out, it will have a tendency to rise and discharge itself from the outer face of the burner, and this tendency is sufficient to prevent the air passing into the gas chamber, and being ignited therein. There are other reasons which make the particular arrangement better, among which may be said that the gas apparently is more evenly distributed over the surface of the heater, by means of the inclined openings, than when they are perpendicular thereto. \* \* \* It may be further added that, where the openings or perforations are horizontal, and the gas in the opening, owing to its buoyant action, it tends to press upon the upper surface of the opening, and if the pressure at both ends of the opening is substantially the same, the gas will either remain in the opening or escape from both sides about equally. When, however, the openings are inclined, the buoyant action of the gas tends to cause it to rise through the opening; and, as the upper end of the opening, in my construction, is outside the gas chamber, it will be seen that the tendency of the gas is to flow out of the burner, and this adds to its safety, and aids in preventing explosion."

The claim here in question is the first, namely:

"A gas burner, comprising a plate of asbestos material having a series of perforations through the same, the perforations being at an inclination to the surface of the plate, substantially as described."

The results of this simple change are really quite striking. The flame closely hugs the face plate, either under high or low pressure. More heat is radiated into the room from the same amount of gas. The asbestos tufts are made more generally incandescent. When the gas is turned down, the jet holes seem to act as tiny flues, and draw forth the gas in small quantities, which still continue to burn, or flash in flame, from one jet to another over the entire surface of the plate. When the gas is turned off the fire goes out quietly, and, even turned very low, there seems to be no tendency of the flame to follow the gas into the chamber, and cause puffs or small explosions. Experiments made during the taking of the proofs show that, where two burners of identical construction, save that one had horizontal, the other sloping, holes, were used under similar conditions, the latter radiated two-ninths more heat than the former. The distribution of the flame under low pressure is also more even. The evidence in the case, and the illustrations given during the argument, satisfy us the Taylor device accomplished a new and useful result in gas burners, and its simplicity commends, instead of condemns, it, in our judgment. It is true Taylor did nothing more than incline the holes of the old asbestos board construction. But, where the subject is so volatile and fleeting as gas, seemingly simple changes of conditions, surroundings, or appliances often accomplish new and far-reaching results. So, in this case, the simple change of the direction of the jet holes has made Taylor's device the success it is shown to be. Such

a method never seemed to have occurred to any of the mechanics who have worked with gas fires for years. While the desirability of keeping the flame close to the radiating face plate was recognized as highly desirable, no one seems to have thought of inclining the holes in an asbestos plate, or to have discovered the subtle and desirable effect such inclined holes would exert on the gas. The character of the result accomplished, and the advances made by it, to our mind, stamp Taylor's device as of a patentable character. Nor was it anticipated by prior devices. While the placing of the holes in the upper side of the ridges of the corrugated metallic plates in use at that time brought the flame in close contact to the face plate, yet these holes were not the holes of the Taylor device, or capable of performing the same functional purpose. In Taylor's burner, a board of material thickness is used, and such thickness (a factor absent in the metallic plate) permits the lower side of the external opening to be higher than the upper side of the internal opening. By this means the higher heated portion of the face-plate opening serves as a positive draft to draw the gas to the surface, and, generally, over the entire face plate.

Nor is Taylor's device anticipated in the gas log or in the burner of the Hewitt patent. While some of the holes in these constructions are inclined, yet such inclination is merely accidental, and was not given for any functional purpose. The holes are made normal to the surface in which they are drilled, and are given a relatively upward or downward inclination to the side they happen upon. Such a construction would be fatal to the efficiency of the Taylor device. Such mere accidental use of some of the features of an invention, without recognition of its benefits, does not constitute anticipation. *Topliff v. Topliff*, 145 U. S. 156, 12 Sup. Ct. 825.

Upon the whole case, our judgment is with the complainant. The respondent's structure is a substantial reproduction of Taylor's device, and is clearly an infringement upon the first claim of his patent. A decree may be prepared.

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#### NATIONAL MACH. CO. v. WHEELER & WILSON MANUF'G CO.

(Circuit Court, D. Connecticut. January 11, 1896.)

##### 1. PATENTS—DECISION IN INTERFERENCE PROCEEDINGS—CONCLUSIVENESS.

The fact that a party to an interference proceeding permits the decision to go against him by default does not make such decision conclusive against him upon the question of the patentability of the machine in a subsequent suit against him for infringement. It is conclusive only upon the issue of priority of invention.

##### 2. SAME—TWO PATENTS TO SAME INVENTOR.

The question whether two patents cover the same invention depends upon the scope of their claims. Claims are coextensive which specify the same combination of the same number of parts, with the same features, though the functions which are mentioned in the claims are not coextensive. But two claims are not coextensive which specify different combinations of parts of a process, machine, or manufacture, even where some of these parts are in each of the combinations. *Miller v. Manufacturing Co.*, 14 Sup. Ct. 310, 151 U. S. 186.

**8. SAME—BUTTONHOLE MACHINES.**

The Osterhout patent, No. 447,791, for an improvement in machines for cutting and stitching buttonholes, shows patentable invention, and was not anticipated. Claims 21 and 22 cover, broadly, a combination having a normally elevated cutter, positively connected with, and unyieldingly actuated and depressed at a certain time by, a depressor operated through or by means of the needle bar actuating mechanism, and a cam or device operating or rotating in unison with the feed cam, whereby the cutter is thrown into action. These claims are infringed by a machine made in accordance with the Tebbetts & Doggett patent, No. 438,655.

This was a bill by the National Machine Company against the Wheeler & Wilson Manufacturing Company for alleged infringement of a patent for an improvement in buttonhole machines.

Edwin H. Brown and James C. Chapin, for complainant.

Livingston Gifford and James H. Lange, for defendant.

TOWNSEND, District Judge. At this final hearing upon a bill in equity, complainant prays for an injunction and accounting, alleging infringement of letters patent No. 447,791, granted March 10, 1891, to James B. Osterhout, assignor to complainant. The record in this very complicated case has the refreshing merit of exclusion of irrelevant matter, and inclusion of all necessary evidence. The questions at issue have been exhaustively presented in admirable briefs, and by lucid and thorough oral arguments.

The patented device is for an improvement in machines for cutting and stitching buttonholes. The specification states that:

"One general object of this invention is to provide buttonhole sewing machines with practically successful cutting mechanisms, which shall automatically cut a buttonhole only when the machine is stitching at a predetermined portion, part, or point in the periphery of the buttonhole."

The patent covers a novel machine, comprising patentable improvements upon previously existing devices, whereby new and useful results were produced. The defense is denial of infringement. Prior to the invention embodied in the patent in suit, and in certain patents relied upon by defendant,—notably, that to Egge in 1885,—no practical, automatic buttonhole attachments for sewing machines had been devised, which would both stitch and cut the buttonhole automatically. The problem presented was to provide a cutter which should not only automatically cut by a single stroke, at the proper time and in the proper place, but should be prevented from thereafter continuing the cutting operation. Defendant admits that Osterhout so far solved this problem by an inventive act that his device was capable of practical operation in the hands of an expert operator. And defendant further admits that the patents upon which it relies, and under which it manufactures, depend for their operation upon a finger or pin on a feed wheel such as is found in complainant's patent. But they deny infringement, on the ground that this finger was well known in the prior art; that the claims in suit do not cover it, except in combination with other elements not used by defendant; and, further, because defendant's machine shows invention, by the solution of the problem presented, upon a different principle, producing the same results in a different way. The

construction of defendant's machine is practically identical with that covered by patent No. 438,655, granted October 21, 1890, to Tebbetts & Doggett. Defendant claims that the Osterhout patent is for an improvement upon the type of cutters known as "step by step cutters," in which a knife is operated at each alternate descent of the needle, but that the Tebbetts & Doggett patent is for an independent, single-plunger cutter, which can operate only once in any event. Defendant further claims that patent No. 345,419, granted to Frederick Egge July 13, 1886, shows such a solution of the problem presented as deprives Osterhout of any claim to any device or construction, except the specific construction described and claimed in his patent. This subject will be discussed later.

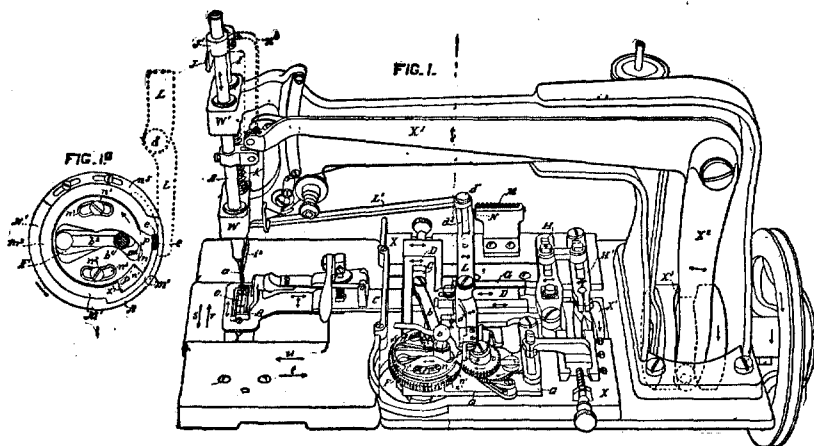
Buttonhole machines of the class in question comprise a stitch-forming mechanism, a work-moving mechanism, and a cutting mechanism. This litigation is concerned with the latter mechanism only. In this is included a cutter, a cutter carrier moving relatively to the plane of the work, a depressor to force the cutter through the fabric, and a cutter controller to cause the engagement of the cutter carrier and depressor. The claims alleged to have been infringed are the following:

"(1) In a buttonhole sewing machine, the combination, with its stitch-forming and work-moving mechanisms, of a work cutter and its carrier, normally elevated; a depressor, which ordinarily does not depress the cutter carrier and cutter; a cutter controller connected to and moving with the said work-moving mechanisms; and connections between the said cutter controller, cutter carrier, and depressor, whereby the latter is temporarily caused to depress the cutter carrier and cutter,—substantially as set forth. (2) In a buttonhole sewing machine, the combination, with its stitch-forming and work-moving mechanisms, of a work cutter and its carrier, normally elevated; a depressor, which is operated by the needle-actuating mechanism of the sewing machine, and which ordinarily does not depress the cutter carrier and cutter; a cutter controller connected to and moving with the said work-moving mechanism; and connections between the said cutter controller, cutter carrier, and depressor, whereby the latter is temporarily caused to depress the cutter carrier and cutter,—substantially as set forth." "(4) In a buttonhole sewing machine, the combination, with its stitch-forming mechanism, work clamps, and mechanism, including a rotary feed device for operating the work clamp, of a work cutter and its carrier, normally elevated; a depressor, which ordinarily does not depress the cutter carrier and cutter; a cutter controller connected to and rotating with the said rotary feed device; and connections between the said cutter controller, cutter carrier, and depressor, whereby the said depressor is temporarily caused to depress the cutter carrier and cutter,—substantially as set forth. (5) In a buttonhole sewing machine, the combination, with a stitch-forming mechanism, a work clamp, and mechanism, including a rotary feed device for operating the work clamp, of a work cutter and its carrier, normally elevated; a depressor, operated by the needle-actuating mechanism of the sewing machine; a cutter controller connected to and rotating with the said rotary feed device; and connections between the said cutter controller, cutter carrier, and depressor, whereby the cutter carrier and cutter are temporarily depressed by the said depressor,—substantially as set forth." "(7) In a buttonhole sewing machine, the combination, with a stitch-forming mechanism, a work clamp, and mechanism for operating the work clamp, of a depressor, operated by the actuating mechanism of the sewing machine; a work cutter; its carrier; means to elevate the cutter carrier, and means to support it when elevated and disconnected from said depressor; a cutter controller connected to and moving with the mechanism operating the work clamp; and connections between the said cutter controller,

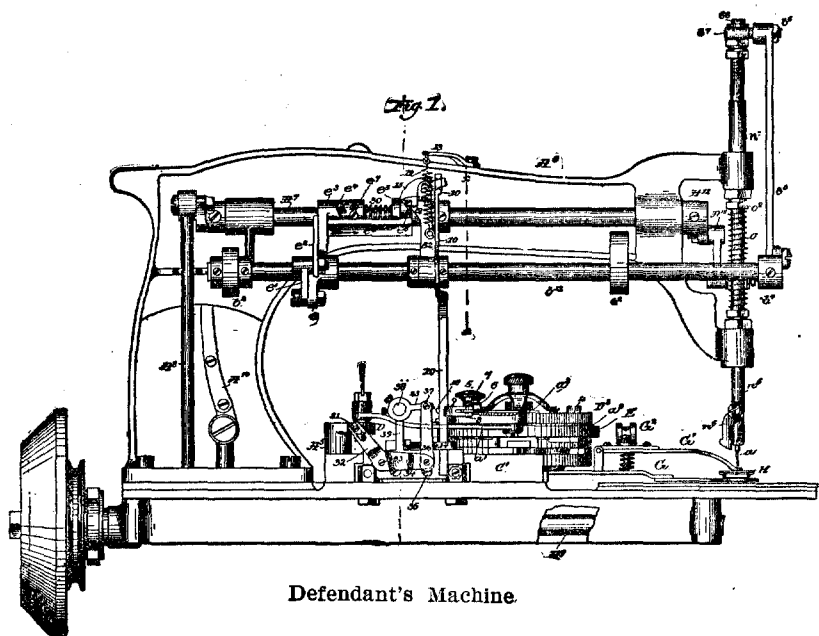
cutter carrier, and depressor, whereby the cutter carrier is temporarily connected with and depressed by the said depressor, and is thereupon elevated and disconnected from the depressor,—substantially as described.” “(15) In a buttonhole sewing machine, the combination, with a stitch-forming mechanism, a work clamp, and mechanism for operating the work clamp, of a cutter carrier, normally elevated, and an attached cutter of suitable length to cut a buttonhole at one insertion; a depressor operated by actuating mechanism of the sewing machine, a cutter controller connected to and moving with the mechanism for operating the work clamp; and connections between the said cutter controller, cutter carrier, and depressor, the same being constructed and arranged so as to cause the cutter carrier and cutter to be depressed by the said depressor to cut a buttonhole when the sewing machine is stitching at or near one and part of one side of the buttonhole,—substantially as set forth.” “(21) In a machine for stitching buttonholes, the combination, with a stitch-forming mechanism, a work clamp, and mechanism for operating the latter, of a cutter, a cutter carrier or bar, a depressor operated by the needle-bar actuating mechanism, a cam or device rotating in unison with the clamp-operating cam or disk, and connections between the said rotating cam or device and depressor, whereby the cutter is thrown into action. (22) In a machine for stitching buttonholes, and combination with a stitch-forming mechanism, a work clamp, and mechanism for operating the latter, of a cutter bar sliding vertically in the head of the machine, and entirely disconnected from the needle bar thereof; a cutter of suitable length to cut an entire buttonhole at a single stroke; a slotted throat plate, through which the said cutter can descend; a depressor operated by the needle bar actuating mechanism to cause a descent of the cutter bar and cutter as a buttonhole is being completed; a cam or device rotating in unison with the feed cam or disk for the clamp; and connections between the said rotating cam or device and depressor, whereby the latter is thrown into action to operate the cutter.” “(28) The combination, with a buttonhole sewing machine, of a cutter, a cutter carrier, a cam from which motion is transmitted to the cutter carrier to depress the cutter, and mechanism whereby the depression of the cutter from the cam will be produced but once, and after the stitching of the greater part of the buttonhole, substantially as specified.”

The invention claimed in this patent consists of a cutter normally elevated, and out of engagement with the other parts of said machine, but which may be so connected with the work-moving and feeding mechanism that, at the appropriate time in the stitching of the buttonhole, it is caused to be positively and unyieldingly operated by the needle-actuating mechanism of the machine, so as to cut the buttonhole, and immediately thereupon to be again disengaged, and return to its normal position. In the stitch-forming mechanism of this class of machines, the needle does not move over the cloth, but reciprocates constantly in one position, while the work-moving mechanism imparts to the fabric a joggling movement for each stitch, and a progressive feed movement, whereby the cloth is so moved as to produce the required buttonhole.

A question which has been much discussed is whether the complainant's cutter controller, as claimed, covers only a controller which necessarily controls the cutting during the entire period from the time when it is automatically put into engagement, until the cutting operation is terminated, or whether it may also cover merely the means whereby it is put into engagement, without reference to the length of the engagement. The accompanying illustrations will serve to show the distinction between the two machines:



Osterhout Patent.



Defendant's Machine.



Complainant's lettered exhibit, "Wheeler & Wilson Machine with Osterhout Device No. 2," also shows the buttonhole cutter of the patent in suit. P, of the patent drawings, represents the cutter controller, a laterally projecting finger attached by means of screws to the feed-wheel disk, F, arranged to be operated by means of teeth in said wheel engaging a ratchet or pawl, motion to which is imparted by the motion of the main shaft of the machine. As this disk revolves, it brings the projecting point of the cutter controller into engagement with a vertical finger on the arm, L, of a lever which so moves the arm, L', of said lever, acting by means of hinges upon the vertical cutter carrier, I, as to cause the cutter bar to slightly rotate, and to bring the clutch, J, on the cutter carrier, and the clutch, J', on the needle carrier, A, into engagement. Thereupon the downward movement of the needle arm depresses the cutter carrier, and the cutter passes through the fabric. Upon the upward movement of the needle carrier, a spring causes the clutches to be disengaged, and another spring, K, upon the cutter carrier, elevates the cutter.

The defendant's machine is constructed substantially in accordance with the Tebbetts & Doggett patent. The drawing on sheet 1 of said patent shows said cutter in operative combination with a Wheeler & Wilson buttonhole sewing machine. It also comprises a circular feed wheel attached to a Wheeler & Wilson machine, and having a laterally projecting finger or controller, like that of the patent in suit, operated in the same way. As the feed wheel revolves, a pin on said finger strikes an arm of a bell crank lever, causing said lever to slightly rotate and bring a latch into engagement with a catch on a collar on a needle bar rocker shaft. This latch is fastened by means of screws to a cutter bar rocker shaft. At the extremity of said cutter bar rocker shaft is an arm which operates the cutter carrier. On said cutter bar rocker shaft is a collar with a projection or finger thereon. The upper short arm of said bell crank lever is pressed against said finger when the lower arm is brought into engagement with the controller or finger on the feed wheel; thus causing a slight rotary movement of the cutter bar rocker shaft, sufficient to bring the latch into engagement, as above stated, with the catch on the collar carried by the needle bar rocker shaft. The rotary movement of the needle bar rocker shaft, communicated by said engagement to the cutter bar rocker shaft, causes a jaw or clutch at the extremity of said arm, connected with and operated by said cutter bar rocker shaft, to descend, and, in descending, to depress a finger, with which it is in engagement, on the cutter carrier, and thus to depress the cutter which cuts the buttonhole. While the cutter is thus being depressed the movement of said cutter bar rocker shaft causes a releasing, snail-shaped cam thereon to press against the top of said bell crank lever, thus releasing the arm of said lever from engagement with the controller on the feed wheel. Defendant claims that this releasing operation accomplishes what the patentees of said machine state as the main object of their invention,—a single automatic descent of the cutter, and the prevention

of further descents by means of a device independent of the needle bar. When the cutting operation is completed a spring on the cutter bar rocker shaft elevates the cutter. A comparison of the two machines shows that each has a circular feed-wheel disk, operated in the same way by the feed-wheel mechanism, and provided with a projecting pin, which, at a certain point, contacts with a lever which causes a cutter carrier to engage with a needle carrier by means of a clutch; the lever in one device acting directly upon the cutter carrier, and causing it to contact and engage with the needle carrier, and in the other device, through the intervention of an interposed cutter bar rocker shaft, engaging with a needle bar rocker shaft by means of collars and clutches thereon. In each case the cutter bar and needle bar are normally disconnected. In each case the movement of the needle-actuating mechanism causes the descent of the cutter carrier. In each case it is positively and unyieldingly actuated at a given point. In each it is normally elevated by a spring. The prior art does not show this construction, or any such combination.

Prior to the invention of the patent in suit, fingers or projections on the feed wheel had been used to bring some independent or auxiliary device into operation at a predetermined point. Thus, in patent No. 303,453, granted to F. W. Ostrom August 12, 1884, a pin on the feed wheel released certain cording mechanism, so that it was operated by a spring, and also released certain brake mechanism. This device did not suit. While it set a train of mechanism in motion, it did not throw it out of operation. In patent No. 240,546, granted April 26, 1881, to John Reece, for an automatic buttonhole stitching and cutting machine, a cutter-actuating cam on the feed wheel, acting upon the cutter lever, caused the depressor of the cutter to cut the fabric, and thereafter permitted its release. This device was combined with a sewing machine having two needles,—one to make the edge stitch, and the other the depth stitch,—so that there was no jogging movement therein, and it furnished no suggestion for adaptation to machines having such movement. Ostrom patent, No. 303,454, is for a buttonhole cutter operated by hand. It was incapable of automatic operation. Allen patent, No. 246,859, is for an attachment for trimming the edges of fabrics. The trimmer descends and cuts at each descent of the needle; thus illustrating the step by step cutter, as compared with the single-stroke cutter. Its operation is controlled by hand, and, while it might be used in a two-needle machine, it is not adapted for use in a machine having a jogging motion. Patent No. 337,273, granted March 2, 1886, to J. W. Lufkin, shows a cutter in which an arm, operating upon the cutter lever every second time that the needle descends, causes it to cut the buttonhole during the operation of the stitching, but only at the time when the needle is making the edge stitch. It differs from the stitching mechanisms here in controversy in that, while in the latter the cutter is brought into operation by means of a finger on the clamp-feed mechanism, and only descends at a certain predetermined portion of the stitching operation, the Lufkin machine operates step by step, and continuously, by alternate descents, during the entire

stitching period, is actuated from a cam in the main driving mechanism of the machine, and is not provided with any means for determining the cutting operation. These machines do not anticipate the combination of the patent in suit. They show that there existed, in the prior art of buttonhole stitching machines, hand and automatically operating cutting attachments, and that fingers, similar to that of the patent in suit, for starting the various operations at a definite time, were well known, and that controlling devices, limited in adaptability and scope, had been constructed. They serve to illustrate the problem then presented in the art, namely, in a machine imparting a jogging motion to the work, how to connect a finger on a feed wheel with a cutter bar so that at a predetermined time the cutter bar would be automatically thrown into such position that upon actuation of a depressor the cutter bar would descend and cut a buttonhole slit, and would thereafter be automatically prevented from continuing such cutting operation. In patent No. 301,974, granted July 15, 1884, to Arthur Felber, the cutter carrier is mounted upon the needle carrier, and connected therewith by a spring which acts as a depressor. The cutter carrier moves up and down with the needle. The needle has a jogging movement relatively to the cloth. When the needle descends at a certain portion of the stitching operation to make an edge stitch, the spring-actuated cutter descends with it, and cuts the cloth. When it jogs to make the depth stitch, a projection on the cutter strikes upon an intercepting jaw, which holds the cutter out of contact with the goods, and prevents it from cutting. It is claimed that this machine was impracticable, and various obvious reasons are given in support of said claim. The evidence shows, however, that it had some small measure of success, as applied to a limited class of work. This machine is arranged to operate automatically with relation to the jogging movement, and is, in a limited sense, controlled, as argued by counsel for defendant, by a cutter controller or interceptor, and provided with a depressor. But the mechanism and mode of operation of this machine are radically different from those of the patent in suit. Osterhout's cutter bar is normally detached from the needle bar. Felber's is continuously attached, and is actuated at every descent of the needle bar. Osterhout's depressor and cutter controller operate through a train of mechanism only to cause a positive and unyielding descent of the cutter to make a single cut. Felber's depressor consists of a mere spring, which causes the cutting by means of its resiliency, and which, when not cutting, opposes every descent of the needle. His, so-called "controller" "is a mere smash block, against which the cutter carrier necessarily smashes at every descent of the needle bar during the stitching of the whole of one side of the buttonhole." I concur with the expert Quimby in his statement as to said machine, which is as follows:

"There is no disclosure or suggestion in the Felber patent of a cutter controller, moving with the work-feeding mechanism, a cutter carrier and depressor, and, between the cutter carrier, depressor, and cutter controller, a train of connections susceptible of being so affected by the cutter controller as to bring about a single actuation of the cutter at any prescribed stage in the stitching of the buttonhole. Nor is there in the Felber patent any suggestion

or disclosure of the employment of a wide cutter to cut the buttonhole slit at one stroke. Hence the Felber patent does not show or disclose the invention of said claims of the patent in suit."

Much testimony has been taken upon the question whether one Egge or Osterhout was the prior inventor of an automatic buttonhole cutter. The evidence as to the original Egge machine, of 1879, for stitching buttonholes, and as to the cutter mechanism attempted to be used therewith, is not directly material, as the proposed cutter attachment never went into practical use, and was a mere abandoned experiment, and also because Egge has failed to show reasonable diligence in reducing to practice, or any excuse for his long delay. He admits that he knew of no sewing-machine head on which this cutter attachment could be used; that he left it out of his application for a patent for the automatic buttonhole stitching device; that, in his crude suggestion of a cutter capable of being used therein, he stated that he preferred to cut the buttonhole in the usual manner, after it was made; and that he never attempted to introduce or sell or reproduce said cutting mechanism. But in January of 1885 Egge again began experiments in the construction of a buttonhole stitching and cutting machine; and in the latter part of February, 1885, he constructed and operated a practical machine, containing a cutting mechanism, for which on July 13, 1886, he obtained patent No. 345,419. The machine feeds at every vibration of the needle bar, and a lug or trip on the feed bar, contacting with or pressing against the crosspiece, keeps the cutter elevated until after one side of the stitch and the barring stitchings are completed. Then, as the feed bar commences to move backward, said lug permits certain pawls to come into vertical alignment, and the cutter is depressed by the upward movement of said crosspiece. The operator then shifts the feed plate to make the barring stitches, and thereby determines the cutting operation. It will thus be seen that the Egge 1885 machine was not strictly an automatic cutter, as applied to the then existing machines. Irrespective of the objections to its practical operation, it was constructed upon a different principle from that embodied in the device of the patent in suit. It did not comprise a rotary cutter controller, nor any device capable of automatically cutting a buttonhole slit, by a single stroke of the cutter at a predetermined point in the sewing operation. The mechanism for forming the complete buttonhole was necessarily shifted by hand. The machine of the Egge patent, therefore, is so differentiated from that of the patent in suit that at most, if it be prior in conception and reduction to practice, it can only affect the claim of the patent in suit as a pioneer patent.

This review practically covers the devices introduced as anticipations which are earlier than the invention of the patent in suit, and the Egge 1885 machine. An examination of the patents and models, and a consideration of the expert evidence and of the arguments of counsel, have failed to satisfy me that any of the devices materially detract from the evidence of inventive skill shown in the Osterhout patent. Some of the machines were failures. Others worked imperfectly. The Felber and Egge devices, which gave the best re-

sults, were constructed and operated upon principles which led away from, rather than towards, the fundamental invention of the patent in suit.

In December, 1884, Osterhout, the patentee of the patent in suit, commenced to reduce to practice a cutter attachment which he claims to have conceived and disclosed as early as 1881. He claims that he completed the first machine in the latter part of February, 1885, and that he completed a second machine in March, 1885. Thus, it will be seen that each of these inventors, Osterhout and Egge, claims to have reduced his conception to practice at the same time. It has already been shown that Egge's earlier experiments were abandoned. I do not feel satisfied as to which of these inventors is entitled to priority. But, in view of the radical differences between the Egge and Osterhout constructions, already stated, and in view of the decision of the patent office as to Tebbetts & Doggett, this evidence is not very material.

In this art, as already stated, two kinds of cutters are recognized: First, the step by step cutter; second, the single-stroke cutter. In the former a small knife is used, and the cutting is effected by imparting several distinct movements to the cutter. In the single-stroke cutter a knife of the size required to cut the particular buttonhole is used, and only a single cut is necessary. The defendant claims that Osterhout first attempted to use the principle of the single-stroke cutter, and afterwards abandoned it, and, having got the idea of using the step by step cutter from the subsequent invention of other persons, he finally secured a patent upon the principle of an automatic, step by step cutter, while the defendant's patentees were the first inventors of a machine covering the principle of the single-stroke cutter, arranged to operate automatically. I think defendant has failed to prove this point. While the conflicting evidence cannot be satisfactorily reconciled, it is sufficiently shown that Osterhout was engaged in attempts to develop both the single-stroke and the multiple cutter, and that he finally claimed both forms of his invention in the original application for the patent in suit. He says:

"In applying my invention to various buttonhole sewing machines, I either have the cutter, *i*, wide enough to cut the whole length of a buttonhole at one stroke, or at a few strokes, and the cam part, *P*, so short, and the part, *e*, of the bar or lever, *L*, so narrow, as to cause the cutter carrier to be engaged with and depressed by the needle carrier only once, or a few times, while the cam, *P*, is passing the part, *e*; or I have the cutter of any desired less width, and the parts, *e*, and *P*, or one of them, of corresponding greater extent, as illustrated by the drawings, so that the cutter carrier will be engaged with and depressed by the needle carrier a greater number of times to progressively cut the work while the part, *P*, is passing the part, *e*."

"In Figs. 33, 49, 53 and 57 the cutter, *i*, is broad enough to cut the whole length of a moderately short buttonhole at one stroke, and such a broad cutter can be secured to and used with each cutter carrier shown in the other figures. When such a broad cutter is used, the part, *e*, of the bar or lever, *L*, and the cam or part, *P*, should each be reduced to a suitable size or tooth."

But in further support of this contention the defendant claims that three things are essential to the operation of the Osterhout device, namely, the to and fro or jogging motion of the feed-wheel

mechanism, to put the cutter carrier into engagement with the depressor on the needle carrier when the goods are in the edge-stitch position; the rotary movement of the feed-wheel disk to regulate the length of engagement of the controller with the lever, and to determine the cutting operation; and, as involved therein, the surface contact of said controller relative to the length of each feed movement. By a series of operations, upon the argument, counsel for defendant demonstrated that its machine did not use said jogging motion at all in connection with the action of the cutter-operating mechanism, and only used the rotary motion to start the cutter device by a pin, and did not depend upon any contact surface to determine the cutting operation. They further show that the original Osterhout device was so constructed that, in practical operation, it sometimes cut beyond the buttonhole. They claim that, in the revolution of the feed wheel, it is impossible to so practically control its operation that the parts shall always be automatically put in engagement at a predetermined point, and the cutter controller operate in the same relative position, because the controller, being mounted upon the cloth clamp actuating mechanism, depends upon the movement of said parts for its operation. In defendant's device, the operation of the cutter not being dependent upon the cloth clamp actuating mechanism, it is claimed that the element of uncertainty as to cutting does not enter into the operation of its cutter controller. Of course, this evidence, although it may show an improvement upon complainant's device, would not, for that reason, relieve defendant from the charge of infringement, but these facts are relevant as tending to show that the means employed in the two machines for effecting the termination of the cutting are different. In each machine there is a jogging and a rotary movement. In each the effect of the rotary movement is to effect the engagement of the controller with the cutter. Each machine starts the cutting operation in the same way. If the correctness of defendant's contention as to differences of operation be assumed, it does not meet the evidence that the original application described an operative device actuated by a cam working in harmony with the progressive movement of the work carrier, and not necessarily limited to a construction dependent upon the combined rotary and jogging motion for causing a depression.

It is further claimed by counsel for defendant that, in the train of mechanism between the operation of the sewing machine and the cutter controller, a frictional element, essential to the operation of complainant's machine, caused a slip, by reason of the friction-driving device on the feed wheel, and necessitated a rearrangement of the relative position of the parts in order to prevent an additional cutting operation. I do not understand why, in this respect, there is any difference in the operation of the two machines, and I therefore do not give any weight to this latter claim.

Complainant argues that its original device, which was confessedly an operative machine, is not limited to a controller which controls the operation of the device throughout the cutting operation, but that, as is shown by claims 21 and 22, it also covers a

device for automatically starting the cutter. The original application covered a construction whereby the cutter might be put in engagement independently of the jogging motion; and complainant forcibly contends that, inasmuch as claims 21 and 22 of the patent refer only to using the cutter controller as a starter, and as the defendant also uses the cutter controller as a starter, it has infringed said claims, considered as a subcombination of the general combinations covered by the other claims. An essential difference between these two claims and the others here in suit is that the latter are limited to a construction moving upon the clamp-feed mechanism, or located on the rotary feed wheel, while the former cover broadly a construction actuated by a cam or device rotating in unison with the clamp-operating cam or disk for throwing the cutter or depressor into action. While it is true that the device of defendant is so constructed that it is not dependent upon the jogging motion of the feed-wheel mechanism for the determination of the number of strokes of the cutter, and while it is true that the complainant's device is thus dependent, yet the specifications do not necessarily describe a controller which thus determines the engagement, or, if they do, they also describe a pin on the feed wheel, which operates as aforesaid, to start such engagement; and the claims 21 and 22 cover the finger device used merely as a starter, and nothing more. They do not claim or refer to any control thereafter. I think defendant, by means of its modified or added devices, may have constructed a better machine than that of complainant, and the later Osterhout and Hallenbeck construction confirms this view. But, from a comparison of the two machines, it appears that in the features which are common the defendant has appropriated devices first conceived and created by Osterhout, and unlike anything in the prior art. The features comprised in claims 21 and 22 of a normally elevated cutter, positively connected with, and unyieldingly actuated and depressed at a certain time by, a depressor operated through or by means of the needle bar actuating mechanism, and a cam or device operating or rotating in unison with the feed cam whereby the cutter is thrown into action, are found both in complainant's and defendant's machine. If, therefore, it be necessary to limit certain claims of the patent to a cutter controller which determines the duration of the cutting period, as is claimed by defendant, yet, inasmuch as the specification describes, and claims 21 and 22 broadly cover, such combination used as a starter, and nothing more, I think these claims are infringed by defendant.

These claims were put in interference with the Tebbetts & Doggett patent, and the applicants for the latter made default, whereupon the patent office awarded said claims priority over Tebbetts & Doggett. Counsel for complainant argues that defendant thereby conceded patentability of its invention, and that defendant's patent infringed said claims. I do not so understand the law. The object of the interference proceedings is to determine priority, not patentability; and, while the decision in interference proceedings may be *res adjudicata* as to this question, it does not preclude

defendant from raising other questions not in issue in said proceedings. *Holliday v. Pickhardt*, 29 Fed. 853; *Christie v. Seybold*, 6 U. S. App. 520, 5 C. C. A. 33, 55 Fed. 69; *Electric Ry. Co. v. Jamaica & B. R. Co.*, 61 Fed. 655; *Reece Buttonhole Mach. Co. v. Globe Buttonhole Mach. Co.*, 10 C. C. A. 194, 61 Fed. 953. But the decision of the patent office effectually disposes of defendant's claims of priority, so far as they are based upon the Tebbetts & Doggett patent. Claims 21 and 22 were originally drawn by counsel for defendant as part of the Tebbetts & Doggett application. The patent office adopted them as a basis for interference with the patent in suit. All the prior patents, except the Ostrom corder patent, were cited as references in said interference. Defendant's counsel did not move to dissolve, but defaulted, and acquiesced in the decision of the patent office awarding priority of invention to Osterhout. The Osterhout and Tebbetts & Doggett machines are the only practical buttonhole stitching and cutting machines now in practical operation, except the Reece machine, which is not relevant in this connection, owing to its totally different construction.

The considerations already suggested apply to defendant's argument that the application was improperly enlarged during its pendency in the patent office. That the invention infringed by defendant was disclosed in the original application, and covered in its claims, and that it was not limited to a dependence upon the jogging movement, is clear from the language thereof. That claims 21 and 22 were not inserted to subordinate defendant's prior machine, has been adjudicated by the patent office. It has not been proved that Egge was prior to Osterhout. Irrespective of the fact that his machine was defective and nonautomatic, its construction was so unlike the combination covered by claims 21 and 22 that there was manifestly no enlargement to cover it.

But, in further support of the defense of noninfringement of any of the claims, defendant contends that the original Osterhout application contemplated a cutter actuated only when the finger is thrown into coaction with its follower; that the snail cam on defendant's device positively throws its vertical rocker shaft out of engagement with the starting pin as soon as the cutting operation is set in motion; that Osterhout, in his patent, says, "I control by a controller on the feed wheel," while Tebbetts & Doggett say, "We do not control by a controller on the feed wheel, but merely push the button so as to put the controller in engagement with the train of operative mechanism and subsequent operations, and eliminate all control from the pin or controller on said wheel;" that, in the present operative machine of complainant, it has been obliged to take away the control of the cutting operation from the controller, in order to get the best results; and that although a machine can be devised which shall be operative, as already stated, in the hands of an expert or skillful operator, when constructed on the principle of the original Osterhout machine, yet that it requires such nice adjustment as not to be capable of use in the ordinary factory, as shown by the patent granted to said Osterhout and one Hallenbeck, as joint inventors. And finally counsel for defendant insist that, if



the claims of the patent in suit are to be so broadly construed as to make defendant's machine an infringement, they also cover the invention in said prior patent to Osterhout & Hallenbeck, and that, therefore, within the rule laid down in *Miller v. Manufacturing Co.*, 151 U. S. 186, 14 Sup. Ct. 310, the patent in suit is void, because the invention therein claimed had been shown, described, and claimed in said patent No. 402,610, granted to said Osterhout & Hallenbeck May 7, 1889. But, while it may be true that the cutter is actuated only when the finger is thrown into engagement with its follower, said finger does not determine the period of any one engagement of the cutter bar and depressor, but only the number of engagements, as already stated. The same function is performed by defendant's snail cam. As this is a different mechanical construction, I think its substitution supports the defense as to all the claims except Nos. 21 and 22. The same may be said as to the above language used by the respective patentees.

The machines now used by complainant are manufactured in accordance with said Osterhout & Hallenbeck patent. This has a lug or controller, called in the patent a "trip," which is similar to the controller of the original Osterhout machine. But, when said lug engages with said lever, it causes another vertical lever to rock and permit a parallel bar to engage with an oscillating stud or follower for the purpose of connecting the two members of the clutch device upon the needle bar and cutter bar, respectively. Thereupon the descent of the needle bar causes a descent of the cutter. The backward movement of the switch cam on the main shaft causes a movement of the parallel bar, which disengages the clutch, and thus the bar is caused to ride up an incline of an auxiliary lever attached to said vertical lever, thus positively preventing any further connection with or operation of the cutter. When the lug on the feed-wheel disk passes out of engagement with the primary lever, the vertical lever assumes its normal position. Assuming that complainant's original device was somewhat defective, yet it is admitted that it was capable of continuous, successful, practical operation. Osterhout & Hallenbeck have made improvements on it in one way, and have obtained a patent therefor. Tebbetts & Doggett have made and patented other improvements. But, notwithstanding the doubts cast upon some of Osterhout's early experiments, the evidence strongly confirms the view that he first disclosed the combination and certain valuable features thereof described in his original application. So far as said combination is concerned, I concur with complainant's expert, in his statement that:

"It is clear from the records of both parties that Osterhout was the first man to produce a buttonhole stitching and cutting machine which had a cutter normally elevated, and out of use; a depressor for positively and unyieldingly forcing the cutter through the work; a controller for effecting the engagement of the depressor with the cutter carrier; and connections intermediate the controller and the cutter carrier for engaging the latter with the depressor."

The distinctive features of the Osterhout & Hallenbeck machine, already stated, show that it embodies specific and distinct devices

adapted to carry out the generic invention of the patent in suit, in certain special classes of machines.

In *Miller v. Manufacturing Co.*, supra, it appears, from the opinion of the court and the disclaimer of the patent, that the court had before it a comparatively narrow and limited invention; and it found that the entire invention, including the part or function claimed in the second patent, was described and claimed in the first patent. The court says, "The broad idea sought to be reserved is embodied in identically the same mechanical device constituting the invention, and covered by the first patent." The question of identity of invention depends upon the scope of the claims. Mr. Walker, in the last edition of his work on Patents, tersely and accurately states the rule deducible from the *Miller v. Manufacturing Co.* case, and applicable herein, as follows:

"Claims are coextensive which specify the same combination, of the same number, of the same parts, with the same features, though the functions which are mentioned in the claims are not coextensive. That was held to be the character of the respective claims of two patents to the same inventor in the case of *Miller v. Manufacturing Co.*, and therefore the second of these patents was held to have been granted for the same invention as the first, and to be void. But two claims are not coextensive which specify different combinations of parts of a process, machine, or manufacture, even where some of those parts are in each of the combinations."

The inventions here claimed are distinct, and are distinctly patentable. But defendant further urges that the effect of sustaining these claims would be to prolong the monopoly of the *Osterhout & Hallenbeck* patent beyond the statutory period of 17 years. In several recent cases in this court, in which *Miller v. Manufacturing Co.* has been cited, this argument has been pressed as a ground for extending the scope of said case beyond the actual decision of the court, and for declaring a new interpretation of the law. But this would not only be violative of the express declaration of the supreme court that its decision therein was in accordance with the rule settled by its previous decisions, but such a construction would amount to judicial legislation. It is not the duty of the court to thus change the law, but only to interpret it as it exists. *Refrigerating Co. v. Sulzberger*, 157 U. S. 1, 15 Sup: Ct. 508. The same questions as are involved herein were carefully considered by me in the case of *Thomson-Houston Electric Co. v. Winchester Ave. R. Co.*, 71 Fed. 192. The material facts bearing on this issue are practically the same, except that in that case both patents were granted to the same inventor. The application for the patent in suit herein was filed in December, 1885. While this application was delayed by interferences, the *Osterhout & Hallenbeck* application was filed. Even if it be admitted, as defendant contends, that the same rules are applicable in the present case, where the subsequent patent issued to joint inventors, I see no reason to modify the following language of my former opinion:

"This patent for this specific combination, adapted and claimed only for this specific purpose, applied for October 22, 1888, after the original application had been allowed, but before the patent thereon was granted, was earlier in

the date of issue. The original application was delayed by interference proceedings in the patent office. Whatever may be the rule as to cases where the application for the generic patent was filed subsequent to the application for the specific patent, I do not think the patentee should be deprived of his broad patent where the application for such patent was made first, and was delayed in the patent office through no fault of the inventor. Such a ruling would be a reproach to the law."

It is not necessary for the decision of this case to extend the principle of said decision in said case of Thomson-Houston Electric Co. v. Winchester Ave. R. Co., namely, that, when a prior application for a generic patent has been delayed in the patent office without the fault of the applicant, the grant of a subsequent patent for a specific, distinct, and separate improvement upon the principal patent will not invalidate a patent subsequently issued upon the original application. Let a decree be entered for an injunction and accounting as to claims 21 and 22 of the patent in suit.

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#### THE GLIDE.

HUDSON v. GRAFFLIN.

(Circuit Court of Appeals, Fourth Circuit. February 4, 1896.)

No. 135.

1. ADMIRALTY APPEALS—DECREE AGAINST STIPULATORS—APPEAL BY CLAIMANT ALONE.

The sureties in a stipulation for the release of a vessel are not parties to the cause, though they are bound by the decree. Hence, where the decree is adverse to the stipulators, the claimant may appeal alone without any proceedings to effect a severance.

2. SAME—DEFECTIVE RECORD—ORAL TESTIMONY.

An admiralty cause was tried in the district court for the district of Maryland upon oral testimony alone, there being no rule in that district requiring the testimony to be reduced to writing. An appeal was taken, but, as no notes of the evidence had been preserved, it could not be included in the record. The proctor for the appellant sought to supply the omission by retaking the testimony of the witnesses before a notary, first giving notice to the proctors on the other side. The latter declined to be present, and, when the testimony was submitted to the judge, he declined to certify that it was the purport of the testimony taken before him. The record was filed in the appellate court with these depositions attached. *Held*, that the judge below properly refused to make the requested certificate; that the depositions could not be considered on appeal; and that, under the peculiar circumstances, the appellate court would not hear the case *de novo*, but would remand it without prejudice, and with instructions to grant a new trial, with a statement, however, that this proceeding is not to be regarded as a precedent, and that in future the party by whose omission the testimony is not taken, so that it can be incorporated in the record, must suffer the consequences.

Appeal from the District Court of the United States for the District of Maryland.

Motion to dismiss the appeal. Leave to take testimony pending the appeal was heretofore granted. 15 C. C. A. 627, 68 Fed. 719.

Robert H. Smith, for appellant.

Frank Gosnell, for appellee.

**Argued before GOFF and SIMONTON, Circuit Judges, and BRAWLEY, District Judge.**

**SIMONTON, Circuit Judge.** This case comes up on a motion to dismiss an appeal from the district court of the United States for the district of Maryland, sitting in admiralty.

On 21st August, 1894, George W. Grafflin filed his libel against the barge *Glide* for damages to a cargo of fertilizers shipped by him on the barge. George P. Hudson intervened as managing owner and claimant. On 23d August she was released from arrest upon stipulation by George P. Hudson, with Samuel G. Rowland and Joseph B. Seth, sureties on the stipulation. The cause was heard upon oral evidence, in open court; but no part of it was reduced to writing, nor were any official notes of it taken. There is no rule or practice in the district court for the district of Maryland making it indispensable to reduce the testimony of an admiralty cause to writing. On 13th April, 1895, a decree was signed in favor of Grafflin, "that Samuel G. Rowland, George P. Hudson, and Joseph B. Seth, stipulators for the barge *Glide*, pay to George W. Grafflin, libellant, \$1,380.20 and costs, within 10 days from the date of the decree." The *Glide*, pending the suit and previously to the trial, had been sunk, and made a total wreck. In a short time after the entry of the decree, a petition for leave to appeal was filed by George P. Hudson, styling himself managing owner and claimant of the barge *Glide*. The stipulators did not appeal; nor has there been any severance. The appeal was perfected. In making up the record, the testimony taken at the trial could not be included in the record for the reasons stated. The respondent, on the part of his client, endeavored to rectify the omission by taking *de novo*, before a notary public, the evidence of the witnesses who had testified in his behalf, giving notice to the proctors of the libellant of his intention so to do, and of the time and place selected. These gentlemen declined to be present. When the testimony was taken, it was submitted to his honor, the district judge, with the purpose of obtaining his certificate to the fact that this was the purport of the testimony, or at least of a part of the testimony, taken before him. The district judge refused to give this certificate—First, because he knew of no law or practice which would justify him in doing so; and, second, because he could not, from his recollection or notes, certify that the testimony of the witnesses so taken was, in substance, the same as given before him. The record has come into this court without any of the testimony actually taken at the trial, and with no statement of it, except said depositions. The appellee (libellant below) moves to dismiss the appeal—First, because, the decree being against the stipulators jointly, and not against the barge *Glide*, the appeal is taken by George P. Hudson, managing owner of the *Glide*, alone, and not by any of the stipulators, without proof of severance; second, because the record does not contain any of the evidence taken at the trial.

As to the first ground: It is unquestionably true that all parties against whom a joint judgment or decree is rendered must join in the application for writ of error or appeal, or the record must show

that those who have not joined have had notice of the application, and have either refused or neglected to join. *Beardsley v. Railway Co.*, 158 U. S., at page 127, 15 Sup. Ct. 786; *Estis v. Trabue*, 128 U. S., at page 229, 9 Sup. Ct. 58; *Hardee v. Wilson*, 146 U. S. 179, 13 Sup. Ct. 39; *The Columbia*, 15 C. C. A. 91, 67 Fed. 942. Formerly, a formal writ or summons and judgment of severance was required. Now, it is enough to show that the parties had been notified in writing by due service, and notwithstanding do not join. *Hardee v. Wilson*, *supra*. But this rule evidently applies only to the parties on the record. Sureties to a stipulation are not parties to the record. When a vessel is attached by proceedings in rem, the owner, or some one on his behalf, files his claim to her, and thenceforward becomes a party to the record, and conducts and controls the defense. *Lane v. Townsend*, 1 Ware, 289, Fed. Cas. No. 8,054. If he be minded to release her from the arrest, he enters into a stipulation, with sureties, either before or after he files his answer, and thenceforward this stipulation represents the vessel. But the sureties in the stipulation do not become parties. Her subsequent fate does not concern the suit. The stipulation having been returned to the court, judgment thereon against both the principal and the sureties may be recovered at the time of rendering the decree in the original cause. *Rev. St. U. S. § 941*.

The twenty-first rule in admiralty says:

"In all cases of a final decree for the payment of money, the libellant shall have a writ of execution in the nature of a *fieri facias*, commanding the marshal or his deputy to levy and collect the amount thereof out of the goods and chattels, lands, tenements or other real estate of the defendant or stipulator."

So, also, by the terms of the stipulation, the sureties consent and agree to pay into court the full amount of the stipulation upon notice of the order or decree of the court, or that execution may issue against their goods, chattels, and lands. *Ben. Adm. 649*.

This is also the rule as laid down in *Clerke's Practice in Admiralty* (title 64):

"Decree having been entered against the principal, it should be executed against his sureties without any other process."

In *Williams & B. Adm. Jur. p. 286*, the rule is thus stated:

"The sureties are only liable to answer the judgment of the court, and they cannot be called upon to pay more than the sum recovered in the suit, together with costs adjudged against the defendant. To this extent, as soon as the defendant has made default, their liability is absolute, because the security is not a mere personal security given to the plaintiff, but it is a security given to the court as a pledge or substitute for the property proceeded against. But the sureties are not parties to the suit, and they are not entitled to interfere in any stage of the proceedings, although, if the defendant be guilty of fraud or there is any collusion between him and the adverse suitors, the sureties are entitled to apply to the court alleging such fraud or collusion."

For an exhaustive and learned discussion of this matter, see *Lane v. Townsend*, 1 Ware, 289, Fed. Cas. No. 8,054.

In other words, the sureties, in great measure, stand in the position of bail to the action. They are not parties to the cause. They

are represented by the claimant; they covenant to pay such decree as may be made against him; and the decree against him binds them. *The Belgenland*, 108 U. S. 153, 2 Sup. Ct. 864. See *The Ann Caroline*, 2 Wall. 549; *The Wanata*, 95 U. S. 600; *The Alligator*, 1 Gall. 145, Fed. Cas. No. 248. The form of decree entered in the district court is strictly within the law and practice of courts of admiralty.

If questions arise between the stipulators as to their relative liability, they may, it seems, come in and be made parties actively. See *The Elmira*, 16 Fed. 133. The invariable practice in this circuit certainly, and it is believed in other courts, is that the claimant in cases like this takes upon himself the whole defense, both in the lower courts and in the supreme court, and the sureties on his stipulation are bound by the result.

The next ground for the motion is that the record does not contain any of the evidence taken at the trial in the district court. This is strictly correct. The affidavits taken by the respondent after the trial of what the witnesses say they testified at the trial are in no sense evidence taken at the trial. We fully concur with the district judge that there is no law or practice which would justify him in granting the certificate asked by proctors for the claimant. The rule 14 of this court (clause 6)<sup>1</sup> requires that the record in cases of admiralty and maritime jurisdiction shall be made up as provided in general admiralty rule No. 52 of the supreme court. This rule No. 52 requires that the record shall contain the testimony upon the part of the libellant and the testimony on the part of the defendant, unless the parties agree, by their proctors, by written stipulation, that it may be omitted. There is no such stipulation here. Clearly, the record is incomplete. This court cannot pass on the merits of the case. Nor, in the absence of a stipulation by counsel, is it possible to supply the omission. We must have the evidence taken at the trial. It is impossible to obtain this. The judge who tried the case cannot recall it. The proctor for claimant is unable to furnish it in such shape as will meet the approval of the other side. Nor can it be imputed as a fault to any one that this evidence is not forthcoming. There is no rule or practice in this district court requiring the reduction to writing of evidence used at the trial. Yet, without such evidence, great injustice may be done. If the appeal be dismissed on this ground, then the claimant will bear all the results of an omission for which he is not responsible. If we go on and hear the appeal, the appellee will be put at a great disadvantage, guiltless as he is of any default. This is an anomalous condition of things. But in a court of justice there should be no default of justice if it can by any possibility be prevented. It has been suggested that the case could be tried here *de novo*. We concur with the court of appeals in the Second circuit in *The Havilah*, 1 C. C. A. 77, 48 Fed. 684, and 1 U. S. App. 17, and with the circuit court of appeals of the First circuit in *The Philadelphian*, 9 C. C. A. 54, 60 Fed. 424, that this court can by the practice in admiralty

<sup>1</sup> 11 C. C. A. cv., 47 Fed. vii.

hear this case *de novo*. But this practice is one to be used cautiously, and in cases of extreme necessity. Besides this, there is much force in the objection taken in *The Philadelphian*, supra: "In any case in which all the proofs are not reduced to writing in the district court, and no equivalent is found in the record, we have no power except to decline to try the facts anew."

There being no precedent for or against the course which suggests itself to us, we will pursue it. That is to remand the case without prejudice to the court below, with instructions to grant a new trial. We have no right to prescribe any rule for the district courts, and have no desire to dictate to them. It is suggested, however, as a convenient practice, that some rule be made requiring the testimony, or at least the substance of the testimony, taken at the trial in a cause of admiralty and maritime jurisdiction, to be reduced to writing. Parties to such cases are notified that the present case cannot be relied on as a precedent, and that in the future the party through whose omission or neglect the testimony or any part of it taken at the trial is not before this court, when the cause comes up on appeal, must suffer the consequence. Cause remanded, without prejudice, for a trial *de novo* in the district court.

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BLACKSHERE v. PATTERSON et al.

(Circuit Court of Appeals, Fourth Circuit. February 13, 1896.)

No. 161.

CONTRACTS—CONSTRUCTION AND EFFECT—OCEAN FREIGHTS.

In April, 1894, a cattle shipper contracted with the agents of a steamship line to ship cattle from Baltimore to Liverpool, during the four months beginning with the 1st of September following. The rate of freight per head was to be "the average rate of freight received by the Boston-Liverpool steamers, month by month, during the existence of this contract." During the four months of the contract there were but two lines of steamers carrying cattle from Boston to Liverpool, and the only cattle carried by them were taken under contracts previously made, with two shippers, who paid, respectively, 46 and 50 shillings per head. Before the 1st of September, however, rates for cattle from other ports had very materially declined, and the shipper claimed that he was only bound to pay the average rate from such ports during the four months of the contract. Held that, as the terms of the contract were entirely clear, the shipper was bound to pay the average rate from Boston, namely, 48 shillings per head, notwithstanding the fact that such rate was fixed in advance by the contracts mentioned.

Appeal from the District Court of the United States for the District of Maryland.

This was a libel by George F. Patterson and Robert Ramsey against Elias A. Blackshere to recover freight alleged to be due upon certain shipments of cattle. The district court rendered a decree in favor of libelants, and the respondent appeals.

The libelants, appellees here, are the agents of the Johnston Line of steamships between Baltimore and Liverpool, England. The respondent, appellant here, is a large shipper of cattle from this country to Europe. In April, 1894, the appellant made a contract with the appellees to ship cattle by their

line of steamers from the port of Baltimore to Liverpool. Shipments were to be made during the four months from September 1, 1894, to December 31, 1894. The shipper was not willing to agree in advance on a fixed rate of freight, but evidently desired to take advantage of any fluctuation in the freight market. The libelants were willing to meet him in this regard. There are several ports in the United States from which cattle are shipped to Europe. Baltimore, Newport News, New York, and Boston enjoy the largest part of this business. Of these ports, Boston has an advantage over the others named, in that it is two or more days nearer to English ports than they are. Instead, therefore, of adopting as a standard of freight charge the rates of these other ports, or any of them, or the average rates from all the other American ports, the parties agreed to take the Boston rates as their measure of charge. The contract is in these words:

"The freight is payable upon said cattle at the average rate of freight received by the Boston-Liverpool steamers, month by month, during the existence of this contract, British sterling per head on the number shipped at Baltimore, whether delivered alive, or not delivered at all, and is payable at Baltimore."

There were two lines out of Boston to Liverpool engaged in the transportation of cattle, one known as the "Warren Line," and the other known as the "Leyland Line." These were the only lines carrying cattle, and the steamships of these lines were the only steamers which carried cattle between Boston and Liverpool during the four months specified in this contract. The Leyland Line had a contract with Swift & Co., large dealers in cattle and dressed meats, made in August, 1894, whereby the whole space room in their steamships in each succeeding voyage during each month was let at the rate of 46 shillings per head for each one of these months. The Warren Line had two contracts, one with Swift & Co., dated 31st July, 1894, the other with Hathaway & Co., dated the 23d of August, 1894, whereby the whole space in each of their steamships for the respective voyages during each of the four months from September to December was let at 50 shillings per head for each of these months. These rates were all fixed in advance. These steamships each received the freight at these rates. In the month of August the demand for freight room for cattle, which before that time had been very great and urgent, ceased, and, as the expression is, "freights broke." The rates at other American ports fell. There were no other rates at Boston than those stated above. Libelants carried the cattle for respondent, and presented a claim against him for 48 shillings per head upon cattle carried by them under the contract above set forth. Forty-eight shillings is the average between 50 shillings, received by the Warren Line, and 46 shillings, received by the Leyland Line. Respondent refused to pay this rate. The libel was then filed, the answer put in, and testimony taken. The fourth paragraph of the libel alleges that, during the months of September, October, and November, the average rates received by the Boston-Liverpool steamers, month by month, was 48 shillings British sterling per head for cattle. The answer to the fourth paragraph categorically denies it, and avers that the average rate of freight received during these months by the Boston-Liverpool steamers, month by month, was between 25 and 30 shillings British sterling per head of cattle. The district court decided in favor of the libelants, whereupon an appeal was allowed and taken to this court.

F. C. Slingluff, for appellant.

Arthur George Brown and Frederick W. Brune, for appellees.

Before SIMONTON, Circuit Judge, and HUGHES and PAUL, District Judges.

SIMONTON, Circuit Judge (after stating the facts). The parties to this contract were men of experience and ability. Each knew precisely what he wanted. The language of the contract is carefully chosen and clearly expressed. The shipper wanted to take advantage of any fluctuation of freights in his favor. The agents



of the shipping line were not afraid to take the risk. The shipper would not agree to the rates fixed so long in advance, and he therefore adopted the standard by which it could be fixed in the future. He did not select as this standard freight rates which might be prevailing at neighboring ports, nor the average freight rates from all, or any, or two or more, American ports. No doubt he saw the advantage Boston would enjoy if the competition for freight should become eager and fierce, and he selected Boston rates as his standard. Nor did he content himself with the rates charged or to be charged. Carefully avoiding the result of rebates and concessions, he adopted as his standard the average rate of freight received—that is, actually received—by the Boston-Liverpool steamers. So the shipping agents agreed to carry his cattle during the last four months of 1894, and were content to receive therefor the average rate of freight received by the Boston-Liverpool steamers, month by month, during the existence of the contract. The Baltimore Line did carry the cattle. The testimony establishes that the Boston-Liverpool steamers did carry cattle during these same months; that only two lines, and only the steamships of these lines, carried cattle between Boston and Liverpool during these months; that one of these lines received, month by month, for such carriage, 46 shillings per head as freight, and that the other line received, month by month, for such carriage, 50 shillings per head, the average being 48 shillings per head. The claim of the libelants is in the very words of the contract. The appellant contends that these rates so received by the Boston-Liverpool steamers were fixed in advance for the whole time, and that he meant rates fixed month by month, in accordance with the law of supply and demand. The contract does not say so. Indeed, how could the contract limit itself to rates fixed just before or during the performance of the contract? Cattle are not like a bill of goods in a warehouse near a wharf. It takes time to transport cattle to a port and prepare them for shipment. Freight engagements for cattle in quantities must be made in advance,—can scarcely be made at the beginning of or during the month of actual shipment. At any rate, this contract is absolutely silent as to the date when the rates were to be fixed. It confines itself to the rate of freight which was received. The appellant seeks to confine the libelants to rates of freight prevailing or received at other American ports, and to ignore the rates received at Boston by Boston-Liverpool steamers. But, when the contract was made, he selected the rates of freight received by the Boston-Liverpool steamers,—not rates prevailing, nor rates charged, but rates received,—in preference to freight rates at any one or some or all of the other American ports. If the demand for freight room had continued and increased, and if at all other American ports it had risen to 75 or 100 shillings per head, but the Boston-Liverpool steamers, bound by their contract, could not take advantage of it, could we compel the shipper here, in spite of his contract, to ignore the lower Boston-Liverpool rates, and to pay the higher rate, because it prevailed at other ports? “Non hæc in fœdera

venit." So the appellant is bound by the terms of his contract, however unexpected to him may be its result.

The decree of the district court is affirmed, with costs.

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THE NICARAGUA.

NICOLAYSEN v. ORR & LAUBENHEIMER CO., Limited.

(Circuit Court of Appeals, Fifth Circuit. January 28, 1896.)

No. 439.

1. CHARTER PARTY—DEMISE OF SHIP—AGENCY OF MASTER.

Under a charter party whereby the general owner retains possession, command, and navigation of the ship, the master is the owner's agent, charged with the duty of getting proper entrance permits to the ports within the charter limits; and, for his default therein, the ship and her owner are liable.

2. SAME—DETENTION AT QUARANTINE—LIABILITY FOR LOSS OF CARGO.

Under a charter party not amounting to a demise, the ship is liable to the charterers for damage to perishable cargo, resulting from detention at quarantine because of the master's act in taking on board, without the charterer's consent, a passenger who was without the health certificate which the master knew would be required at the port of destination. 71 Fed. 723, affirmed.

Appeal from the District Court of the United States for the Southern District of Alabama.

This was a libel in rem by the Orr & Laubenhimer Company, Limited, against the Norwegian steamship Nicaragua (G. Nicolaysen, claimant), to recover, under a charter party, for damage to perishable cargo, accruing during detention of the vessel in quarantine at the port of Mobile. The district court rendered a decree for the libellant (71 Fed. 723), and the claimant appealed.

Gregory L. & H. T. Smith, for appellant.

H. Pillans, for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and BOARMAN, District Judge.

McCORMICK, Circuit Judge. This case was begun on August 24, 1894, by the libel of the appellee, seeking to recover damages for the alleged violation of a certain charter party, then existing between the libellant and the owners of the steamship, in that after the vessel had left Bluefields, Nicaragua, destined for Mobile, Ala., with a cargo of perishable fruit, the master thereof received and knowingly took on board at Bluefields a passenger, and brought him to Mobile, whereby, on arriving at Mobile, the steamship Nicaragua became and was detained by the quarantine authorities at that port, for fumigation, for a space of three entire days, which detention, the libel alleges, arose alone from the violation by the master of the quarantine regulations in bringing the passenger to Mobile. It is conceded by all that this vessel did arrive at quarantine station, Mobile Bay, on Saturday, the 19th of August, and was there de-

tained by the quarantine officer in charge on account of the presence of a passenger, one John McCafferty, and that certain damage did result to the cargo of the vessel from this detention. The extent of this damage is not now material, the only question raised by the assignments of error being as to the liability of the steamship for the damage thus suffered, the amount thereof having been correctly ascertained. On April 11, 1895, the district court decreed that the libellant was entitled to recover these damages, which were finally fixed at \$2,833.15, for which a decree was rendered against the appellant on July 10, 1895. It is for the reversal of these decrees that this appeal is taken.

The respondent (now appellant) denies liability of the vessel in his answer, and now insists upon the reversal of the decree, for the following reasons: (1) Because the master of the steamship was, in the matter in question, the agent of the libellant, as charterer, and not as the agent of the owner of the vessel; (2) because no duly-established quarantine regulation was in fact violated; (3) because the passage of John McCafferty was in fact authorized by the agent of the libellant residing at Bluefields; (4) because McCafferty was an American citizen, who was at that time in great peril of assassination, and because it was necessary to so receive him as such passenger in order to save human life.

It is unnecessary and would be tedious to detail here and compare the evidence, which, as is not unusual in such cases, is conflicting. The charter party is in the common form of the West Indian and American time charter party; and, on consideration of its special provisions and of all the proof showing the practical construction put on it by the parties while it was in active life, we concur in the findings of the trial judge that it was not a demise of the vessel; the general owner did not part with the possession, command, and navigation of the ship; the captain was the agent of the owner of the vessel, whose business it was to get proper entrance permits to the ports within the charter limits, and that a default of the master in that respect is chargeable on the ship and its owners; that in August, 1894, there were in fact quarantine regulations in force in the port of Mobile, of which the appellant had notice, which required that passengers from Bluefields should have a health certificate or entrance permit from the quarantine physician at Bluefields, in default of which the vessel bringing passengers from Bluefields would be detained at the quarantine station. The proof with reference to the circumstances under which the passenger was brought from Bluefields does not relieve the master from his liability for failure to have the proper papers and entrance permit for this passenger, by reason of which failure the detention occurred and injury to the cargo resulted. The decree appealed from is affirmed.

## AUER et al. v. LOMBARD et al.

(Circuit Court of Appeals, First Circuit. February 15, 1896.)

No. 146.

## 1. CIRCUIT COURT—JURISDICTIONAL AMOUNT—SUIT AGAINST STOCKHOLDERS OF CORPORATION—COLORADO STATUTE.

A statute of Colorado provides that "shareholders in banks \* \* \* shall be held individually responsible for debts \* \* \* of said associations in double the amount of the par value of the stock owned by them respectively." Laws 1885, p. 264. *Held*, that the remedy of creditors of such corporations under this statute, unless in exceptional cases requiring an accounting, is at law only, and that the claims of creditors against shareholders are several, and cannot be joined in one action to make up the amount required to give jurisdiction to the United States circuit court.

## 2. SAME—COSTS.

Under the circumstances of the case the order for dismissal by the circuit court must be without prejudice and without costs in that court, but with costs in the court of appeals.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

Henry W. King and Charles M. Rice, for appellants.

Robert M. Morse and John Duff (Edgar S. Hill with them on brief), for appellees.

Before PUTNAM, Circuit Judge, and NELSON and WEBB, District Judges.

PUTNAM, Circuit Judge. This is a bill in equity brought by a part of the creditors of a savings bank, established under the laws of the state of Colorado, in behalf of themselves and of such other creditors as may desire to join them, against a portion of the shareholders of the corporation. The bank was incorporated June 8, 1887, and the bill was filed February 28, 1895. A statute of the state of Colorado, enacted in 1877, provided as follows:

"The officers and stockholders of every banking corporation or association formed under the provisions of this act shall be individually liable for all debts contracted during the term of their being officers or stockholders of such corporation, equally and ratably to the extent of their respective shares of stock in any such corporation or association, except that when any stockholder shall sell and transfer his stock, such liability shall cease at the expiration of one year from and after the date of such sale and transfer." Gen. St. 1883, c. 19, § 43.

By a subsequent section this enactment was made applicable to the officers and stockholders of savings banks. In 1885 the following statute was also enacted:

"Section 1. Shareholders in banks, savings banks, trust, deposit, and security associations, shall be held individually responsible for debts, contracts, and engagements of said associations in double the amount of the par value of the stock owned by them respectively.

"Sec. 2. Any and all acts or parts of acts in conflict herewith be, and the same are hereby, repealed." Laws 1885, p. 264.

The respondents are all citizens of the state of Massachusetts, and there are no other shareholders residing or found within the district

of Massachusetts, and none others are sought to be made parties to the bill. The demand against one respondent is \$1,000, against another \$2,000, and against each of the others in excess of the latter sum. The claim is stated as a joint demand against each respondent, as follows:

"And the plaintiffs say that said defendants, by virtue of the provisions of said law, are severally indebted to them in double the amount of the par value of the stock hereinbefore set forth as having been owned by them respectively, to wit: that the defendant Lewis Lombard is indebted to the plaintiffs in the amount of three thousand dollars; that the defendant B. Lombard, Jr., is indebted to the plaintiffs in the amount of ten thousand dollars; that the defendant Irving Wood is indebted to the plaintiffs in the amount of two thousand dollars; and that the defendant Darius Wood is indebted to the plaintiffs in the amount of one thousand dollars."

The amount of all the debts due all the complainants would, if recovered, exhaust the amounts thus demanded, but no debt due any complainant exceeds \$2,000, exclusive of interest and costs. The first questions, therefore, are whether, on this showing, a circuit court of the United States can take jurisdiction of any part of this controversy; and, if yes, of what part.

The earlier of these two statutes required an apportionment among stockholders. In many jurisdictions, if not in all, this would involve a bill in equity with an accounting of all the corporate liabilities and a contribution by the stockholders, and for this the further making the corporation, and perhaps all stockholders, parties. Thus, serious difficulties arose touching the jurisdiction in cases where there were nonresident stockholders; and it is a matter of common knowledge, with reference to Western states like Colorado, that a large proportion of the local financial corporations have shareholders of that class. Consequently, proceedings under statutes like the earlier one referred to involved great doubts and difficulties; and the same might be said as to all like statutes which required proceedings in equity. A striking example is found in *Cattle Co. v. Frank*, 148 U. S. 603, 13 Sup. Ct. 691, where it was held that a creditors' bill would not lie in that case against stockholders unless the corporation was made a party, although the corporation was a nonresident. On the other hand, *Flash v. Conn*, 109 U. S. 371, 3 Sup. Ct. 263, is an example of the facility with which a single creditor may proceed against even a nonresident stockholder, by a suit at law, under a statute similar in its construction to the act of 1885. That there may be a remedy at law under such statutes in other states than that where the statute was enacted was settled by the supreme court in *Flash v. Conn*, *ubi supra*, *Huntington v. Attrill*, 146 U. S. 657, 13 Sup. Ct. 224, and in some other cases which need not be referred to. The same conclusions as those of the supreme court were also reached in the house of lords in *Huntington v. Attrill* [1893] App. Cas. 150, where the litigation arose out of the same transactions as in *Huntington v. Attrill*, *ubi supra*. The statute of 1883 was under adjudication by the supreme court of the state of Colorado in *Buenz v. Cook*, 15 Colo. 38, 24 Pac. 679, and the same general view was there taken of it as is taken by us. In the light of these considerations, we have no doubt that the purpose of the later statute is to give each creditor a simple and direct remedy against each share-

holder, and that for this a suit at law by any creditor, on his behalf alone, is maintainable under it. *Flash v. Conn*, ubi supra. The act of 1885 establishes a liability of an essentially different character from that of 1883, in the fact that it is not ratable, and also of an essentially different amount. The two cannot stand together with reference to the same corporation, and debts of the same period of contracting; and we have no doubt that, so far as this controversy is concerned, the later act wholly supersedes the earlier one, and the complainants' rights rest on it alone. As the liability involves no accounting, the remedy is at law only. *Kennedy v. Gibson*, 8 Wall. 498, 505; *Casey v. Galli*, 94 U. S. 673. We do not say that there might not be a case under the statute which would involve an accounting, and the securing and distribution of a fund, but only that no such case is shown here. Nor do we say that a circuit court of the United States could take jurisdiction of such a case when no single debt reaches the jurisdictional amount, or where it has not jurisdiction over the corporation involved. We only hold that, on the case as made, the claims of the various complainants are several, and cannot be joined to make up the required jurisdictional amount.

As the circuit court had no jurisdiction for the reasons stated, no costs can be allowed in that court; and inasmuch as our disposal of the case in no way involves the merits of the controversy, the bill must be dismissed without prejudice. In these two particulars the orders in *Peper v. Fordyce*, 119 U. S. 469, 472, 7 Sup. Ct. 287, and in *Wetherby v. Stinson*, 18 U. S. App. 714, 721, 10 C. C. A. 243, 62 Fed. 173, are in accordance with the settled practice of the supreme court. The decree of the circuit court is modified, and the case is remanded to that court, with directions to dismiss the bill without prejudice, for want of jurisdiction, with the costs of this court in favor of the respondents, but without costs in that court for either party.

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PULLMAN'S PALACE-CAR CO. v. CENTRAL TRANSP. CO.

CENTRAL TRANSP. CO. v. PULLMAN'S PALACE-CAR CO.

(Circuit Court, E. D. Pennsylvania. January 14, 1896.)

1. ULTRA VIRES LEASE—RESTITUTION—LOSS OF IDENTITY OF PROPERTY—MEASURE OF COMPENSATION.

A sleeping-car company, operating a system of lines, leased the cars, contracts, etc., of another company, operating another system, and thereupon so merged and absorbed the plants of both companies into an entire system, by substitution of cars and of new contracts in its own name, that the identity of the plant of the lessor company was destroyed, and the plant itself could not be returned. After 15 years' possession the lessee company, without returning the property, repudiated the lease on the ground that it was ultra vires and void, and successfully defended on that ground against a suit for rental. In a proceeding in equity to compel the lessee company to make compensation for the property so appropriated, *held*, that the lessee company must pay the value of the property leased, as a whole, including contracts, and not merely the value of the tangible property, such as cars and equipments.

2. SAME.

*Held*, further, that a valuation at a sum not above the selling price of the stock of the lessor company was not excessive.

**8. SAME—RENTALS AND EARNINGS—PRESUMPTIONS.**

*Held*, further, that as the lessee company had failed to furnish the information necessary to ascertain whether the earnings before the repudiation of the lease had been greater or less than the rental paid, the presumption was that the rent and earnings balanced each other, and that as the evidence justified the presumption that up to the time of repudiation the property had increased, rather than decreased, in value, a decree should be entered for the value found by the master, with interest from the time of repudiation.

**Hearing on Exceptions to Report of Master.**

This was a bill in equity by Pullman's Palace-Car Company against the Central Transportation Company, and a cross bill by the Central Transportation Company against Pullman's Palace-Car Company. The two companies, plaintiff and defendant, had been sleeping-car companies, of about the same size, but occupying different territories; the Central Transportation Company operating a system of lines from St. Louis east to the Atlantic, and Pullman's Palace-Car Company operating a system of lines from Buffalo west to the Pacific. Negotiations entered into for consolidation resulted in a lease of the Central Transportation Company by Pullman's Palace-Car Company for 99 years, under a Pennsylvania statute specifically drawn by counsel for that purpose, and passed by the legislature. After the lease had been in operation 15 years, and after the Central Transportation Company's property had been so absorbed into the Pullman system that identification and separation had become impossible, the two companies quarreled over a clause of the lease. The Central Transportation Company brought suits at law to recover accruing installments of rent, and Pullman's Palace-Car Company filed the present bill, alleging that the lease had been terminated by it under a clause reserving that right, and that in any event it was originally invalid; alleging further that it was impossible to return the property, and asking the court to enjoin the suits at law, and ascertain what would be an equitable compensation for the property. The court granted an injunction against suits at law for further rental, but refused to interfere with pending suits for rental previously accrued. Pullman's Palace-Car Company thereupon set up as a defense to one of these pending suits at law the claim already made in the bill in equity, viz. that the lease itself was invalid. This defense the court sustained, and its decision was affirmed on appeal. *Central Transp. Co. v. Pullman's Palace-Car Co.*, 139 U. S. 24, 11 Sup. Ct. 478. Thereupon Pullman's Palace-Car Company asked leave to dismiss the present bill, in which it had asked the court to fix the compensation to be paid for the property in lieu of its return; and the Central Transportation Company opposed this motion, and asked leave to file a cross bill praying for compensation for the property taken. The motion to dismiss was refused, and leave was granted to file the cross bill. *Pullman's Palace-Car Co. v. Central Transp. Co.*, 49 Fed. 261. Issue being joined, testimony was taken, and the cause heard on bill, answer, and proofs, with the result that a decree was entered in favor of the Central Transportation Company, and the cause referred to Theodore M. Etting, as master, to ascertain the value of the property. *Pullman Palace-Car Co. v. Central Transp. Co.*, 65 Fed. 158.

The master reported that the Central Transportation Company was incorporated December 30, 1862, for 20 years, originally with a capital of \$200,000, which from time to time had been increased until it reached \$2,000,000 prior to the time of the lease, and which was still further increased at the time of the lease by the issue of \$200,000 of stock for the purchase of patents, making a total capital of \$2,200,000, and that it had a net earning capacity of 9½ per cent. per annum, increased to about 11½ per cent. per annum by the purchase of patents hereinafter mentioned, on which the company had been paying nearly \$50,000 per annum royalty, and that it had a business which indicated a healthy growth. Its earnings were made by operating lines of sleeping cars extending from New York, Philadelphia, Baltimore, and Washington to Chicago and St. Louis. There were 16 written contracts with different railroads, covering the operation of most of these lines, but not all of them, as a few lines were operated without any written contract with the

railroads over which they extended. Pullman's Palace-Car Company had been incorporated in 1867 with a capital of \$1,250,000, subsequently increased to \$1,750,000, and with net receipts equal to 13 per cent. per annum. It operated lines under contracts with lines mostly north and west of Chicago, and extending to the Pacific Coast; but it had no means of reaching Philadelphia, Baltimore, or Washington from the west, and its only means of reaching New York was by the Grand Trunk & Michigan Central Railroad to Buffalo, and the Delaware, Lackawanna & Western Railroad to New York. Its cars were superior in comfort and safety to those of the Central Transportation Company, and this fact affected travel on the lines of the latter company, especially those over the Pennsylvania Railroad and its affiliated companies. In addition to this, the entire condition of sleeping-car transportation at that time was unsatisfactory. Passengers were obliged to change cars at points where the two systems came in contact with each other. The Pennsylvania Railroad, and the roads forming its system, could not make contracts with Pullman's Palace-Car Company, because of the existing contracts with the Central Transportation Company. There was pending litigation between the two companies, the Central Transportation Company claiming that the Pullman Company had infringed its patents. Under these conditions, it appeared to be desirable, in the interests of both the sleeping-car companies, the railroads, and the public, that a consolidation of the two companies should be effected. Negotiations resulted in: (1) A purchase by the Central Transportation Company of all the patents under which it had been operating at a royalty. To enable this purchase to be made, the capital was increased from \$2,000,000 to \$2,220,000. (2) A lease by the Central Transportation Company to the Pullman Company for 99 years, at a rental of 12 per cent. per annum on \$2,220,000, and an assignment by the Central Transportation Company to the Pullman Company of all the former's cars, contracts, and patents. (3) A contract between the Pullman Company and the Pennsylvania Railroad Company whereby the various contracts under which the Central Transportation Company had been operating lines over the roads comprising the Pennsylvania system were exchanged for a single 15-year contract in the name of the Pullman Company. This contract allowed the equipment to be made up in part of the old Central Transportation Company cars, and in part of new cars to be furnished by the Pullman Company, the railroad undertaking to place the old cars in first-class condition.

To obtain legislative authority for the lease by one sleeping-car company to the other, the counsel for the Pennsylvania Railroad Company prepared a statute, which was passed by the Pennsylvania legislature, intended to authorize the lease, extend the corporate existence of the Central Transportation Company for 99 years, and authorize the issue of the \$200,000 of new stock. The effect of these agreements, as stated by the master, was: "The Pennsylvania Railroad obtained forthwith, for its entire system, Pullman cars and Pullman connections; agreeing, however, to accept, as a part of its new equipment, old cars of the Central Transportation Company, which were to be put in first-class condition. The Central Transportation Company was thus saved from an expenditure necessary to provide a proper equipment of cars and better service, which, under other circumstances, would have been unavoidable, and received at once a sum exceeding its then earning power by about one-half of one per cent., and which payment, it was anticipated, it would continue to receive. An harmonious system of sleeping-car transportation was thereby established, extending from the Atlantic to the Pacific, the receipts of which, it was believed, would be sufficiently large to secure the continuous payment of the above rental, and also to insure greater prospective value to the Central Transportation Company's shares. The Pullman Company acquired an entrance to the principal cities of the Atlantic seaboard, by favored routes. It at once took the place of the Central Transportation Company on the Pennsylvania lines, so called, for fifteen years, and also on the lines of all other railroad companies covered by the assigned contracts of the Central Transportation Company; and there was thus established reciprocal relations, which have, for the most part, since continued. It attained an ascendancy in the sleeping-car business which has never since been disputed, as well as a monopoly of a most valuable territory for fifteen years."



The master further reported that, in all of the 16 contracts between the various railroads and the Central Transportation Company, the railroads were to furnish fuel and light, and keep the cars in good order and condition, and in some of them the railroads undertook to renew worn-out parts. Some of the contracts expired at definite dates, others ran for the life of the patents previously taken out. Six of them ran "during the continuance of the incorporation of" the Central Transportation Company. The master held that this included the continued corporate existence under the statute subsequently passed, extending the corporate life of the Central Transportation Company beyond the original limit of its charter. After the execution of the lease to the Pullman Company, some of the contracts were replaced by new ones taken in the name of the Pullman Company, and some were canceled. The master further reported that at the time of the lease the rolling stock of the Central Transportation Company consisted of about 119 cars and their equipments, of which the total cost was about \$950,000, and the value at the time of the lease about \$712,000, and that the Pullman Company had actually received from various railroads, in settlement of cars retired or destroyed, \$556,933.61, and had on hand 33 cars. The master reported, however, that, on account of the peculiar nature of the contracts, it was, in his judgment, impossible to correctly value the cars, apart from the obligations to maintain and use them set forth in the contracts. The master further reported that the value of the patents was \$266,000,—that being the price paid for them at the time of the lease. He further reported that it was impossible to make a separate appraisal or valuation of the contracts, owing to their peculiar nature, and varying terms of duration. The master then proceeded to report the value of the property taken as a whole. He found that there were three measures of value, which served to check or verify each other, viz.: (1) The testimony of a witness who knew the property well, who was competent to appraise it, and who estimated it to be worth at least \$3,300,000. (2) The market value of the stock of the company at the time of the lease, which was between \$2,464,000 and \$2,640,000. (3) The earning capacity of the property, taken in connection with the probable amount to be put aside to restore the capital on a fair expectancy of probable life, and this value the master estimated as at least \$50 per share. The master then reported as follows: "The several forms of valuation above considered may be summed up as follows: If Torrey's valuation is to be adopted, the capital stock of the company was worth about seventy-five dollars a share. If the public estimate is to be adopted, the stock was worth from fifty-six dollars to sixty dollars a share. If the estimate predicated on earnings, coupled with probable life, is to be adopted, the stock was worth at least fifty dollars a share. The two latter estimates serve to verify each other, and to indicate that Torrey's testimony is excessive. They are both so far above the capitalized value of the rental agreed to be paid by the Pullman Company that either of them, if accepted, would leave a large margin for the illegal consideration which the court has directed shall be excluded from the account. Which of the two is to be preferred? And, if the price of the stock on the street is to be accepted as the measure of value of the property when transferred, what figure is to be adopted? The estimate of probable life is hypothetical. The value of the stock on the street is a positive indication of the estimate placed on the property by the public. That it is not entirely a satisfactory measure of value must be conceded, but in the judgment of the master, supported as it is by the best independent estimate that the evidence affords, it should be accepted as the fairest criterion of value. This amount has, according to the testimony, been placed at from fifty-six dollars to sixty dollars a share; and, whilst the evidence as to these values is not as satisfactory as the master would wish, it is nevertheless uncontradicted. As between the two quotations above named, which indicate the fluctuations of the stock in value, the master has taken the average, or, in other words, a valuation of fifty-eight dollars a share. This, he believes, is as fair and equitable a valuation as is possible, under the testimony; and he accordingly reports the value of the property, when received, is by him appraised at fifty-eight dollars a share, or \$2,552,000." With regard to the earnings of the property after it had been delivered under the lease, the master reported: "An accurate ascertainment of the earnings, without further evidence than that which has been produced

before the master, is impossible. The plant, upon the execution of the lease, became absorbed in a system in which the elements of new contracts, additional cars, and added lines entered so largely that, from the evidence presented, it is not possible to distinguish accurately the earnings applicable to the property assigned. General results, therefore, can only be ascertained." The master then proceeded to discuss the contentions of the respective parties as to the earnings, under certain statements which had been produced, and held that neither estimate was satisfactory or complete. He then reported as follows: "The Pullman Company has failed, though requested by the master, to furnish him with such information, which would, he believed, have enabled him to state an account. In so doing, it has doubtless conformed to what its counsel have advised as the true interpretation of the order of reference, but the testimony furnished has not been sufficient to make it possible for the master to comply with the directions of the court, as they are understood by him; and he accordingly is compelled to report that he has not as yet been furnished with sufficient data to enable him to ascertain the difference between the rental paid to the Central Transportation Company from January 1, 1870, to January 1, 1885, and the receipts derived by the Pullman Company from its use of the property transferred during the period above referred to."

Both parties filed exceptions to this report. The Pullman Company prefaced its exceptions by a protest that the Central Transportation Company was not entitled to any recovery, and that the Pullman Company was protected by the statute of limitations. The exceptions, which were voluminous, covered substantially three objections, viz.: (1) That the Pullman Company was not accountable for the intangible property, such as contracts, etc.; (2) that the valuation was too high; (3) that the rents paid more than compensated for all the property received. There were numerous other exceptions to matters of detail, but the above comprehended the substantial objections. The exceptions of the Central Transportation Company were to the refusal of the master to find that the property was worth at least \$3,000,000, and his failure to report that the failure of the Pullman Company to furnish the information necessary to state an account of earnings entitled the Central Transportation Company to a decree for the value of the property, without reference to the earnings. On the argument the Central Transportation Company, for the purpose of avoiding delay, offered to waive any claim for excess of earnings over the rental paid, and asked for a decree for the value of the property, with interest from the time when the Pullman Company repudiated the lease.

A. H. Wintersteen, Robert T. Lincoln, and Edward S. Isham, for Pullman's Palace-Car Co.

The contract under which the property was delivered having been adjudged void, the courts will leave the parties where they have placed themselves; and there can be, therefore, no recovery by the Central Transportation Company. The Pullman Company, if liable at all, was only liable for the property which was susceptible of manual transfer and physical delivery, to wit, the cars and equipments. The lease being void, so, also, was the assignment of contracts to the Pullman Company, and the Pullman Company therefore acquired nothing by the contracts. It was the duty of the Central Transportation Company to reassert its rights and take possession of the property, and its passivity and acquiescence in the situation were equally illegal with the lease itself. A party cannot recover for an injury which it was in his own power to prevent (*Sedg. Dam. §§ 201, 202; Loker v. Damon, 17 Pick. 288; Dodd v. Jones, 137 Mass. 323; U. S. v. Smith, 94 U. S. 218*), nor for an injury which it was its social duty to avoid (*Miller v. Mariners' Church, 7 Me. 51*). And no fiduciary relation could arise out of the mere possession and use of the property. *Root v. Railway Co., 105 U. S., 215; Monk v. Harper, 3 Edw. Ch. 111; Doyle v. Murphy, 22 Ill. 508; Wilson v. Kirby, 88 Ill. 572*. The valuation of the master is excessive because it capitalizes the earning-producing capacity of the plant, when the Central Transportation Company has received the earnings in the rental, and also because it includes the franchise of the corporation, which still exists. The legislature could not, by extending the corporate existence, extend a contract which would otherwise have expired at the end of the original incorporation.

**Frank P. Prichard and John G. Johnson, for Central Transp. Co.**

If the master erred in his valuation, the error was in favor of the Pullman Company. A competent witness appraised the plant as worth at least \$3,000,000. It was earning 8 per cent. on this value, and with every prospect of increasing business. No witness was called by the Pullman Company to contradict this by any other appraisal of the plant as a whole. The master cut down this appraisal to \$2,552,000, the selling value of the stock. If this is to be changed, it should, under the evidence, be raised, not lowered. The plant leased, consisting of cars, contracts, patents, etc., was absorbed by the Pullman Company into a new system, and its identity so destroyed by the establishment of new lines that it is impossible to separate or restore it, or even to identify its earnings. The Pullman Company has refused to furnish the information necessary to state an account, but there is sufficient evidence to raise almost a conclusive presumption that, up to the time when the Pullman Company repudiated the lease, the earnings were far more than the rental paid. Under the circumstances, the Central Transportation Company ought not to be put to the delay of another accounting; and, if it is willing to waive any claim for excess of earnings, it is entitled to a decree for the value of the property which the Pullman Company has appropriated.

Before DALLAS, Circuit Judge, and BUTLER, District Judge.

BUTLER, District Judge. The master was appointed in pursuance of the opinion filed December 18, 1894, to ascertain the value of the property transferred and the amount of its earnings. He has found the value to be \$2,552,000, and reports that no estimate of earnings can be made from the data furnished; that "the Pullman Company failed to produce, (though requested to do so,) evidence in its possession which he believes would have enabled him to state an account." Although both parties filed exceptions, the Transportation Company now seeks a decree for the \$2,552,000, with interest from January 1st, 1885, when payment of rent ceased—waiving its claim to earnings, to avoid, (as it asserts,) further delay in obtaining a settlement. The Pullman Company stands on its exceptions, claiming, in substance, first, that it is not accountable for the intangible property, such as contracts with railroads, patent rights, etc.; second, that the valuation is too high; and third, that the rents paid more than compensate for all the property received.

The matter embraced in the first exception is covered by the opinion under which the master was appointed. It is not too late, however, to revive the question and continue the discussion; but we do not desire to add materially to what has been said. The argument drawn from the invalidity of the lease—that this instrument did not transfer this description of property—seems to be fallacious. The lease did not transfer any description of property. It was ineffectual for every purpose. The acts of the parties, however, transferred the property—the intangible as fully and effectually as all other. The counsel say no railway contracts valid "and obligatory in favor of the Pullman Company, upon the railways during the original or the extended life of the Central Company, or during the continuance of any patent rights, original or extended, or for any other period whatever, were ever received by the Pullman Company. The Central Company had definite contract rights for fixed and long periods of time, and enforceable against the railway companies. The Pullman Company did not acquire those, and the Central Company did not "part with"

them. The Pullman Company got nothing enforceable upon the railways, either specially or by damages. It acquired at best but a precarious status, terminable and destructible at any moment by the Central Company itself or by the state. The attempted assignments passed no title, and no legal rights whatever."

This view was presented with force and earnestness. But the obvious answer is that the Pullman Company got the use and benefit of these contracts as completely as it did that of all other property named in the lease, operated its cars under them in some instances, in others surrendered them and obtained new contracts, in pursuance of the rights which they secured, and thus acquired complete possession of the Transportation Company's business, which it still holds and enjoys. It is of no consequence that the railroad companies *might* have refused recognition of the Pullman Company; they did not. Like the parties to the lease, they believed it to be valid, treated the Pullman Company as lawful owner of the contracts, and accorded to it all the rights they secured. To say that the Transportation Company might immediately have resumed possession of the contracts and continued the prosecution of its business, signifies nothing material to the circumstances. The same might as justly be said respecting the cars, and other tangible property. It is not true, however, that the possession might have been so resumed. The Pullman Company would not have allowed it; and although the lease might have eventually been declared void, the property and business would have been absorbed in the meantime. Both parties firmly believed the lease to be valid; they were so instructed by eminent counsel, and were therefore justified in the belief. It was not until after the lapse of many years, when the property was irretrievably lost to the Transportation Company, that it had cause to doubt the validity of the lease. It must not therefore be visited with knowledge of the invalidity, and the consequences of such knowledge, until the Pullman Company changed its position and raised the question. To hold otherwise would work manifest injustice, by allowing the latter company, after standing on the lease until it had absorbed the property and business, to turn about and say, we had no right to it, you should not have permitted us to take it, and you therefore have no right to complain.

As respects the second exception, we think the valuation is not unjust to the Pullman Company. The assertion that it includes the value of the Transportation Company's franchise is not well founded. It is true that the property is valued at its worth to the latter company, in view of the right to use it as the company did. This right the Pullman Company could exercise by virtue of its own franchise, and did not, therefore, need the Transportation Company. The value of the property to the Transportation Company and to the Pullman Company was, therefore, what the former lost and the latter gained by the transfer. If the latter's gain was less than the former's loss, this might be, possibly, the proper measure of compensation. There is no evidence, however, that it was less; the indications are that it was not. If it was less the Pullman Company could have shown it.

The Transportation Company's franchise was simply rendered valueless by the transfer of its property. Its business was thus lost and its power to establish another destroyed.

As respects the third exception, we think the inference that the earnings were equal to the rent paid, is reasonable, if not unavoidable. If they were not, the Pullman Company, having possession of the evidence, could have shown it. The testimony produced by the Transportation Company was quite sufficient to put the burden on the other side. The failure to respond to the master's request greatly strengthens the inference. It is urged, however, that if the Pullman Company is charged with the property as of 1870, it must be treated thereafter as entitled to the earnings, and be credited with the amount subsequently paid as rent. Of course, if it is treated as owner from that date it could not justly be held accountable for earnings thereafter, and would be liable only for the value, with interest from that date, subject to the credit stated. But it is not so treated, and cannot be, because it would not correspond with the facts and would be unjust. The ownership of the property remained in the Transportation Company; the Pullman Company taking possession and holding it for the former, paying a stipulated price for its use up to 1885. The lease under which the parties acted was void, but this did not render the parties acts void. They chose to, and did, treat it as valid, and to the extent that its provisions were executed, the court will not interfere, except to prevent manifest injustice. Up to 1885 they were executed; the Pullman Company got and enjoyed the use and paid the stipulated price. Inasmuch, however, as the enjoyment of the use was granted, and the rent was paid therefor, in contemplation of a longer continuance of the arrangement, it was supposed that the rent might fall short of a just compensation for the use, or be in excess of such compensation. This was therefore considered a proper subject of inquiry. It is plain, however, that the parties substantially intended that the use and the rent should balance each other; and, in the absence of proof to the contrary, it should be presumed they did. It was not, therefore, until 1885, when the Pullman Company ceased to pay rent, and repudiated the arrangement, that it became practically responsible for a return of the property, or the payment of its value. Of course, it may be said that such responsibility actually existed from the beginning because the arrangement was unlawful. The parties, however, did not so understand, and treated it as lawful; and to the extent of what they thus did in good faith their acts will not be disturbed. It is too late now to treat the responsibility as existing in 1870, and make settlement accordingly. It would not only be in conflict with the facts, but would work manifest and very great injustice. It would enable the Pullman Company to set up the statute of limitations, as it did before the master;—and, if this failed, then to take the property for less than it agreed to pay and did pay, (interest considered) substantially as compensation for fifteen years of its use. It is the value of the property at the time it should have been returned that the Pullman Company should be charged with.

Inasmuch as this value would be difficult of ascertainment by the

Transportation Company except by reference to the value in 1870, it was considered proper to direct the inquiry to the latter date. Presumably the value increased; the evidence fully justifies the presumption. If it decreased the Pullman Company could and should have shown it. The master's valuation in 1870 is therefore to be taken as the value in 1885, when the property should have been returned. The payment of this sum, with interest from January 1, 1885, seems necessary to a just settlement; treating the value of the use and the rents paid prior to that date as balancing each other.

A decree may be prepared accordingly, dismissing the exceptions and confirming the report.

DALLAS, Circuit Judge. I concur in the foregoing opinion, and deem it unnecessary to further extend the discussion of the questions with which it deals; but may add that the result arrived at by the master, seems to me to be quite as favorable to the Pullman Company, as, upon any possible view of the facts and the law, could reasonably have been reached.

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AMERICAN MORTG. CO. OF SCOTLAND, Limited, v. OWENS et al.

(Circuit Court of Appeals, Fourth Circuit. February 4, 1896.)

No. 122.

1. MARRIED WOMEN—MORTGAGE OF SEPARATE ESTATE—SOUTH CAROLINA STATUTE.

Under the constitution and statutes of South Carolina relating to the property and contracts of married women, a married woman cannot pledge her estate by mortgage, to secure the contract of another, which has no reference to her separate property, even though that other be her husband, and the mortgage purports, in positive terms, to bind her separate estate.

2. SAME.

One O., a resident of South Carolina, called upon D., the agent of a foreign banking corporation, and applied for a loan upon his wife's real estate, situated in South Carolina. D. made out the application, which O. signed with his wife's name, upon D's advice that he could do so. O's wife, at the time, in fact, knew nothing about it. D. forwarded the application to the banking company, and received from it the mortgage and note, for execution, and a check for the amount of the loan, drawn to O's order. He took the papers to O's residence, where the note and mortgage, and a receipt for the money, were signed by O's wife, at O's request, without reading them, or hearing them read or explained. D. then gave O. the check to his order. None of the money was expended for the benefit of the wife's estate. *Held*, that the land of O's wife was not bound by such mortgage, though it contained a clause purporting to bind her separate property.

Appeal from the Circuit Court of the United States for the District of South Carolina.

This was a suit by the American Mortgage Company of Scotland, Limited, against Missouri A. Owens and Raymond Owens, for the foreclosure of a mortgage. The circuit court dismissed the bill. 64 Fed. 249. Complainant appeals.

Allen J. Green (John T. Sloan, Jr., on the brief), for appellant.  
J. J. Brown, for appellees.

Before FULLER, Circuit Justice, GOFF, Circuit Judge, and HUGHES, District Judge.

GOFF, Circuit Judge. The appellant filed its bill in the circuit court for the district of South Carolina against Missouri A. Owens and Raymond Owens, praying the foreclosure of a mortgage made by said Missouri A. Owens, dated March 12, 1886, to secure the payment of the sum of \$2,500, with interest thereon, as shown by her promissory note, payable to the appellant, the allegation of the bill being that the conditions of said note and mortgage had been broken by the failure to pay, when requested, the sum due on said note. The defendant Raymond Owens was made a party, because he was the husband of the maker of said mortgage. The bill charges that the consideration of the note was a loan of \$2,500 to the said Missouri A. Owens, at her request, and that it was stipulated, in the contract relating thereto, that it was to be construed under the laws of the state of South Carolina. The answer sets up that defendant Missouri A. Owens is a married woman, and that her husband borrowed the money, for which the note was given, from W. H. Duncan and the Corbin Banking Company of New York, the agents of the complainant below, for his own use and purposes; that she, at her husband's request, executed the note and mortgage; that complainant, through its said agents, knew that her husband would, and did, use the money for the payment of his own debts, and for his individual purposes, and that she was not to receive, and did not receive, one dollar of said loan; that no part of it was expended for her benefit, or for the benefit of her separate estate. The cause was duly matured for hearing, and submitted on bill, answer, exhibits, and testimony, when the court passed a decree dismissing the bill, and from that order the case comes here on appeal. The court below found that the loan was made to the husband for his own purposes, upon the security of his wife's note and mortgage, and that such a contract, as to the wife and her separate estate, was void, under the laws of South Carolina applicable thereto.

The questions raised on this appeal involve the construction of the laws of that state relative to the contracts of married women, as well as the finding of the facts from the testimony, and their proper application to such laws. The constitution of South Carolina (article 14, § 8) provides that:

"The real and personal property of a married woman held at the time of her marriage, or that which she may thereafter acquire, either by gift, grant, inheritance, devise or otherwise, shall not be subject to levy and sale for her husband's debts, but shall be held as her separate property, and may be bequeathed, devised or alienated by her, the same as if she were unmarried."

An act of the general assembly (14 St. at Large, 325), passed in 1870, relative to the rights of married women, under such provision of the constitution, conferred upon them the same power to contract, and be contracted with, as if they were sole. *Pelzer v. Campbell*, 15 S. C. 581. In December, 1882, the general as-

sembly of South Carolina passed an act, amending the act of 1870, which, as so amended, reads as follows:

"A married woman shall have the right to purchase any species of property in her own name, and to take proper legal conveyance therefor, and to contract and be contracted with as to her separate property in the same manner as if she were unmarried: provided, that the husband shall not be liable for the debts of the wife contracted prior to or after their marriage, except for her necessary support." Gen. St. 1882, § 2037.

It is under this enactment that the contract in question is to be construed. It is certainly true that, under the common law, a married woman could not have made the note and mortgage now in suit. If they can be maintained, it must be by virtue of the constitutional provision and the legislative enactments before mentioned. The supreme court of South Carolina has given us the proper construction and true meaning of said provisions, so that it is now no longer an open question, whatever the diversity of opinion relative thereto may have formerly been. The only contract which a married woman, in South Carolina, is authorized to make must not only relate to her separate estate, but it must be in regard to her individual property. She may, in positive terms, in a writing signed by her, declare that her object is to bind her separate estate, and still she would not be bound by it, unless it was clearly shown that the contract was intended to benefit her separate property, or that it in fact concerned or had reference to such property. Under said legislation, a married woman cannot pledge her estate by mortgage, for the purpose of securing the contract of another, which has no reference to her separate property, even though that other be her husband. In the case of *Bates v. Mortgage Co.*, 37 S. C. 88, 16 S. E. 883, the following language was used in the decree, which was affirmed by said court, in construing the legislation referred to:

"We think it is now the settled law of this state that it is necessary, in an action to enforce a contract executed by a married woman, to show that such contract was made with reference to her separate estate; that the burden of proof is upon the party seeking to enforce such contract; and that, while a married woman may borrow money for her own use, either directly, or by her husband, as her authorized agent, and secure the same by a valid mortgage of her separate estate, yet she cannot do this for the benefit of her husband, provided the lender has knowledge of such intended use when he makes the loan."

In the case of *Salinas v. Turner*, 33 S. C. 231, 11 S. E. 702, Chief Justice Simpson, delivering the opinion of the court, said:

"Now, it has been held by this court, in several cases recently decided, that, while a married woman may borrow money for her own use, etc., and secure the same by a valid mortgage, yet that she cannot do this for the benefit of her husband, provided the lender has knowledge of such intended use. This has been so recently and so plainly decided that we do not deem it necessary here to examine into the reason and foundation of the proposition. We think it sufficient simply to refer to the cases, to wit: *Tribble v. Poor* (S. C.) 8 S. E. 541; *Gwynn v. Gwynn* (S. C.) 10 S. E. 221; *Greig v. Smith*, 29 S. C. 426, 7 S. E. 610. If these cases have not established this proposition beyond controversy or doubt, then we do not know how a legal proposition could be established; certainly not by the decisions of a court of last resort."



In the case of *Greig v. Smith*, supra, Judge McIver, in his opinion, says:

"If a married woman, either personally or through an agent, obtain advances, under a representation made in the instrument intended to secure such advances, that the same are to be used in carrying on business for herself, whether the same is to be conducted by herself personally or by an agent, she is estopped from afterwards denying such representation, as it would be a fraud upon the person making the advances; and, surely, the faithlessness of her agent, in misapplying the money advanced, cannot affect the rights of the person advancing the money, without it is shown that he participated in such misapplication. Where, however, a married woman executes an obligation to pay the debt of another, her intention to bind her separate property, though expressed in the clearest and strongest terms, does not estop her from disputing her legal liability for the payment of such debt, for the simple reason that the law has denied to her the power to contract such a debt, and therefore the expression of her intention to do that which she has no power to do cannot bind her. But, inasmuch as she has been invested with power to contract with reference to her separate estate, her representation that a given debt is of that character will estop her from afterwards disputing that fact, unless it be shown that the creditor knew, at the time the debt was contracted, that such representation was not true; for, in that case, the creditor would not be misled, and there would, therefore, be no ground for the estoppel."

So far as the law of this case is concerned, we have no trouble; and a careful study of the evidence forces us to agree with the court below in its findings as to the facts. We are unable to see the facts as the counsel for the appellant presents them. If we did, it would follow that appellant's insistence should be sustained, and the decree complained of be reversed. Briefly stated, the testimony shows as follows:

The American Mortgage Company, a corporation organized under the laws of Great Britain and Ireland, was engaged in business in the United States; its managing agent, J. K. O. Sherwood, residing in the city of New York. In 1883 he, with representatives of the Corbin Banking Company of New York, went to Columbia, S. C., for the purpose of investigating the financial situation, and determining as to the propriety of establishing their business in that state. While so there they met and advised with one W. H. Duncan, of Barnwell, S. C. Soon after this visit the American Mortgage Company commenced to make loans in that section of the state on the security of real estate. The Corbin Banking Company was organized in 1874, its purpose being to carry on a general banking business, and to negotiate loans on the security of improved farms. It commenced its negotiations in South Carolina very soon after said conference with W. H. Duncan, furnishing him with all the necessary blanks to be used by applicants for loans, and which, when properly filled up, gave to the lender information as to the character of the applicant and the sufficiency of the security offered. A party desiring to negotiate a loan would apply to Duncan, who would see that the questions asked in the application were answered and the blanks all properly filled, after which the paper would be sent to the Corbin Banking Company, in New York. If that company was satisfied, the application was accepted, and the notes, with the mortgage, for the borrower to sign, were prepared under the direction of its officials, and, with the check

of that company for the amount of the loan, less commissions, were sent to Duncan, who had them executed and returned, after which they were delivered to the American Mortgage Company, which paid to said Corbin Banking Company the full amount called for by the notes. Duncan advertised, in the papers published where he lived, that he had large sums of money to loan. He procured the borrowers, supervised the execution of the papers, made abstracts of the titles, reported as to the value of the property offered as security, and took contracts, from those desiring such loans, by which the borrower generally agreed to allow said Duncan and the Corbin Company 20 per cent. of the sum borrowed as commissions for negotiating the loan. If default was made in the payment of either the interest or the principal when due, the Corbin Company so advised Duncan, and he proceeded to foreclose the mortgage and remit the proceeds to the lender. It was shown that Missouri A. Owens, the defendant, was the owner of the land conveyed by the mortgage, and that her husband, Raymond Owens, was without property himself, but that he lived on the land with his wife and managed the same; that Duncan, who lived near them, advertised that he had money to loan; and that Raymond Owens, without the knowledge of his wife, went to Duncan, and asked him for a loan, offering as security his wife's real estate. Duncan advised him that he could secure the loan, and made out the application for him, when Raymond, with the approval of Duncan, signed his wife's name to it. He did not ask for the loan for his wife, but for himself. The application, so signed by the husband, was not seen by the wife until after this suit was brought. While she was informed, before the mortgage was given, that an application had been made by her husband for a loan on her property, she was not told that it was in her name. She had not authorized the application, nor the signing of her name to it. Duncan sent the application to the Corbin Banking Company. It was stated, in the application, that part of the money was to be used in building a gin house on the land to be conveyed to secure the loan; but none of it was so used, and no part of it went to the wife, nor was it expended for the benefit of her separate estate. The note and mortgage were prepared under the direction of the Corbin Company, in New York, and sent to Duncan, in South Carolina; and he took them to Mrs. Owens, after having arranged for a conference with her, through her husband, who had asked her to sign them. Neither the note nor the mortgage was read or explained to her. She was told where to sign them, and she signed as she was requested to do. The note and the mortgage were then retained by Duncan, who gave to Raymond Owens—he having been present during the execution of the papers—a check, payable to his order, for the amount of the note less commissions and costs; his wife giving her receipt for the same. This is, in substance, all the testimony relating to the procurement of the loan and the execution of the papers connected with it.

We think it is clear that, as to this transaction, Duncan was not the agent of Missouri A. Owens, but was the agent of Raymond Owens. She had not requested the services of Duncan, nor had she

authorized any one to do so for her. He had not talked with her, nor communicated with her on the subject, until he called to see her, in order to close the negotiations he had undertaken for her husband. The claim of the appellant, that, when Mrs. Owens signed the note and executed the mortgage, she ratified the previous acts of her husband relating thereto, and that she was, therefore, estopped from denying them, is, in the light of the evidence, without merit; for the matter was not explained to her, she was not advised that the application for the loan was in her name, nor was she told that it stated that the money was for her use, and that it was to be expended on her property. As the transaction then appeared to her, it was an effort on the part of her husband to borrow money, the payment of which, with the interest that might accrue thereon, she was to secure by her note and a mortgage on her land; and we think Duncan so, in effect, considered it, evidently believing that, under the law then existing, the wife could secure such a debt by a conveyance of her separate estate. That she was willing to do so is shown by what took place at the time when Duncan gave his check for the money due on the loan; but that she had no power so to do, she being a married woman, is also plain, and therefore her willingness, and her intention to so secure the debt of her husband, would not make the act valid and binding upon her. On this point we quote, with approval, the following words from the opinion of the court below, viz.:

"As Mrs. Owens was a married woman, with a limited power to contract, a person dealing with her must take notice of her disability; and, when he seeks to enforce this contract, the burden is upon him to show that it is one a married woman is capable of making. He must show that she had the power to make the contract. To do this, he must show that the money was borrowed for her use. If it were, she would be liable; if not, she would not be liable, even though she expressly declared her intention to bind her separate estate, in the obligation given to secure the repayment of the money borrowed, for the simple reason that, in the latter case, she had no power to make such a contract, and her intention to do that which she had no power to do is wholly insufficient to bind her legally. *Savings Inst. v. Luhn*, 34 S. C. 186, 13 S. E. 357. Who, then, borrowed this money? The husband acted. Did he act as his wife's agent? Did Duncan deal with him as such, believing, or having reason to believe, that Mrs. Owens was the principal, that she was the borrower, that the money was borrowed for her use, and that her husband was only the agent? Owens told him that he wanted the money, and that he wanted the loan on his wife's estate. He did not say that his wife wanted it; nor did he say that it was for her use, nor that his wife authorized him to borrow it. When Duncan prepared the application, Owens asked him if he could sign it. He did not profess to have authority from his wife to sign it. Apparently the question meant, 'Being her husband, have I a right to sign for my wife?' Duncan seemed to think that he could. Now, the husband is never, qua husband, the agent of the wife. Such agency is never presumed, it must be proved, and must be proved like every other fact. Merely signing his wife's name does not prove that he was the agent, especially when he signed it under the advice of Duncan. The application was a contract, the foundation of the loan. So far there is nothing to show that it was Mrs. Owens' contract. Did she subsequently ratify it or affirm it? Or, if not, is she estopped from denying that it is her contract? In order to prove that she ratified or confirmed the act of her husband, it must be shown that she had full knowledge of the facts concerning it (*Drakely v. Gregg*, 8 Wall. 267); and in order to estop her it must be shown that she held out her husband to the world as her agent, or that, in this transaction, she

had put him in possession of all the indicia of authority to act for her as her agent."

That Duncan, as to the execution of the note and mortgage, was the agent of the appellant, does not admit of doubt. They were sent to him, in order that he might have them signed and properly authenticated; and, as to them, he represented the American Mortgage Company, to whom the note was payable, in whose name the mortgage was given, and which said company was fully aware that such proceedings would be taken by him, not only in this, but in all other like cases. So far as the appellant is concerned, Duncan's authority may have been confined to the particular matters mentioned, and his agency may have been special as to them; but it follows, nevertheless, that Mrs. Owens was, in effect, dealing with the company, and that it was not only bound by the acts of Duncan, but that his knowledge was its information as to the matters so confided to, and then necessarily considered by, him. That Duncan well knew, at the time the papers were signed, that the husband was in fact the borrower, and that he was endeavoring to secure the loan by the note of his wife and the mortgage of her property, is apparent; and to hold otherwise is to ignore the evidence, and place an estimate on his ability and character not justified by the facts as they appear to us in the record of this cause. We conclude that Mrs. Owens did not bind her separate estate, that the mortgage cannot be enforced, and that the bill was properly dismissed.

It follows that the decree appealed from should be affirmed, and it is so ordered.

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SCANLAN et al. v. TENNEY et al.

(Circuit Court, D. Connecticut. February 15, 1896.)

**NEGLECTANCE—CARRIERS OF PASSENGERS.**

Plaintiff was a passenger on a steamboat managed by defendants. The boat arrived at the wharf, where plaintiff was to land, at 8:30 p. m., on an evening when the sun had set at 7:25, and the moon had risen at 8:21, there being some clouds in the sky. There was a lamp on the boat, the light from which was thrown by a reflector away from the gang-way by which passengers were to land, and there was a light on the wharf, at some distance from the gang-way, which would be directly in the eyes of passengers landing from the boat. The gang-way in the boat's side was 4 feet wide, and was opposite a brow or slope in the side of the wharf which was over 6 feet wide, but the gang-plank by which passengers were to land was only 28 inches wide, and had no railing. In passing from the boat to the wharf, plaintiff fell, and was injured. *Held*, that defendants were negligent in failing to provide sufficient light to guide passengers in landing, and were liable for the damage suffered by plaintiff.

Case, Eley & Case, for plaintiffs.

F. T. Brown and A. F. Eggleston, for defendants.

TOWNSEND, District Judge. This is a hearing in damages on a default in an action brought by James J. Scanlan and Mary F. Scanlan, his wife, to recover \$25,000 for injuries claimed to have

been sustained through the negligence of defendants. Upon the evidence therein, I find the following facts: The plaintiffs are citizens of the city of St. Louis, state of Missouri, and the defendants were, on the 29th day of June, 1893, the executors of the last will and testament of Albert P. Sturtevant, and, as such, were engaged in managing and sailing a steam vessel called the Osprey, which carried passengers from New London, in the state of Connecticut, to a wharf near the Ft. Griswold House, at Eastern Point, opposite said New London. At about half past 8 o'clock in the evening on said 29th day of June, said Mrs. Scanlan, being a passenger from New London on said boat, in attempting to pass therefrom onto said wharf at said Ft. Griswold House, fell, and sustained painful injuries, including a sprained ankle, from which she had not entirely recovered at the date of this hearing. On said evening the sun had set at 7:25, and the moon rose at 8:21. It was a fairly clear night, and there was a lamp on the forward end of the engine room, about 6 feet above the deck, and about 15 feet from the center of the gang-way near where Mrs. Scanlan fell. Said lamp held a pint of kerosene oil, and had an 8-inch reflector, and glass sides, 8 by 12 inches in size, and was lighted at the time of the accident. The gang-way was 4 feet wide. There was a depression or brow in the surface of the wharf, which gradually sloped down to about 2 feet below the level of the wharf at its edge, at which point it was 6 feet and 8½ inches wide. When the boat came up to the wharf on the night of the accident, the tide was about seven-eighths high, and there was a distance of some 15 to 18 inches between the level of the deck and the level of the foot of the slope of said brow. In going onto the wharf, the plaintiff fell from the boat or the gang-plank down into said brow. Whether the gang-plank was or was not put out it is impossible to say with certainty, and, in the view herein taken, it is immaterial. If it were necessary to the decision of the case, I should find, from the preponderance of testimony, that it was put out.

It is claimed that, at the time of the accident, there was sufficient light from the twilight and moon alone, provided such light were unobstructed, to enable a person to distinguish said gang-plank. But there were some clouds that evening. The moon rose less than 10 minutes before the accident, from a point behind some of the houses on the shore, and there was a light on the wharf 69 feet distant, which, while it would not have thrown any light down into said brow, would have been almost directly in the eyes of a person passing off said gang-way. As to the light on the forward end of the engine room, its reflector projected the rays forward, and a stanchion slightly interfered with its side rays. Other passengers were passing off the boat or gang-plank at about the same time. Comstock, who had charge of putting out the gang-plank, testified that a person coming on to the gang-plank would shut said light off from it, and the captain of the boat acknowledged that said light would be shut off by persons getting in front of it. Said gang-plank was 28 inches wide, without any side rails. It is claimed that it was suitable for such a boat, and that it

would have been impracticable either to use one as wide as said brow or slope, or to have a railing thereon. It is further claimed that as defendants were only managing the boat, and had no control over the wharf, they were not liable for the absence of lights on the wharf.

Common carriers of passengers by water, as well as by land, are bound to provide reasonably safe means of exit for passengers using due care. Inasmuch as the gangway was 4 feet wide, and the slope 6 feet and 8½ inches wide, a person of ordinary prudence would be justified in supposing either that the gang-plank would, at least, be of substantially equal width with the gang-way, or that otherwise there would be some warning as to its size or location, such as a railing thereon, or a light so located as to throw its rays onto said gang-plank or into the slope. It may be assumed that a railing was impracticable, and that defendants had no control over the wharf. In that event, however, the reasonable care required of the defendants, in order to comply with their legal duty of furnishing a safe exit, required that they should adopt some other suitable means for warning the passengers of the danger involved in passing, in such circumstances, over a gang-plank only 28 inches wide. I find that the light which was provided was insufficient; that, if there was any light from the moon or the lamp on the wharf, it was quite as likely to interfere with a view of said gang-plank as to assist a person in passing over it. The plaintiff has shown by a preponderance of evidence that the defendants were negligent, and that she was not guilty of negligence which contributed to cause the injury. I assess her damages, including expenses for physicians, medicines, etc., at \$1,500.

Let judgment be entered for plaintiffs in accordance with this opinion.

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#### NEW ORLEANS & N. E. R. CO. v. MERIDIAN WATERWORKS CO.

(Circuit Court of Appeals, Fifth Circuit. February 4, 1896.)

No. 438.

#### CONTRACTS—BREACH—DAMAGES.

The N. R. Co. brought an action against the M. Waterworks Co., alleging that a contract had been made between the parties by which, for a certain price, the waterworks company agreed to furnish, at the shops and tanks of the railroad company, a sufficient supply of water, at not less than 60 pounds pressure, for all purposes for which it might be needed or used; that one of the purposes for which water was needed was the extinguishment of fires which might break out in the shops, and that this was known to the waterworks company; that, during the existence of the contract, a fire broke out in the shops; that at the time there was not a pressure of 60 pounds in the water pipes, but only 25 pounds; that, if there had been a pressure of 60 pounds, the fire could have been extinguished, but, in consequence of the deficient pressure, the shops and tanks were destroyed. Judgment was demanded for the value of the property destroyed. *Held* that, if the allegations of the complaint were proved, the plaintiff would be entitled to recover, and it was therefore error to strike out all the plaintiff's evidence, and direct a verdict for the defend-

ant, on the ground that the contract would not warrant the recovery demanded.

In Error to the Circuit Court of the United States for the Southern District of Mississippi.

J. W. Fewell and Harry Hall, for plaintiff in error.

J. P. Walker and G. I. Hall, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and BOARMAN, District Judge.

BOARMAN, District Judge. The plaintiff below, a railroad company, was on the 28th day of January, 1895, the owner of divers railway buildings, machinery, shops, tools, etc., in the city of Meridian. The defendant is the Meridian Waterworks Company. Those two corporations entered into a contract January 28, 1889, as follows: "\* \* \* That, for and in consideration of the payments hereinafter agreed to be made by the said railway company to the waterworks company, the waterworks company agrees to supply and furnish the shops and tanks of the said railway company in Meridian, Miss., with full, adequate, and sufficient supply of good, pure water, not less than 60 pounds pressure, for all purposes for which water may be needed or used at said shops." There is an additional provision as to the contract to convey a supply of water to the said shops for the use of two other railways. We omit it because it has no material bearing under the view we have of the issues. "Said waterworks company further agrees to construct and maintain in good order the necessary pipes and connection to said railroad company's shops." It will be noted that the necessary pipes are to reach the "company's shops." The contract was to run for three years. The railroad was to pay \$1,200 per year for the use of an adequate and sufficient supply of water, at 60 pounds pressure. On the 26th of January, 1892, certain of the buildings, tanks, shops, machinery, etc., of the railroad company, were destroyed by fire, and this suit is to recover damages. The plaintiff's declaration, having set out in full the said contract, alleges that among the uses and needs which plaintiff had for said supply and pressure of water at said shops was for the purpose of putting out such fires as might occur in the buildings, etc., at said shops, through the instrumentality of hose and plugs attached to defendant's pipes; and to that end the plaintiff kept at the said shops divers hose, etc., with nozzles and with proper connections with defendant's pipes, which said hose, etc., plaintiff kept constantly at hand, and ready to throw, out of said pipes, under the pressure specified and contracted for, on any fires that might take place or begin in and about said buildings, shops, etc., streams of water, and thus extinguish such fires, and prevent the destruction or injury of plaintiff's said property; and plaintiff avers that the said 60 pounds pressure above referred to and specified in said contract was contracted for, and intended for, and understood by said defendant to be for, the purpose of securing such stream of water, through such hose, etc., from defendant's pipes at the shop,

as would enable plaintiff to use such hose, etc., in the extinguishment of fires occurring in said buildings, shops, etc. The declaration further alleges that "for use in the work done in said shops, and also to protect said shops and the contents thereof from injury and damage by fire, it was necessary and proper to provide said shops with a supply of water of not less than sixty pounds pressure, and that protection against loss and damage by fire was and is one of the ordinary purposes for which water is needed and used at railroad shops, all of which the defendant, at the time and before the time of making the contract hereinafter mentioned, well knew; \* \* \* and that, with full knowledge of all the foregoing, said defendant, on or about the 7th day of November, 1888, proposed to plaintiff to furnish and deliver to it at its said shops and tanks, at a less cost than plaintiff was paying for the water it was then using, obtained elsewhere than from the defendant, a supply of water to be used in conducting the work carried on in its shops, and for filling said tanks, and also to afford a perfect fire protection to said shops and tanks and the contents thereof; and in accordance therewith, on the 28th day of January, 1889, said plaintiff and the defendant entered into a contract in writing, a copy of which is hereto attached, and made part hereof, whereby said defendant, in consideration of the sum of twelve hundred dollars per annum, to be paid to it by the plaintiff, in equal monthly installments, during a period of three years then next ensuing, did undertake and agree to, and with plaintiff, to supply its said shops and tanks, during said period, with a full, adequate, and sufficient supply of good, pure water, at not less than 60 pounds pressure, for all purposes for which water may be used and needed at said shops. And plaintiff says that one of the purposes for which water was needed, and for which it could be used at said shops, was to afford protection to said shops and the contents thereof against fire, there being at said time no other water supply or means at said shops whereby fire occurring there could be extinguished, as defendant well knew; and, as a part of said agreement, said defendant did lay pipes necessary for the purpose of conducting said water to said premises, and did afterwards, at said shops, attach to said pipes certain fire hydrants, to enable the plaintiff to use the said water as a protection against fire, as defendant well knew." To this declaration defendant pleaded the general issue: a jury was impaneled. The plaintiff put in evidence the contract sued on, and offered evidence to prove the allegations of the declaration. Thereupon, when plaintiff closed his case, the defendant, without offering any evidence, moved the court to exclude the plaintiff's testimony, and to direct the jury to find for the defendant; the grounds of the said motion being that the contract sued on was not such as to warrant a recovery of the value of the property destroyed on account of the breach thereof. The court held that the motion was well taken, and the proof of the allegations in the declaration would not entitle plaintiff to recover for loss of plaintiff's property by fire if



he failed to furnish the water as per contract to extinguish fires, and directed the jury to find for the defendant. Plaintiff took his bill of exceptions to the ruling of the court, and now assigns as error the exclusion by the court of the evidence offered and testimony adduced, and to the instruction of the court to the jury to find for the defendant, and, further, to the exclusion of the testimony as to whether the fire in question could have been extinguished had there been a pressure of 60 pounds.

Defendant filed a demurrer, raising the question as to its liability, under the contract, for losses by fire, which was overruled, and plaintiff, later on, filed an amended declaration. Then defendant interposed the general issue. On the trial below, both sides consented to waive a bill of exceptions setting out plaintiff's evidence in support of its allegations. So the issue before us may be considered as if the court below had sustained a general demurrer to the sufficiency of plaintiff's declaration to show a cause of action, and a decree therein had come up for review in this court. On the trial of such a demurrer, the court below would have had to take, as we shall have to take, as true, the allegations of the plaintiff's declaration. The essential allegations therein are, substantially, that plaintiff was the owner of, and was actively using and operating, certain railway buildings, shops, machinery, etc., at Meridian, and needing a supply of water, among other things, for the purpose of protecting its said property from fire, and that there being no other available source from whence to obtain such quantity of water as might be necessary to extinguish fires, as the defendant well knew; that said defendant then owned and operated a system of water-works, for hire and profit, and plaintiff contracted for a full, adequate, and sufficient supply of good, pure water, not less than 60 pounds pressure, for all purposes for which water may be needed or used at said shops; that, as a part of said agreement, defendant laid its pipes to plaintiff's said premises, and attached thereto fire hydrants, to enable plaintiff to use said water as a protection against fire; and that, to that end, plaintiff kept hose and nozzles on said premises; and that the supply of water at 60 pounds pressure was contracted for, and intended to be used for the purpose of, extinguishing any fire that might break out in said premises; and that, within the terms of the agreement and understanding, a fire did break out, which the plaintiff would have been able to extinguish had the said adequate supply of water, contracted for, been furnished to the plaintiff, and had the contract for pressure at not less than 60 pounds been maintained; and that the loss sustained, by plaintiff, in consequence of such fire, was caused solely by the failure of the defendant to comply with the terms of his said contract; that defendant, in agreeing to furnish "a full, adequate, and sufficient supply of good water" for the consideration of \$1,200 per annum, at 60 pounds pressure, knew that one of the essential purposes for which plaintiff desired to have such adequate supply of water was that the plaintiff might extinguish fires endangering said shops, etc.

Counsel for defendant in error suggests in his brief that "the gravamen of the complaint is that at the time the fire began, and when the water was attempted to be thrown thereon, defendant failed to perform its contract, in that it failed to furnish 'a full, adequate, and sufficient supply of water, at 60 pounds pressure,' it being alleged that, with such a supply and pressure at the time, plaintiff's servants would have been able to extinguish said fire in its incipency, and before any considerable damage could have been done to plaintiff's property." In answer to this complaint, he says that fire protection of plaintiff's property was not in the contemplation of either of the parties to the contract. He contends for a rule of evidence, which he states to be "that the intent and meaning of the parties to the contract can be legally ascertained, only, from the language employed and written down in the agreement evidencing the contract between the parties; and that such meaning cannot be legally ascertained from plaintiff's allegations or pleadings, or from witnesses, as to any purpose of the parties not expressed in the agreement." Under a given state of facts, such a contention by the counsel might be well founded, but all the evidence offered by plaintiff to support the averments of his declaration was excluded, and the record does not advise as to what that evidence was, or any part of it may have been. Counsel for appellee (defendant below), on the trial, when the plaintiff was offering his evidence in support of his action, might have been able to state well-founded objections to the admissibility of some of the evidence; and, doubtless, he would have had no difficulty in sustaining his objections, for when the objections urged were to the admission of evidence, the effect of which would be to show a purpose in either of the contracting parties, not expressed in the agreement, or to the admission of evidence the necessary effect of which "would be to add to the contract, and to substitute extraneous matter—the views, the recollections, the impressions of witnesses—for that which they deliberately wrote down and subscribed as expressive of their intent, purpose, and meaning, such is unwarrantable." Under such objections, the court might, or should, have forbidden much of plaintiff's evidence; but we are not prepared to sustain the view of the circuit court in holding that the contract sued on under such allegations as are well pleaded in the declaration would not, under any state of legal evidence, present a suit in which a recovery for damages for the breach of the said contract might be had.

As the case comes to us, that obligation of the contract with reference to furnishing water at not less than 60 pounds pressure was breached. Certainly, the plaintiff, whatever may have been the cause of its failure to extinguish said fire, did not have, at the time of the fire, such an adequate supply of water as that pressure would have given to it. Under such a state of case as might have been shown by legal evidence, admissible under the pleadings, it may be that the plaintiff was entitled to have that amount of pressure in the company's fire hydrants, to which plaintiff's hose were attached at the

time of the fire, and that his failure to do so would render defendant company liable to plaintiff for damages.

By way of illustrating such evidence as might have been admissible under the allegations of the declaration, we think testimony would have been admissible, and of legal value, to show that the defendant corporation might have frequently, in its sales of water, been supplying the city generally or other shops or factory buildings with water for fire purposes, and that the defendant had knowledge that, from time to time, plaintiff or other manufacturing shops had been using the fire hydrants set up by defendant at such shops, for the extinguishment of fires. Such facts, with other admissible evidence, might have been conclusive, or, at least, very persuasive, to show that the 60 pounds of pressure was contracted for because plaintiff, to the knowledge of defendant, wanted and relied on such a pressure for fire purposes. If the terms of the contract are ambiguous or indefinite, and hence of doubtful character, the particular construction by the parties themselves is entitled to great, if not controlling, influence. *Topliff v. Topliff*, 122 U. S. 121, 7 Sup. Ct. 1057. It is a familiar rule that, in the construction of contracts,—and a rule too, which does not contemplate the allowance of additions thereto, or the interposition between the contracting parties of new purposes or obligations not found in the language of the contract,—courts “may look not only to the language employed, but to the subject-matter and the surrounding circumstances, and avail themselves of the same light which the parties possessed when the contract was made.” *Merriam v. U. S.*, 107 U. S. 437, 2 Sup. Ct. 536; *Lowber v. Bangs*, 2 Wall. 738; *U. S. v. Peck*, 102 U. S. 64; *U. S. v. Gibbons*, 109 U. S. 200, 3 Sup. Ct. 117; *Railway Co. v. Jurey*, 4 Sup. Ct. 566. In *Atkinson v. Sinnott*, 67 Miss. 502, 7 South. 289 (see cases cited), the supreme court held “that it is competent to look to the surroundings of the parties, not to contradict, but to interpret, the meaning of the words they have employed.”

It is not contended that warranties common to an insurance contract against fire losses could be set up or maintained under plaintiff's declaration. We do not know that \$1,200 a year would be a fair or an excessively high charge for supplying plaintiff's shops with sufficient water for other uses than for fire purposes; nor are we advised as to how far \$1,200 would go to secure a reasonable amount of insurance on such valuable property as was destroyed by the fire. The warranties in this contract do not suggest in favor of the plaintiff such absolute indemnity as might be contracted for in an insurance risk; yet an inquiry into such matters might have disclosed to us “the same light the parties possessed when the contract was made.” The breach of the contract was not, as it would be in fire insurance contracts, in the fact that a fire destroyed the railway company's property; for if water with a much greater pressure had been thrown, through ample piping, by the most skillful firemen, it might not, or possibly could not, have been arrested. But the breach upon which the pleadings herein show this action to be

founded occurred when the defendant failed to furnish plaintiff's servants with an adequate supply of water, at not less than 60 pounds pressure, as contracted for; so that such servants might, with the use of water under that pressure, have done all that was practicable to save plaintiff's property. The defendant agreed to furnish that pressure of water, as the plaintiff alleges, for fire purposes; and plaintiff took on itself the risk as to the effectiveness or sufficiency of water at such a pressure to extinguish such fires as might threaten said company's buildings.

The plaintiff's buildings were destroyed by fire. Under the real facts in the case, the proximate cause of plaintiff's loss may have been the said fire, or the proximate cause may have inhered in, and sprung out of, defendant's failure to furnish water at 60 pounds pressure. On the other hand, the real facts in the case might have disclosed conditions under which defendant would not be chargeable for plaintiff's loss, even though the waterworks company had failed, in plaintiff's emergency, to supply any water at all. But the plaintiff had contracted for an adequate supply of water at such pressure, and, when the emergency came, the railway company was entitled, under a reasonable condition of things, to the use of water at that pressure, to aid its servants, to that extent, to extinguish the fire. Under the pleadings, plaintiff's evidence, not objectionable under the well-established rules as to the admissibility of evidence, applicable under such a state of case, might have authorized a recovery of damages. See *Greenl. Ev.* § 230; *Tufts v. Greenewald*, 66 Miss. 360, 6 South. 156; *Dixon v. Cook*, 47 Miss. 222. Plaintiff's declaration alleges that the proximate cause of its damages was not the fire, but was in the fact of defendant's failure to furnish water at 60 pounds pressure. If such be the case, plaintiff's damages were not remote or too consequential to be sustained by the law applicable to the facts. *Hadley v. Baxendale*, 9 Exch. 341; *Suth. Dam.* p. 80, cases cited; *Hammer v. Schoenfelder*, 47 Wis. 455, 2 N. W. 1129; 5 Am. & Eng. Enc. Law, pp. 5, 6, 13.

Under the rule in *Hadley v. Baxendale*, 9 Exch. 341, and quoted with approval by a number of federal and state courts, the court said:

"When two parties have made a contract which one of them has broken, the damages which the other ought to recover, in respect of such breach of contract, should be either such as may fairly and substantially be considered as arising naturally—i. e. is according to the usual course of things—from such a breach of contract itself, or such as may be supposed to have been in contemplation of both parties, at the time they made the contract, as the probable result of it."

*Fogg v. Blair*, 139 U. S. 122, 11 Sup. Ct. 476 ; 1 Sedg. Dam. pp. 66, 77; 5 Am. & Eng. Enc. Law, pp. 5, 13, 15.

It follows from what we have said that there was error in excluding the plaintiff's testimony, and directing a verdict for the defendant in the court below. Therefore, the judgment of the circuit court must be reversed, and the cause remanded, with directions to award a new trial and to take such proceedings as may be in accordance with this opinion.

## HUBBARD et al. v. EXCHANGE BANK.

(Circuit Court of Appeals, Second Circuit. February 18, 1896.)

## BILLS AND NOTES—ACCEPTANCE—LAW OF PLACE.

P., a member of a firm doing business in New York, called upon one H., in Y., S. C., requesting him to buy certain cotton, and agreed that, upon receipt of the bills of lading therefor, his firm in New York would either remit currency for the price, or would promptly honor drafts therefor. In an action against H.'s firm to recover the amount of drafts, drawn in accordance with this agreement, which that firm had refused to accept or pay, *held*, that the contract to accept the drafts was governed by the law of South Carolina, where it was made, and was not affected by a statute of New York forbidding a recovery upon a verbal promise to accept bills of exchange by one who has taken a bill upon such promise.

In Error to the Circuit Court of the United States for the Southern District of New York.

This was an action by the Exchange Bank of Yorkville, S. C., against Samuel T. Hubbard and others, doing business as Hubbard, Price & Co., to recover the amount of certain drafts, drawn on Hubbard, Price & Co. by the firm of Hope & Co. A demurrer to the complaint was overruled. 58 Fed. 530. Thereafter, upon the trial, judgment was rendered for the defendants, which was reversed on error, and a new trial granted. 10 C. C. A. 295, 62 Fed. 112. On the second trial, judgment was rendered for the plaintiff. Defendants bring error. Affirmed.

Edward B. Hill, for plaintiffs in error.

John R. Abney, for defendant in error.

Before WALLACE and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. This case comes for the second time to this court by writ of error. The facts of the case and the law which was deemed applicable thereto are fully stated in *Bank v. Hubbard*, 10 C. C. A. 295, 62 Fed. 112. The new fact of substantial importance which appeared upon the second trial was Price's testimony, that, when he said, in his telegram, "drafts on New York," he meant on Hubbard, Price & Co., the defendants. The court charged the jury that the theory of the plaintiff was twofold, and that, if it succeeded in establishing, either that Hope bought the cotton and borrowed the money as the agent of Hubbard, Price & Co., or that, if buying for himself, and selling on his own account, there was a promise made, on behalf of the defendants, by Price, that they would accept the drafts, it was entitled to a verdict. The jury returned a verdict for the plaintiff.

The brief of the plaintiffs in error presents three grounds upon which they seek to recover the judgment: (1) That, the action being for a breach of promise to accept bills of exchange, the statute of New York forbids a recovery by one who has taken a bill of exchange upon such a promise; (2) that the plaintiff cannot recover upon any cause of action except the one founded upon a promise to accept the bills; (3) that there was no evidence to

justify the theory that Hope & Co. were acting as agents for Hubbard, Price & Co.

Upon the first point, this court, in its former opinion, cited the well-considered opinion in *Scudder v. Bank*, 91 U. S. 406, which turned upon the question of the validity of a verbal acceptance of a bill of exchange, as an authority for the proposition that "matters bearing upon the execution, the interpretation, and the validity of a contract are determined by the law of the place where the contract is made." The defendant insists that, under circumstances similar to those in this case, the supreme court subsequently held that the law of the place of performance must govern as to the validity of a contract which was invalid under the statute of the state in which the contract was made. *Hall v. Cordell*, 142 U. S. 116, 12 Sup. Ct. 154. In that case, which was an action in Illinois, upon the breach of a verbal agreement, made in Missouri, to accept and pay, in Illinois, drafts drawn upon the promisor by the promisee, the same being a contract upon which no action, by a statute of Missouri, could be maintained in that state, but which was valid in Illinois, it was held that "nothing in the case shows that the parties had in view, in respect to the execution of the contract, any other law than the law of the place of performance. That law, consequently, must determine the rights of the parties." This statement of the law is in accordance with the well-established principle which had been previously concisely stated in *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 9 Sup. Ct. 469, as follows:

"Contracts are to be governed, as to their nature, their validity, and their interpretation, by the law of the place where they were made, unless the contracting parties clearly appear to have had some other law in view."

In the case now in question, the facts clearly show that the parties did not have in view, in respect to the execution of the contract, the law of the state of New York. Price, one of the defendants, at Yorkville, S. C., authorized Hope to state to the Exchange Bank of Yorkville that the defendants would remit the currency immediately upon receiving the bills of lading for the cotton, or would honor drafts promptly, as the bank preferred, and on the next day sent Hope & Co. a telegram, containing the sentence, "Drafts on New York, or currency shipment from there as you prefer." This telegram was shown to the president of the bank, as Hope & Co.'s authority to obtain the money. In view of the defendants' express promise to remit currency, or to honor drafts promptly, as the bank preferred, there can be no doubt that the parties had only the law of South Carolina in view. If the plaintiff had had any idea that it was contracting in view of the statutory law of the state in which the drafts were to be accepted, and that it might be entangled by the law of the place of performance in regard to a verbal promise to accept drafts, it would have promptly accepted the promise to remit the currency; in other words, a promise of prompt cash payment. The conduct of Price in regard to payment, equally shows that he did not have the

statute of New York in contemplation as a safeguard or a shield against the effect of his promise. Moreover, the drafts were cashed and the advances were made in South Carolina, which Price knew must be the course of business,—a fact which was regarded, in *Bank v. Griswold*, 72 N. Y. 473, to be powerful upon the inferences to be drawn from the conduct of the parties in regard to their views respecting the law applicable to the contract.

The other points which the plaintiff in error presents were fully considered in the former opinion. The judgment of the circuit court is affirmed, with costs.

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MACK et al. v. PORTER.

(Circuit Court of Appeals, Fourth Circuit. February 4, 1896.)

No. 145.

1. EVIDENCE—RELEVANCY.

One P. brought an action against M. and B., upon a contract alleged to have been made by parol on December 31, 1891, at a conference between them and one V., the president of the E. Bank, in regard to certain indebtedness of P. to the other parties, and to the sale and purchase of stock owned by P. and pledged to the various other parties. The defendants denied the making of the contract. Upon the trial, the court excluded evidence, offered by defendants, as to who prepared an agreement, previously made, between M. and the E. Bank about some of the stock, which agreement was admitted; evidence as to negotiations, previous to December 31, 1891, between V. and one L. about a sale of the stock; evidence as to other transactions between P. and M., the only purpose of which would be to show the feeling between them; evidence, to explain testimony given for plaintiff, from which an inference adverse to defendants might be drawn, but of which an explanation had been given in other testimony admitted; evidence that P., long previous to December 31, 1891, had misrepresented certain facts material to the alleged contract, as to which, however, there was no proof that, at the time of the contract, the defendants were ignorant or misled; evidence of a threat, made by B. to P., in a conversation prior to December 31, 1891, such threat having no relation to the alleged contract; and evidence of conversations, previous to December 31, 1891, in which M. said that he would not make such a contract as he was alleged to have made. *Held*, that there was no error in any of such rulings, and that the evidence offered was not admissible as part of the *res gestae*.

2. PRACTICE—AMENDING PLEADINGS ON TRIAL.

It is not error to permit amendments of the declaration, during a trial, to conform the pleading to the proof upon matters forming part of the original cause of action, and introducing no foreign substantive cause; nor to refuse a continuance because of such amendments, in the absence of any proof that the same were a surprise, or required the introduction of testimony from witnesses not present.

In Error to the Circuit Court of the United States for the District of West Virginia.

G. B. Caldwell (of Caldwell & Caldwell) and Chas. V. Meredith, for plaintiffs in error.

W. P. Hubbard (Harry M. Russell on the brief), for defendant in error.

Before GOFF and SIMONTON, Circuit Judges, and BRAWLEY, District Judge.

BRAWLEY, District Judge. This case is before us on a writ of error to the circuit court of the United States for the district of West Virginia, and grows out of exceptions taken and allowed at the trial, wherein John Porter, the defendant in error, was plaintiff, and recovered a verdict against John M. Mack and G. B. Boren, in an action of assumpsit on a special oral contract, originally brought in the circuit court of Hancock county, W. Va., and removed into the United States court on the ground of diversity of citizenship. The record discloses 18 exceptions, 13 of which relate to the rejection and exclusion of testimony, and 5 to the allowance of amendments to the declaration at the time of the trial and to the refusal to grant a continuance on account thereof.

In the year 1891 John Porter held a controlling interest in the stock of a corporation engaged in the manufacture of brick in Hancock county, W. Va., known as the John Porter Company, the name of which, by proceedings subsequent to the transactions hereinafter mentioned, was changed to the Mack Company. He had sold and conveyed to said corporation certain real estate, upon which there were two liens, that will be hereafter designated as the "Stewart Lien" and the "Silvers Lien," the amount due thereon being about \$14,000, for which he was liable; and, to secure said company against loss by reason of said liens, he had given his note, and pledged stock of the John Porter Company to the amount of \$15,000. He was indebted to G. B. Boren, and had pledged \$15,000 of the stock of said company as security; also, to the Exchange Bank of Wheeling, which held, as security, \$71,000 of the same stock. He had likewise, before that time, become indebted to John M. Mack, who had held some of the same stock as collateral to secure him as indorser, but this stock had been sold prior to the events now to be related, leaving an indebtedness of about \$4,000 and some hard feelings. He was likewise indebted to the John Porter Company, on an open account, then unliquidated, but subsequently ascertained to amount to about \$400. The stock held by the Exchange Bank had been transferred to one Jones, its cashier, as trustee, and stood in his name. The defendant Mack had made some effort, without result, to purchase this stock from Vance, the president of the bank, who was friendly to Porter, and unwilling to sell without his consent; and, as Porter had an equity of redemption, the bank had given to James M. Porter, a kinsman of the plaintiff, a power of attorney to negotiate its sale. Thus matters stood when, by an appointment arranged by Vance, the president of the bank, an interview was had at an hotel in Steubenville, Ohio, on December 1, 1891, between John Porter, James M. Porter, Vance, Boren, and De Haven Lance, who represented Mack. It was at that interview that the contract which gave birth to this controversy is alleged to have been made. The accounts given of this interview and contract are hazy and conflicting; but as it has been passed upon by a jury, and a verdict in favor of the plaintiff, Porter, has been sustained by the trial judge, it is beyond the province of this court to open up any question as to the merits of the respective contentions. The verdict of the jury settles



the point that a contract was made, as alleged by the plaintiff in the action below; and, unless some reversible error is discovered in the proceedings leading to it, such verdict must stand.

On the part of John Porter it is contended that he was unwilling to part with his interest in the stock held by the bank, and in the stock held by Boren, unless he could sell all, and close out at the same time all interest in the John Porter Company, and be freed from all liability connected with it; and that the result of the negotiations on that day was an agreement that the bank should sell to Mack the stock held by it at a price which would give him \$41,000, that Boren should take the stock held by him at 65 cents on the dollar, that the stock pledged to the John Porter Company should become the property of that company, and that he should be relieved of all liability on account of the Stewart and Silvers liens, and of the indebtedness against him on the books of that company, and that he should also be relieved of the indebtedness growing out of the previous transactions with Mack. On the part of the defendants, Mack and Boren, it is contended that the negotiations had no other object, and had no other result, than an agreement that Boren should take the stock held by him at 65 cents on the dollar, and that Mack should purchase the stock held by the bank at a figure to be settled between the bank and himself; the bank only stipulating with Porter that he should receive \$41,000.

At this date the Stewart and Silvers liens were not due. Subsequently, when they fell due, they were paid by the Mack Company, which, in January, 1893, brought suit against John Porter, and recovered judgment against him for the sum of \$14,772.27, this being the amount of the indebtedness on account of those liens and the open account. A credit of \$5,700 as of February 21, 1893, being the proceeds of the sale of the pledged stock, was made on said judgment, and execution issued against the property of John Porter for the difference, which, with costs, amounts to \$10,443.60. It is to recover this sum that this suit is brought, against Mack and Boren, upon the contract hereinabove referred to; and the case came on for trial before Judge Jackson and a jury, on the 15th of April, 1895, resulting in a verdict for the plaintiff for the amount claimed. The exceptions taken upon such trial are now to be considered,—those relating to the exclusion of testimony, each in its order; those relating to the allowance of amendments during the progress of the trial being considered together. And, to a proper apprehension of the bearing of the testimony, it may be well to state that the question submitted to the jury, and the only question, was whether a contract had been made at Steubenville, Ohio, on the 1st of December, 1891, as maintained by the plaintiff and denied by the defendants.

The first exception assigned as error relates to the exclusion of certain testimony respecting the preparation of a certain paper, which was offered by the defendant, and admitted in evidence. This paper is an agreement, bearing date and executed on December 2, 1891, between the Exchange Bank of Wheeling and John

M. Mack, whereby the said bank agreed to sell to Mack the 710 shares of stock of the John Porter Company standing in the name of John J. Jones, trustee, and Jones, the trustee, at the foot of the agreement, makes a declaration that he holds the stock for the use and benefit of the Exchange Bank of Wheeling. The court excluded testimony which was offered to show that the original draft of this agreement was prepared by the attorney of the bank, and that some additions were made by the attorney for Mack. We fail to see any possible relevancy to the real question at issue which this rejected testimony could have. When Porter consented to the sale and transfer of the stock, and received from the bank the purchase money therefor, the details of the transfer by the bank to another purchaser, and the terms of payment, were of no concern to him. In so far as this testimony tended to show that Mack was dealing with the bank alone, the defendant has had the benefit of it, with all the inferences that could possibly and legally flow from it by the admission of the paper itself, which, on its face, purports to be an agreement between him and the bank alone. It was of absolutely no consequence whether said agreement was prepared by the attorney for the bank or the attorney for Mack, by either or neither, or by both conjointly. There is no error in the rejection of the proffered testimony.

The second, third, and fourth exceptions refer to the amendments, and will be considered hereafter.

The fifth exception is to the ruling out of the question: "At whose solicitation?" asked of the witness Lance, by the defendant's counsel, when he was giving an account of some negotiations for the purchase of the stock from Vance, anterior to the 1st of December. Whether Lance had made an effort to buy, or whether Vance had made an effort to sell, prior to that date, can throw no light upon what took place at that meeting, as to whether the contract alleged was then entered into or not. If offered for the purpose of showing that Lance would have no dealings with Porter, it is negated by the fact that he did have dealings with him; that is to say, that he did go to the meeting, on December 1st, at Steubenville, for the purpose of some negotiation respecting this stock. Whether those negotiations eventuated in the contract declared on is another question. There is no error in the rejection of the question.

The sixth, seventh, eighth, and ninth exceptions are to the refusal to admit testimony concerning certain offers made by Mack to Porter in regard to a transaction between them, long since closed, growing out of the sale of some stock pledged by Porter to secure a debt for which Mack was an indorser, and on account of which Porter had, or thought he had, a grievance. It is not pretended that this transaction had any relation to the negotiations of December 1st, or could throw any light upon the agreement alleged as of that date. The utmost effect of that kind of testimony would be to show that Mack was a benevolent man, and not a harsh man, and that Porter's alleged grievance was imaginary.

These were not questions which were at issue. The matter in dispute was whether a contract was made on December 1st. The fundamental principles of the law of evidence confine testimony to the point at issue, and to facts from which some reasonable presumption or inference affecting the matter in dispute may be drawn. If testimony had been offered by the plaintiff, the tendency of which was to create a prejudice against the defendant, by showing that, in some other transaction, and at some other time, the defendant had done the plaintiff some injury, the proper course would have been to object to that testimony. The record here discloses that whatever was said by Porter in derogation of Mack was brought out on the cross-examination by the counsel for the defendant himself. In excluding the testimony which tended to draw away the minds of the jury from the real question at issue, no error was committed.

The tenth, twelfth, and thirteenth exceptions relate to the exclusion of testimony offered in explanation of a conversation between Stewart and Boren, one of the defendants, wherein Stewart relates that Boren had said that "we" were going to pay the liens. To meet the argument that plaintiff's counsel might be expected to make, that, in using the pronoun "we," Boren meant Mack and himself, defendants proved, by Boren, that he meant the John Porter Company, that the meeting with Stewart was altogether for the purpose of attending to the business of the company, and that he had no affairs of his own in connection with Stewart. Counsel for the defendants then offered in evidence the proceedings of the board of directors on May 9, 1891, showing that at that time it was agreed between the company and John Porter that the company would assume and pay the Stewart and Silvers liens, and that Porter had transferred to the company, for its indemnification, 150 shares of the stock of the company. A copy of the minutes of this meeting was put in evidence without objection. An offer was then made to prove something that was said by Porter during the meeting, for the purpose of explaining the conversation between Boren and Stewart. This was objected to, and the court sustained the objection. The witness was then asked some further questions concerning this meeting, whereupon the court, of its own motion, said: "You cannot prove this. I will allow you to prove the simple fact that, before that meeting of Mr. Boren, in January, 1892, with Mr. Stewart, the John Porter Company had assumed to pay off these Stewart and Silvers liens." Upon an exception being taken to this ruling, the court said: "Then I will exclude it all." The record does not show whether the testimony, already in without objection, was excluded or not, and it does not appear that the jury was directed to disregard it. Assuming that it was, to what extent did such exclusion work injury to the defendants? The fact that the John Porter Company had agreed, in May, to assume the payment of these liens, and had taken the note and stock of John Porter as indemnity, is not inconsistent with the claim that a contract was made, in December following, that Mack and Boren would relieve Porter from any fur-

ther liability in respect to said liens. That contention was the main issue that was being tried. Boren had already sworn that he referred to this obligation of the company to pay the liens in his interview with Stewart; and, when the court allowed him to prove that the John Porter Company had, prior to the interview with Stewart, assumed the payment of these liens, that was all that could properly be asked. It was the apparently needless iteration of that proof that led the court to the exclusion of any further testimony upon that point. We are of opinion that the testimony admitted by the court allowed a sufficient explanation of Boren's remark to Stewart, and do not find, in these exceptions, grounds for reversal.

The eleventh exception grows out of the refusal of the court to allow testimony that Porter, in May, 1891, had represented that the Stewart and Silvers liens did not amount to more than \$9,000. No proof was offered to show that, in December following, at the time when the alleged contract was made, the defendants were ignorant of the true amount of the liens, and that they were misled by those representations into the making of the contract, which, otherwise, they would not have entered into. If that was the contention, proof of a misstatement would be relevant; otherwise, not.

The fourteenth exception relates to a conversation at a meeting, on January 11, 1892, whereat James M. Porter claims that Boren had made certain admissions. Boren denied that he had made such admissions, and stated that the object he had in view in going to that meeting was to settle a personal account with John Porter, and that, upon Porter's refusal, he threatened to sue him. Plaintiff's counsel objected to witness repeating the threat, and the court rebuked the witness, and sustained the objection to so much of the answer as is in these words: "Unless you settle my account, I will sue you before the sun goes down." This is the ground of an exception. There does not appear to be any merit in this exception.

The fifteenth, sixteenth, and seventeenth exceptions relate to the exclusion of conversations between the defendant Mack and Vance, the president of the bank, some time in the fall of 1891, prior to meeting at Steubenville, in which Mack had said that he would not make any offer for the stock if Porter had anything to do with it; that he would only buy it if it belonged to the bank, and that he would not have any negotiations with Porter for the stock. Porter was not present at any of these conversations. As it is a matter of common knowledge that men frequently change their minds, and as it is in evidence that Lance, the agent of Mack, did enter into negotiations of some kind with Porter, at the end of December, at Steubenville, with reference to this very stock, it is difficult to see what bearing these antecedent conversations have upon the question at issue. If there was a contract made at Steubenville, all previous negotiations are merged in that contract, except in so far as they may tend to make clear any ambiguity as to the terms. It is not claimed by the defendants that there is such ambiguity. They deny that any contract at all was made at that meeting. If that is so, then the conversations are irrelevant. It cannot be seriously

contended that a man can escape the performance of a contract by proof that, some time before it was alleged to have been made, he had declared that he would not make it.

This testimony, and some other testimony, the rejection of which we have already considered, and determined to have been properly excluded, because of its irrelevancy, is claimed to have been properly admissible as part of the *res gestæ*. The object to which it was addressed was, not to explain or elucidate the contract which was in issue, but to show that no contract was made at all. They endeavor to show that the purchase of the 710 shares of stock was a simple transaction between Mack and the bank. If that is true, it is a good defense to this action; but, like all other defenses, it must be established by competent testimony. Upon such an issue, it can scarcely be pretended that a declaration, not under oath, of one of the parties to that transaction, can affect the rights of any party not present when such declaration is made. It is elemental that such declarations are inadmissible. Declarations are not admissible to prove a past occurrence. An isolated conversation, or an isolated act done, or a statement of intention respecting it, is no proof of the fact itself. In so far as this kind of testimony tended to show that the defendant bought from the bank, he had the benefit of it in the evidence, which was admitted,—in the written agreement, showing, on its face, that the bank sold the stock to Mack. This action was for the enforcement of a contract alleged to have been made at Steubenville, and witnesses competent to prove it testified to that contract. Here is a single act, well defined as to time. To be a part of the *res gestæ* of that act, the declarations must have been made at the time of the act done, and calculated to explain it, and unfold its true nature and quality. As such, they are admissible as original evidence, because they are regarded as part of the principal act, explaining whatever may be equivocal in its character. They grow out of the act itself, and serve to illustrate it. There may be cases, where the transaction is of a continuous nature, where the limitations as to time would not be so restricted, and admissions of declarations made after the event would be governed by those principles of law which the particular case might require. In the case under consideration, the declarations sought to be introduced related to facts detached from the principal issue, and did not grow out of it, or serve to illustrate it, or constitute a part of it. To be admitted as evidence, other principles of law must be invoked than that they are a part of the *res gestæ*. We know of none that would allow the admission of such testimony, and its exclusion, therefore, is not error.

We come now to the consideration of exceptions (2, 3, and 4) relating to the allowance of amendments pending the trial, and the refusal of the continuance asked on account thereof. The purpose of the amendments was to make the declaration conform to the proof. The first one alleged that it was a part of the agreement at Steubenville that the defendant Boren would take the stock pledged to him at 65 cents on the dollar. As there was no dispute on that point,

and as the defendant Boren did take the stock, and credit Porter with that amount, no breach being charged, or claim made on account thereof, the amendment was properly allowed; and so as to the second amendment, which allowed the plaintiff to state, in his declaration, that it was also agreed that the indebtedness of Porter to the John Porter Company on the open account should be canceled. These amendments did not, nor did either of them, state a separate cause of action, nor claim damages for separate breaches. It was claimed that they were all a part of the same transaction. The contract at Steubenville was a single contract, containing various provisions, none of which constituted separate causes of action, upon which separate actions could be brought. The amendments did not bring in any foreign substantive causes of action, and, as they related to and formed part of the original cause of action, they became, properly, a part of the declaration, charging a breach of the single contract, which was the subject of the litigation. In matters of this nature, the courts of the United States are governed by the laws of the state where the litigation is had, and the Code of West Virginia (section 12, c. 125) provides that:

"The plaintiff may of right amend his declaration or bill at any time before the appearance of the defendant, or after such appearance, if substantial justice will be promoted thereby. But if such amendment be made after the appearance of the defendant the court may impose such terms upon the plaintiff as to a continuance of the cause and the payment of the cost of such continuance as it may deem just."

There is nothing in the record to show that the allowance of the amendments operated to the disadvantage of the defendants, that it was a surprise, and that a continuance was necessary in order that additional testimony could be provided to meet any new aspect of the case made by the amendments. In fact, as all of the witnesses who were present at the time when the alleged contract was made, or who could testify as to the terms of it, were already before the court, and had already been examined as to their knowledge of the matters to which the amendments related, no case is made which takes it out of the general rule that the granting or refusing of continuance is within the discretion of the trial judge, not reviewable in this court.

The last exception assigns as error the including in the verdict of the amount of the open account, \$400, and interest thereon. This suit was upon a contract which provided that the defendants should pay the amount of liens upon the property of the company for which the plaintiff was liable, and the open account. Judgment had been recovered against the plaintiff by the company, which judgment included both liens and open account; and the cause of action in this case was the breach of the contract, which consisted in the procuring of that judgment. If the plaintiff was entitled to recover at all, he was entitled to recover the whole amount of that judgment.

Our opinion, upon the whole case, is that the judgment of the court below should be affirmed; and it is so ordered and adjudged.

**MT. HOLLY MINING & MANUFACTURING CO. v. CARALEIGH PHOSPHATE & FERTILIZER WORKS.**

(Circuit Court of Appeals, Fourth Circuit. February 4, 1896.)

No. 140.

**1. CONTRACTS—MEETING OF MINDS.**

The M. Co., of Charleston, made a contract with the C. Co., of Raleigh, for the sale of a quantity of phosphate rock, at a fixed price, deliverable in certain quantities per month. The time for delivery was extended, and, before delivery was completed, the market price of the rock fell, and negotiations were opened for a settlement and cancellation of the contract. One T., an agent of the M. Co., went to Raleigh, and submitted two alternative propositions to the C. Co., both including the giving of notes by the C. Co. for certain parts of the price of the rock contracted for. These propositions were declined, and T. returned to Charleston. On April 1, 1892, he returned to Raleigh, and made a new proposition, which the C. Co. declined, and proposed to give notes for less amounts than the M. Co. had required. T. telegraphed the M. Co., and received an answer, which did not authorize the acceptance of the offer, and suggested a modification. T., however, agreed to settle on the terms offered, and proposed that a written agreement be drawn up, and the notes signed. The C. Co., however, declined, as T. had not the M. Co.'s copy of the original contract in his possession for cancellation. T. returned to Charleston. The M. Co. decided to accept the C. Co.'s offer, and drew up an agreement and notes accordingly, which were sent to the C. Co. The C. Co. added to the notes a reference to the contract, making them nonnegotiable, and returned them, signed in this form, to the M. Co. The M. Co. declined to accept such notes, and demanded and received back from the C. Co., to which it had been sent, the original contract. *Held*, that there was no meeting of minds of the parties on April 1st in any new contract annulling the original one, and that the latter remained in force; that it was error to submit to the jury a question which did not depend for solution upon the preponderative weight of testimony or the credibility of witnesses.

**2. SAME—QUESTION FOR COURT.**

*Held*, that it was for the court to determine whether a contract could be inferred from the facts proved granting to the testimony all the weight and probative force to which it was entitled.

In Error to the Circuit Court of the United States for the Eastern District of North Carolina.

John W. Hinsdale, for plaintiff in error.

R. O. Burton, for defendant in error.

Before GOFF and SIMONTON, Circuit Judges, and BRAWLEY, District Judge.

BRAWLEY, District Judge. The Mt. Holly Mining & Manufacturing Company, a corporation in South Carolina, engaged in the mining of phosphate rock, on June 23, 1891, entered into an agreement in writing with the Caraleigh Phosphate & Fertilizer Works, a corporation organized in North Carolina to carry on the business of manufacturing phosphates, whereby the first-named company sold to the last-named 3,000 tons of phosphate rock at \$7.25 a ton, free on board the cars at the seller's mines in Berkeley county, S. C.; shipments to begin in September or October, 1891, and to continue at the rate of 500 tons per month, until the contract was performed. Owing to delays in the completion of the works of the Caraleigh Company, the rock

was not called for as stipulated, and at the request of said company and by mutual consent there was a postponement of the delivery from time to time, so that but 284 tons had been delivered before April 1, 1892. Meantime the price of phosphate rock had greatly fallen in the market, and about the end of March the Mt. Holly Company sent its bookkeeper, one W. H. Tucker, to Raleigh, to confer with the Caraleigh Company about the outstanding contract of June 23, 1891, and on the evening of March 28th he was invited to a meeting of its board of directors for that purpose, and at that meeting stated that he was authorized to make two propositions for a settlement,—either to extend the time of the delivery of the rock to January 1, 1893, if the Caraleigh Company would give its notes indorsed by the board, or to cancel the contract if said company would pay \$1.75 a ton for the undelivered rock; this being something less than the difference between the contract price and the then market price. A long discussion followed, and the board decided not to accept this proposition, but to make a counter proposition, which, being submitted to Tucker the next morning, was not accepted by him, and on the same day he returned to his home in Charleston. After informing the president and other officers of his company of the nonsuccess of his mission, he was sent back to Raleigh, with directions to waive so much of his former instructions as required the indorsement of the notes by the board, but to insist upon the payment of \$1.75 per ton for a cancellation of the whole contract. Upon his return to Raleigh he had an interview with the president and some of the directors of the Caraleigh Company on April 1st, and after considerable discussion the president made a proposition for a settlement, and the following telegrams passed between Tucker and his company:

"Raleigh, April 1, 1892.

"Berkeley Phosphate Co., Charleston, S. C.: Caraleigh offer to cancel 1,500 tons, paying one dollar and a half; settle by note, sixty days, interest six per cent., fifteen hundred tons; three notes, payable January, April, June 1st, ninety-three. Best can do. Answer promptly. William H. Tucker."

To this telegram, the following reply was received:

"Charleston, S. C., April 1, 1892.

"William H. Tucker: Close. Presume notes indorsed by board. Try to get notes payable within present year. President out of city.

"Berkeley Phosphate Co."

The Berkeley Company and the Mt. Holly Company are substantially the same corporation, and the reply of the Berkeley Company was sent by its secretary, the president being absent. Upon the receipt of this telegram, which, as will be seen, did not in terms authorize the acceptance of the proposition as made, Tucker, after some further discussion, agreed to settle, and proposed that a written agreement be drawn up, and notes executed in accordance therewith, and offered to cancel the agreement of June 23, 1891; but as he was not in possession of the agreement held by the Mt. Holly Company, the president of the Caraleigh Company would not accept the cancellation of his copy, and so the agreement was not then consummated. Tucker returned to Charleston, and, after acquainting his principals with the terms of settlement upon which he had agreed, and urging



the acceptance thereof, a contract was drawn up in accordance therewith; a statement of the account was made up, and notes prepared and forwarded by mail to the Caraleigh Company; also the original contract. Three notes, similar in terms, of one of which the following is a copy, were sent on April 4th:

"\$3,044.11.

Charleston, S. C., April 1, 1892.

"On November 1 after date we promise to pay to the order of the Mt. Holly Mining and Manufacturing Company three thousand and forty-four and 11-100 dollars at the People's National Bank, Charleston, S. C. Value received.

"Due November 1-4, 1892."

The plaintiff likewise inclosed the old contract of June 23, 1891, seller's copy, to be canceled when and after the proposed new contract should be duly accepted in writing, and the notes should be executed by the defendant. The defendant, on April 7th, wrote to the plaintiff the following letter:

"Raleigh, N. C., April 7, 1892.

"Mt. Holly Mining and Manufacturing Co., Charleston S. C.—Dear Sir: Your favor to hand yesterday, with notes, new contract, etc. We tried to secure a conference with our attorney to-day, but he was so occupied with a business engagement that he would not confer to-day, but a conference has been set with him for ten o'clock in the morning. The results shall be promptly written you. We deem it not amiss to say in advance of the conference that he advised us in a brief conversation on the street to-day that he thought we would be guilty of business imprudence to give negotiable notes for rock undelivered. We said this much to Mr. Tucker. However, we will write you again tomorrow.

Yours, truly."

And on April 9th defendant wrote the following letter:

"Raleigh, N. C., April 9, 1892.

"Mt. Holly Mining and Manufacturing Co., Charleston, S. C.—Dear Sir: We beg leave to return herewith the five notes and new contract duly signed. The old contract we will destroy. Under the advice of our attorney, we have added to the three notes given for undelivered material the following: 'As per contract hereto attached and made a part hereof.' We feel sure you will appreciate that, while we have no idea that we should be sufferers in any way should this have been left off, still that is a piece of business prudence and precaution that it is proper for us to take under the advice cited, and not to incur any liability for criticism either at the hands of our directors or stockholders.

"Very truly yours,

Caraleigh Phosphate and Fertilizer Works.

"Per F. B. Dancy, Secretary, Treasurer and General Manager."

Immediately upon the receipt of this letter with its inclosures the plaintiff sent the following telegram:

"Charleston, April 11th, 1892.

"J. J. Thomas, President Caraleigh Phosphate & Fertilizer Works, Raleigh, N. C.: Letter received. Notes unsatisfactory. We notify you not to destroy contract. Tucker leaves to-night for Raleigh.

"[Signed]

Mt. Holly Mining and Manufacturing Co."

Tucker returned to Raleigh, and the minutes of the regular monthly meeting of the defendant company, held on April 12th, contains the following:

"Subject brought up was the question of the settlement of the company's contract for phosphate rock with the Mt. Holly Mining and Manufacturing Co. Mr. Smith moved that the president, secretary and treasurer and the company's attorney be directed to confer with Mr. Tucker, the representative of the Mt. Holly Co., now present in the city, and offer him \$1.50 per ton to cancel the entire balance, 2,715 and 1500/2240 tons of rock; falling in ac-

completing which to use their discretion in effecting the best settlement their judgment might dictate."

No result followed this third effort at adjustment. Tucker demanded and received the original contract, which had been inclosed in the letter of April 4th, from the Mt. Holly Company to the Caraleigh Company, and subsequently he returned to the president of the Caraleigh Company the notes inclosed in his letter of April 9th. This suit is upon the original contract of June 23, 1891, and the defense is that said contract was annulled and superseded by a new contract made on April 1, 1892.

If the negotiations of that day had terminated as proposed by Tucker, and notes in the form of those tendered on April 9th had been accepted by him, and cancellation written upon the duplicate copy contract held by the defendant company, a very nice question would have arisen as to the nature of Tucker's agency, and his power to bind the plaintiff company by accepting notes of this character. There is a preponderance of testimony that at the meeting of the directors on the 28th of March, attended by Tucker, a most decided opinion was expressed by some of the directors that the company should not give negotiable notes, and it is equally clear that these expressions of opinion made little impression upon him, and were not communicated at all to his principals; nor is it very surprising that such should be the case. His instructions were to compromise by accepting \$1.75 a ton in satisfaction of the contract, or to take notes payable by the 1st of January following, indorsed by the individual members of the board. The form of the notes had not been the subject of any specific instruction, and, as the board determined not to accept the terms which he was directed to offer,—that is, not to give any notes at all,—and as he returned home without having effected any settlement, the conversations at that meeting have no illuminative effect upon the negotiations which subsequently followed; and these will now be considered, for it is at the meeting on the 1st of April that the new contract was made, if at all. After his return home, and report to his principals, Tucker was sent back, with instructions similar in all respects to the first, save that he was authorized to waive the demand for the individual indorsement; that is, he was authorized to extend the time for the delivery of the rock to January 1, 1893, taking notes payable before that date, or to settle by canceling the whole contract upon the payment of \$1.75 per ton.

It is in evidence that the market price of land rock on April 1, 1892, was \$4.75 per ton. The difference between this price and the contract price was therefore \$2.50 per ton. After considerable discussion, a proposition was made, which Tucker concluded was advantageous to his company, and a telegram was sent, and a reply received. Copies of the same appear above. All the attendant circumstances go to show that in this telegraphic correspondence Tucker was merely the conduit through which the Caraleigh Company communicated with the Mt. Holly Company. The telegram was prepared at the instance and with the assistance of Thomas, the president of the Caraleigh Company, in his office, and a copy of it kept at his request. In effect

it was a proposition submitted by the defendant company to the plaintiff company, and not accepted in terms; but Tucker, the agent, believing that a settlement could be made upon the basis proposed, assumed the responsibility of accepting these terms, and offered to close the matter on that day, but his offer was not accepted, and the transaction was not completed. In the same interview, and subsequent to the receipt of the telegram from the Berkeley Phosphate Company, there was some further negotiation as to the time when the notes were to be payable, evidently with the desire to reach an agreement as to the time of payment which would accord with the instructions in the telegram to get the notes made payable within the year. The result of this negotiation was that the first note should become payable in November, 1892, instead of January, 1893, as proposed in the first telegram. When Tucker found that the transaction could not be closed on that day, and that he would have to return to Charleston without having effected a final settlement, he testifies that he informed Thomas that "if you compel me to return to Charleston, I will not take this responsibility upon myself; I will reserve the right to submit it to the principal for his action. If Mr. Chisolm agrees to the terms of this proposed compromise, the new contract and the notes will be drawn up immediately and forwarded." Upon this point Thomas testifies that "he does not recollect about his saying that"; "there may have been something said." Do these negotiations, propositions, understandings, or agreements of the 1st of April constitute a contract? If nothing further had been done, could the Caraleigh Company, on the next day, have enforced specific performance by bill? We think not. There was not that agreement of minds between the parties to be bound, which is of the essence of a contract. The Mt. Holly Company, through its agent, made a proposition, which was rejected. The Caraleigh Company, using the same agent as a medium of communication, made a counter proposition, which the secretary of the Mt. Holly Company, the president being absent, authorizes the acceptance of, with certain modifications, which the Caraleigh Company would not assent to. The agent of the Mt. Holly Company thereupon, believing that the president would sanction his act, assumed the authority to close the negotiations upon his own responsibility,—an authority never before claimed by him, and which all the circumstances show that the Caraleigh Company knew that he did not possess, for, if he had, there would have been no need of the submitting their offer by telegraph to his principal; but his proposition for an immediate settlement was declined, and so the matter rested. During all the time of these negotiations it is claimed by the Caraleigh Company that whenever it used the word "notes" it meant non-negotiable notes, and it is claimed by the Berkeley Company that when it used the word "notes" it meant negotiable notes; so that on this point, which is of material consequence, the minds of the two parties to the alleged contract never came together. The letters of the Caraleigh Company of date April 7th and April 9th, and the minutes of the board of date April 12th, all negative the idea that a binding contract, specific in its terms,

was made on April 1st. The negotiations and transactions of that day had no other result than this: that the agent of the Mt. Holly Company came to an understanding with the president of the Caraleigh Company that the outstanding differences between the two companies could be settled upon certain terms. This understanding is referred to by the Mt. Holly Company in its letter of the 4th of April, inclosing the notes and new contract as an "agreement," and the same letter contains a "statement of settlement as per agreement"; but in matters of this kind courts are bound to consider the thing itself, and not the words by which it is characterized.

We are of opinion that no contract was made on the 1st of April; that the minds of the parties to be bound never came together in actual agreement as to the specific thing to be done; and therefore that the exception to the charge of the judge set forth in the thirteenth assignment of error must be sustained. The portion of the charge excepted to submitted this question to the jury. If the solution of it depended on the preponderating weight of evidence or upon the credibility of witnesses, then it was one for the consideration and determination of the jury; but it was for the judge to say whether a contract could reasonably and legitimately be inferred from the facts proved, granting to the testimony all the weight and probative force to which it was properly entitled. The onus was upon the party setting up the contract to establish it by sufficient evidence. It was not enough to prove certain facts and conversations, which had a tendency to establish it, and to leave it to the uninstructed mind of the jury to draw a conclusion that a contract was made. Conceding all the testimony to be true which relates to the transactions of April 1st, and all the inferences which legitimately may be drawn from the facts proved, they all fail to show that at any one time during that day there was such an agreement of minds as to the thing to be done that must lie at the base of every enforceable contract. If that is so, then it was error to submit it to the jury. Mr. Justice Miller in *Pleasants v. Fant*, 22 Wall. 116, states the duty of the court in its relations to the jury, and, reviewing the cases, says:

"And accordingly we hold the true principle to be that, if the court is satisfied that conceding all the inferences which the jury could justifiably draw from the testimony the evidence is insufficient to warrant a verdict for the plaintiff, the court should say so to the jury."

And Judge Goff, in delivering the opinion of this court at the last term in *Franklin Brass Co. v. Phoenix Assur. Co.*, 13 C. C. A. 124, 65 Fed. 773, cites all the authorities in support of the rule which is there stated by him:

"The decisions are many, and of the highest authority, that in cases where the testimony is of the character of that submitted to the jury in this case, it is not only proper, but the duty of the court, to direct a verdict."

This decision renders it unnecessary to consider in detail the numerous exceptions and assignments of error contained in the record, and prevents the consideration of the very interesting questions submitted in the learned and exhaustive arguments of counsel upon other aspects of the case. For the reasons given, the judgment of the court below is reversed, and a new trial ordered.

## GREENE v. WESTERN UNION TEL. CO.

(Circuit Court, D. Minnesota. March 11, 1892.)

## MASTER AND SERVANT—ASSUMPTION OF RISKS—TELEGRAPH LINEMAN.

A "lineman" engaged, as one of a crew, in repairing a telegraph line, under the immediate charge of a foreman having power to hire and discharge the men, assumes the risk of the falling of an insufficiently guyed "gin pole" (one guyed for the purpose of setting other poles), which he ascends by order of the foreman.

This was an action by John C. Greene against the Western Union Telegraph Company to recover damages for personal injuries received while in its employment. Defendant moved the court to direct a verdict in its favor.

Erwin & Wellington, for plaintiff.

Ferguson & Kneeland, for defendant.

Before NELSON, District Judge, and a jury.

Plaintiff was in the employ of defendant as a lineman, and was one of a crew engaged in repairing its telegraph lines, under the immediate charge of a foreman, who had authority to hire and discharge men, and direct them where and how to work. He was ordered by the foreman to climb a certain "gin pole," which had been erected by other members of the crew; and while climbing said gin pole, pursuant to such order, the pole fell, apparently because not sufficiently guyed, and plaintiff was injured. This action is to recover damages sustained, claiming that the foreman was a vice principal, for whose negligence in the erection of said pole, and ordering plaintiff to climb the same, defendant is liable. Upon motion of defendant's attorneys for an instruction to the jury to return a verdict for defendant, the court, after hearing the respective counsel, granted the motion, as follows:

The Court: I think this was a risk that the plaintiff assumed when he was hired. It was a part of his duty. He was not only to help erect and climb poles and string wires, but to help put up those gin poles. While the business may have been a hazardous one, he assumed the ordinary risks incident thereto, and among them that of a pole not being properly guyed, owing to negligence on the part of his fellow workmen. Conceding that the foreman was a representative of the company, I do not think it has anything to do with the case. Plaintiff was not taken from any particular duty and put into one that he was not hired to do, which was extrahazardous, and unnecessarily exposed him to a danger which he did not contemplate by virtue of his employment; but he was hired to do just what he was ordered to do, and in so doing the accident happened. I think this man was injured by a risk which he assumed by virtue of his employment, and I instruct you that the defendant is entitled to your verdict.

## WHITE et al. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. February 20, 1896.)

## 1. CUSTOMS DUTIES—APPEAL FROM BOARD OF APPRAISERS—CONFLICTING EVIDENCE.

A decision by the board of general appraisers of a question of fact involved in great conflict of testimony, which is affirmed by the circuit court upon a like conflict of testimony, should not be disturbed by the circuit court of appeals.

## 2. SAME—MANUFACTURES OF JUTE AND FLAX—BURLAPS.

Articles woven of flax, and of jute and flax, less than 60 inches wide, used chiefly for stiffening collars and fronts of coats and other garments, and as bands in trousers, etc., the goods being known commercially as "canvas," "paddings," "ducks," "coatings," etc., were dutiable as manufactures of flax, under paragraph 371 of the act of 1890, and as manufactures of jute and flax, under paragraph 374, and not as burlaps over 60 inches wide, under paragraph 364. 65 Fed. 788, affirmed.

This is an appeal from a decision of the circuit court for the Southern district of New York affirming a decision of the board of general appraisers sustaining the collector's classification of certain merchandise as manufactures of flax, or of which flax is a component material, under paragraph 371 of the tariff act of October 1, 1890. The importers claim that the articles in question are paddings or canvas from 18 to 24 inches in width, and used chiefly in the clothing trade. A description of the goods, together with a statement of the evidence, will be found in the report of the decision of the circuit court. See 65 Fed. 788.

Stephen G. Clark, for appellants.

James T. Van Rensselaer, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. The board of general appraisers had before it a number of importations of jute fabrics, claimed by the importers to be burlaps, and after taking a great deal of testimony as to the character, manufacture, and uses of the goods, and as to the meaning in commerce of the words "burlaps," "canvas," and "paddings," delivered a long and carefully considered decision. In that decision they held that the articles before them, represented by some 30 different samples, were burlaps, and dutiable as such under the act of 1890. An appeal being taken, that decision of the board of general appraisers was affirmed by the circuit court in the Southern district of New York (In Re White, 53 Fed. 787), the court holding that there being conflicting evidence before the board as to whether the articles were commercially burlaps or not, its decision on such evidence would not be disturbed. Subsequently, the goods now before the court, represented by four samples, came before the board upon appeal from the collector; the importers claiming that they, too, should be classified as burlaps. The board held that they were not burlaps, and referred for a statement of the facts involved to their earlier decision, returning in this case the evidence taken in the former one. Except for the fact that the

articles in this case are composed wholly or in part of flax, and are not, perhaps, quite as coarse, the fabric containing more threads to the square inch, there is no difference apparent between the respective importations.

The appellants contend that the board was in error in its finding, apparently on the assumption that it differentiated these importations from the earlier ones because of their material, and refers to the statute (paragraph 364) which provides for duty on "burlaps, not exceeding sixty inches in width, of flax, jute or hemp, or of which flax, jute or hemp, or either of them, shall be the component material of chief value," as sufficient authority for the proposition that burlaps may be made of flax, jute, or hemp. This is a sound argument, but it does not apply, for there is nothing to show that the board decided this case against the importers on any theory that burlaps could only be made of jute. Indeed, a reference to the board's decision in the earlier case shows conclusively that they recognized the fact that there were burlaps of flax and hemp, as well as of jute. The relative coarseness or fineness of the weave is, as all the evidence shows, an important element in determining whether or no an article is burlaps. There was great conflict in the testimony before the board as to what degree of coarseness was essential to constitute burlaps, and, upon that conflicting testimony, the board held that these articles were not burlaps. A similar conflict exists in the testimony taken in the circuit court, and its conclusions ought not to be disturbed. The decision of the circuit court is affirmed.

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#### KLEEBERG v. UNITED STATES.

(Circuit Court, S. D. New York. February 20, 1896.)

No. 2,185.

#### CUSTOMS DUTIES—CLASSIFICATION—INSERTING.

"Insertions" or "inserting," of silk, are dutiable at 45 per cent. ad valorem, under paragraph 302 of the act of 1894, as "manufactures of silk, or of which silk is the component material of chief value, \* \* \* not specially provided for in this act"; and not as "articles made wholly or in part of lace," under paragraph 301, which imposes a duty of 50 per cent. ad valorem.

This was an appeal by P. Kleeberg from a decision of the board of general appraisers overruling his protest and sustaining the classification of the collector of the merchandise in question, as "silk laces," under paragraph 301 of the act of 1894.

The paragraph above referred to is part of Schedule L—"Silks and Silk Goods"—and, so far as it relates to the present controversy, is as follows: "Laces and articles made wholly or in part of lace \* \* \* composed of silk, or of which silk is the component material of chief value, and beaded silk goods, not specially provided for in this act, fifty per centum ad valorem." The importer protested insisting that the imported articles should have been classified under paragraph 302, which provides for "all manufactures of silk, or of which silk is the component material of chief value, \* \* \* not specially pro-

vided for in this act, forty-five per centum ad valorem." The assistant appraiser on the 26th of October, 1894, reported that the merchandise in question "consists of silk insertings similar to those covered by G. A. decision No. 2,723 and should have been returned at 45% ad valorem under Par. 302, N. T., in harmony therewith." Subsequently the deputy collector addressed to the appraiser the following question: "Are not the silk insertings referred to herein in fact articles made wholly or in part of silk lace?" To which the assistant appraiser answered: "Yes; they are articles made wholly or in part of silk lace." The board found as follows: "We find as matter of fact, from the report and return of the appraiser, and other papers in the case, that the goods in question consist of silk and cotton laces or articles made wholly or in part of lace." The dictionary definitions applicable are as follows: Webster (Internat. Dict.): "Lace. A fabric of fine threads of linen, silk, cotton, etc., often ornamented with figures; a delicate tissue of threads much worn as an ornament of dress." "Insertion or Inserting. That which is set in or inserted, especially a narrow strip of embroidered lace, muslin, or cambric." Stormonth: "Lace. A fine kind of net work texture or trimming." "Insertion or Inserting. A kind of lace trimming." Century: "Lace. A fabric of fine threads of linen, silk, or cotton, whether twisted or plaited together or worked like embroidery, or made by a combination of these processes, or by machinery." "Insertion or Inserting. A band of lace or other ornamental material inserted in a plain fabric for decorative purposes. Such bands are often made with both edges alike and with a certain amount of plain stuff on either side, to allow them to be sewed on strongly." No testimony was presented by the importer to the board. Eight witnesses have been examined in this court, and their testimony has been returned by the referee together with the testimony in the case of Lahey & Duncan, which is stipulated into the present record. It is probable that, if this testimony had been before the board, they would have reached a different conclusion, for the reason that in two subsequent cases they found with the importer on this issue, and this class of merchandise is now being passed at 45 per centum.

Stephen G. Clarke, for appellant.

Henry C. Platt, Asst. U. S. Atty.

COXE, District Judge (after stating the facts). The testimony taken in this court establishes the following facts: The articles in question are made at Nottingham, England, on a lace machine and are woven into a wide web with a draw thread between each piece; when the web is removed from the machine, dressed and dyed, the draw thread is pulled out leaving the articles in controversy. They are used as trimmings, and are known commercially as "insertings" or "insertions." So far there is no dispute. There is a difference of opinion as to whether they are lace or not, but the testimony of those most competent to speak on the subject—importers and large dealers—is to the effect that the term "lace" has a well-known commercial meaning and that "inserting" is not lace. "Lace," according to these witnesses, is an article having one scalloped edge and one straight edge; inserting has two straight edges and is thus commercially distinguished from lace. This designation differs from the dictionary definitions of lace, the latter clearly including the articles in controversy. But in tariff law the commercial meaning must take precedence.

Indeed, the proposition that these insertings are not laces was not seriously disputed at the argument, the principal contention being that they are "articles made wholly or in part of lace." The difficulty with this theory is clearly stated by the board in an opinion



filed about a fortnight after the decision of the case in hand. They say:

"We detect no force in the contention that insertings are articles 'made wholly or in part of lace.' It is not necessary to inquire what constitutes lace; that question has been passed upon by the courts. It is sufficient to observe that lace is a completed article or fabric made of threads, and that 'inserting' is also a completed article made of threads. As insertings are made of threads they are not 'articles made wholly or in part of lace,' because lace is not thread but a fabric composed of thread."

It is not perceived how the force of this reasoning can be avoided. Starting with the proposition that inserting is not lace, how can it be maintained that it is made of lace? How can a lace article be made without lace? If the mind be once clearly imbued with the idea that in tariff nomenclature "inserting" and "lace" are two totally distinct fabrics, it will follow as a necessary conclusion that lace articles can no more be made of insertings than of burlaps. The fact that lace would have been produced had the process of manufacture stopped at an earlier stage is not material. It did not stop there; it continued until inserting was produced. In order to make lace articles one must have lace to start with.

The decision of the board of general appraisers is reversed.

#### WOOD et al. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. February 18, 1896.)

##### 1. CUSTOMS DUTIES—VALUATION OF FOREIGN COIN—AUTHORITY OF SECRETARY OF TREASURY.

The statutes directing the secretary of the treasury to proclaim the values of foreign coin as expressed in the money of account of the United States (Rev. St. § 3564; 26 Stat. 624) do not require the secretary to take the valuation of such foreign coin as established by proclamation at the date of the entry, rather than at the date of exportation, in the estimate of the values of imported merchandise. And the secretary's proclamation of July 1, 1891, and the corresponding regulations of 1892, changing the time from the former to the latter date, are valid. Rev. St. §§ 251, 2903. *Heinemann v. Arthur's Ex'rs*, 7 Sup. Ct. 446, 120 U. S. 82, distinguished.

##### 2. SAME—JURISDICTION OF BOARD OF GENERAL APPRAISERS.

The board of general appraisers has jurisdiction to review the action of the collector in regard to the date at which the value of foreign coin is to be estimated in determining dutiable value. *U. S. v. Klingenberg*, 14 Sup. Ct. 790, 153 U. S. 93, distinguished.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Everit Brown, for appellants.

Wallace Macfarlane, U. S. Dist. Atty.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. The facts in the case are undisputed. Wood & Payson exported from Russia 513 bales of Donskoi wool, of the third class, upon which the proper rate of duty under the tariff act of October 1, 1890, was 32 per cent. ad valorem. The other facts are succinctly stated by the board of general appraisers as follows:

"(1) The shipment of the goods covered by this protest was made from Russia on or about December 1, 1891. (2) The merchandise arrived in the United States, and was entered for consumption, January 8, 1892. (3) The merchandise was purchased and invoiced in silver roubles of Russia. (4) The collector, in liquidating the entry, estimated the value of the silver roubles in gold dollars of the United States to be \$0.578, in conformity with the value established by the director of the mint, as proclaimed by the secretary of the treasury October 1, 1891. (5) The value of the silver rouble, as estimated by the director of the mint, and proclaimed by the secretary of the treasury on January 1, 1892, was \$0.553. The appellants (importers) claim that the entry should have been liquidated on the basis of value of the silver rouble as proclaimed by the secretary of the treasury January 1, 1892. The issue presented in this case is whether the collector should have adopted the value of the silver rouble at the date of exportation, or at the time of entry."

The board of general appraisers sustained the protest, and reversed the action of the collector. The circuit court, upon appeal, reversed the decision of the board of general appraisers, upon the ground that they had no jurisdiction. From the decree of the circuit court the importers appealed to this court.

The two important questions in the case are: (1) Was the action of the collector legal or illegal? (2) Was the action of the collector final, and, whether correct or incorrect, was it the subject of appeal to the board of general appraisers?

An examination of either question requires an historical reference to the statutes upon the subject of the valuation of foreign coins, and to the decisions of the supreme court thereon. This brings into immediate prominence the question of the legality of the collector's action, which will be first considered. The first section of the act of March 3, 1873 (17 Stat. 602), which became section 3564 of the Revised Statutes, provided as follows:

"That the value of foreign coin, as expressed in the money of account of the United States, shall be that of the pure metal of such coin of standard value, and the values of the standard coins in circulation of the various nations of the world shall be estimated annually by the director of the mint, and proclaimed on the 1st day of January by the secretary of the treasury."

Although this section did not, in terms, declare that the value of foreign coins as proclaimed by the secretary of the treasury was to be applied in the estimation of the invoice values of imported goods, the supreme court, in *Arthur v. Richards*, 23 Wall. 246, held that this was the correct construction of the section, and that it declared the rule for the ascertainment of the value of foreign coins, by which officers charged with the collection of duties upon imports were to be governed, and furthermore decided in *Cramer v. Arthur*, 102 U. S. 612, and in *Hadden v. Merritt*, 115 U. S. 25, 5 Sup. Ct. 1169, that:

"The value of foreign coins, as ascertained by the estimate of the director of the mint, and proclaimed by the secretary of the treasury, is conclusive upon customs officers and importers."

Section 52 of the tariff act of October 1, 1890 (26 Stat. 624), changed the pre-existing statutes by requiring that the values of the coins of foreign countries should be estimated by the director of the mint quarterly, instead of annually, and should be proclaimed by the secretary of the treasury quarterly, on the 1st day of January, April, July, and October in each year. The annual proclamations of the secretary

of the treasury, after the act of 1873, until and including the proclamation of January 1, 1891, declared that the estimates of the director of the mint were to be followed in the valuations of foreign merchandise imported on or after the date of the proclamation, but it will be perceived that the statute had not established either the date of exportation or of importation as the date at which the values of foreign coins were to be estimated. The proclamation of July 1, 1891, informed the collectors of customs that the estimate by the director of the mint of that date was to be followed in estimating the value of foreign merchandise exported to the United States on or after July 1, 1891, and all succeeding proclamations have been in the same form. The customs regulations of 1892 were changed to correspond with the change in the form of the proclamation.

It is urged by the importers that this change from the valuation of foreign coin in force at the time of the entry to the valuation in force at the date of the exportation was unlawful. We perceive nothing in the statutes which compels the secretary to take the date of entry, rather than the date of importation. It is a matter of detail in regard to the execution of the customs laws, which the secretary of the treasury has express authority to regulate by rules and regulations not inconsistent with law. Section 251 of the Revised Statutes provides that the secretary "shall prescribe \* \* \* rules and regulations not inconsistent with law, to be used \* \* \* in carrying out the provisions of law relating to raising revenue from imports or to duties on imports." A very early statute, still in existence, as section 2903 of the Revised Statutes, provided as follows:

"The president may cause to be established fit and proper regulations for estimating the duties on merchandise imported into the United States, in respect to which the original cost shall be exhibited in a depreciated currency, issued and circulated under authority of any foreign government."

By virtue of the power conferred by these statutes, the secretary originally adopted the system of reducing the currency of foreign countries into the money of the United States, according to the proclaimed value at the date of entry of the merchandise; but there was a propriety in making the currency valuations correspond with the obvious and long-continued statutory policy of congress, which was to estimate the value of imported merchandise at or near the date of exportation. This policy is clearly manifested in the various provisions of the act of June 10, 1890, in regard to valuation of imported goods; and after quarterly estimates were prescribed the change was entered upon for the purpose of bringing the entire system of valuations into harmony, and was a change which the secretary was empowered to make by virtue of the quoted statutes, unless the new regulation was inconsistent with law. But it is said that the supreme court, in *Heinemann v. Arthur's Ex'rs*, 120 U. S. 82, 7 Sup. Ct. 446, declared that the valuation of foreign coins must in all cases be taken as of the date of entry of the goods. The facts in that case were as follows: The importers bought in Russia, in October, 1873, a quantity of carpet wools, which were imported into the port of New York, and entered at the customhouse, January 5, 1874. The importers insisted that the Russian rouble should be computed at 75

cents, which was its value under the act of March 3, 1843 (5 Stat. 625), and its statutory value at the time of the exportation. The director of the mint, in pursuance of the statute of March 3, 1873, estimated the value of the rouble for the year 1874, at 77.17 cents, and on December 29, 1873, the secretary of the treasury proclaimed that:

"From and after January 1, 1874, the following table of standard values of foreign moneys, reduced to the moneys of account of the United States, will, until otherwise provided by law or regulation, be taken at customhouses in computing the invoice value of all imported merchandise expressed in such currency, to wit, Russian roubles, of 100 copecks, silver, 77.17."

The supreme court held that the effect of the act of 1873 was to repeal the act of 1843, and that the rouble must be computed at 77.17, its value when the computation was to be made. The court, also, among other suggestions, said that the statute as to computation applied as of the date of the entry, to the entered value. In view of the fact that the statute of 1843 had been repealed, this was true; and this remark is to be construed in connection with the regulation of the secretary, which was a part of the case, and which provided that the valuation should be taken in accordance with the proclaimed estimate at that date. The court cannot be understood as intending to say that the statute was imperative, and demanded that, until repealed or altered, the computation must be made in accordance with the proclamation last made before the date of the entry. The attention of the court was directed to the effect of the statute of 1873 upon the statute of 1843, and no question existed as to the power of the secretary, after the act of 1873 went into effect, to instruct collectors to compute in accordance with the valuation which was in existence at the date of exportation.

The next question relates to the finality of the action of the collector, and whether the board of general appraisers had power to review his action in regard to the date at which the valuation of foreign coin is to be estimated. The counsel for the government insists that his action was not the subject of appeal, and, as authority for this position, relies upon the decision of the supreme court in *U. S. v. Klingenberg*, 153 U. S. 93, 14 Sup. Ct. 790. In that case the importer imported merchandise from Austria-Hungary, in July, 1892. The invoices were made out in paper florins of that country, but no consular certificate giving the value of the paper florin accompanied the invoices; and the collector estimated the florin at \$0.482, which was the value of the gold florin as proclaimed by the treasury department July 1, 1892. The importer protested because the collector should have adopted the silver florin as the standard value, which was, as proclaimed by the treasury department, \$0.32. The portion of the proclamation of July 1, 1892, which related to Austria-Hungary, contained a footnote which stated as follows: "Silver the nominal standard, paper the actual standard, the depreciation of which is measured by the gold standard." The supreme court, following its previous decisions, *supra*, naturally held that the collector's action was correct, because, "in the proclamation and the footnote attached thereto, silver was stated to be only the nominal standard, while paper was the actual standard, the depreciation of

which was to be measured by the gold standard," and, furthermore, that the collector's action, being in accordance with the proclamation of valuation, was conclusive. In the present case the collector's action, if it was erroneous, was illegal, because it was in violation of the statute of 1873, and the question before him depended upon the construction of sundry statutes upon the subject. In the *Klingenberg Case* the collector was simply called upon by the statute to follow the estimate made by the director of the mint, and proclaimed by the secretary of the treasury, and his action was not the subject of reversal. In this case the collector was compelled to construe the statutes, and determine which proclamation he should observe. The *Klingenberg Case* is not an authority in favor of the proposition that an act of the collector in regard to valuation of foreign coins which is or which may be in violation of the statutes cannot be the subject of review or of reversal by the board of general appraisers. On the contrary, the opinion asserts that by section 14 of the customs administration act of June 10, 1890, "if the decision of the collector imposes an excessive amount of duties, under an improper construction of the law, the importer may take an appeal to the board of general appraisers, whose decision on such questions is not made conclusive, as it is in respect to the dutiable value of the merchandise, and, not being conclusive, is subject to review [by the circuit court], under the express provisions of section 15." It follows that the validity of the action of the collector is sustained, and that the judgment of the circuit court in reversing the decision of the board of general appraisers is affirmed.

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DENNISON MANUF'G CO. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. February 20, 1896.)

1. CUSTOMS DUTIES—CLASSIFICATION—COMMERCIAL DESIGNATION.

A commercial designation, established after the passage of a tariff law, does not determine the classification of the article in question.

2. SAME—CREPE TISSUE PAPER.

The article now known as "crepe tissue paper" or "crepe tissue," but which had acquired no such designation in commerce prior to October 1, 1890, being a crimped or crinkled paper, much heavier than ordinary tissue paper, weighing from 24 to 48 pounds to the ream, and made of tougher and stronger stock, is not dutiable as "tissue paper," under paragraph 419 of the act of 1890, but is classifiable under paragraph 422, as "all other paper not specially provided for," and subject to a duty of 25 per cent. ad valorem. 66 Fed. 728, reversed.

This is an appeal from a decision of the circuit court, Southern district of New York, affirming a decision of the board of general appraisers, which sustained the collector of the port of New York, in his assessment of duty upon certain importations as "tissue paper."

Chas. H. McDonald, for appellant.

James J. Van Rensselaer, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The tariff act of October 1, 1890, contains the following provisions.

"Par. 419. Papers known commercially as copying paper, filtering paper, silver paper, and all tissue paper, white or colored, made up in copying books, reams or in any other form, eight cents per pound, and in addition thereto 15% ad valorem; albumenized or sensitive paper, 35% ad valorem."

"Par. 422. Paper hangings or paper for screens or fire boards, writing paper, drawing paper, and all other paper not specially provided for in this act, 25% ad valorem."

"Par. 425. Manufactures of paper, or of which paper is the component material of chief value, not specially provided for in this act, 25% ad valorem."

The collector classified the merchandise in suit under paragraph 419. The importer duly protested, claiming that it should be classified under either paragraph 422 or paragraph 425. The board of general appraisers sustained the collector, but say in their opinion:

"We should be inclined to doubt the propriety of its classification as tissue paper, but for the commercial designation given by the manufacturers, importers, and sellers of the article."

The circuit court affirmed the board, but evidently with considerable doubt.

In this particular case, the question raised cannot be determined, as it so frequently is in other cases, by a reference to "commercial designation." It is assumed that congress uses denominative words in tariff acts with the intention that they shall convey the same meaning that they do in trade and commerce. But this assumption presupposes a commercial meaning established at the time when congress uses the words. It is not to be supposed that it affixes to them any peculiar meaning which becomes established in trade only after the tariff act is passed. Of the article in suit the board says, on May 4, 1893:

"It is a novelty known in the trade here only during the last two or three years."

The evidence fully sustains this finding. There seem to have been a few importations prior to October 1, 1890, and a few sales of the goods thus imported, all subsequent to June 9, 1890, the appellant being the sole importer; but it was not generally known to the trade until after the passage of the act. Down to October 1, 1890, it was referred to, in commercial documents, generally, as "crepe paper," and sometimes as "crepe tissue paper," or "crepe tissue." There is no proof, however, of any such established, definite, uniform, and general designation of the article in this country, prior to October 1, 1890, as should, under the decisions, require its classification as tissue paper, if it be not tissue paper in fact. *Curtis v. Martin*, 3 How. 106; *Twine Co. v. Worthington*, 141 U. S. 468, 12 Sup. Ct. 55; *Rossman v. Hedden*, 145 U. S. 561, 12 Sup. Ct. 925; *Maddock v. Magone*, 152 U. S. 368, 14 Sup. Ct. 588.

Tissue paper is defined, by one of the witnesses, as "a thin paper, of size 20 by 30, weighing, in white, from about 4 or 4½ to 6 or 7 pounds, at most, and, in colors, from 5 to 8 pounds, to the ream." The other evidence is in substantial accord with this statement, although some of the witnesses increase the limit of weight to 10

or 12 pounds. It is of smooth surface, and is used for printing, wrapping, interleaving in binding, and making copying books, and, of course, for manufacture into other articles. The crepe paper, as its name implies, is crimped or crinkled, is very much heavier, weighing from 24 to 48 pounds to the ream, is made of much tougher and stronger stock, and sells for a dollar a pound (tissue paper sells for 65 to 80 cents a ream) is not adapted for use in printing, wrapping, interleaving, or making copying books, and cannot be produced by a tissue-paper machine. Exactly how the paper in suit is made does not appear, the method of manufacture being a trade secret. There is a suggestion in the record that it is made direct from the pulp, without being, at any time during the process, in the condition of smooth-surface tissue paper; but the evidence on this point is not competent. A domestic manufacturer (called by the government), who makes a similar article, not quite so tough so far as samples indicate, testified that he makes his product from a special variety of tissue paper uncalendered. He admits, however, that if he sent out for a ream of tissue paper, and received a ream like the importation, he would "decidedly consider" that his order was not filled. He takes the special tissue paper, colors and dampens it, and then subjects it to the action of a machine of his own, not a tissue-making machine. By this process the paper is increased in value about five times, and the witness adds that he "certainly considers it a manufacture of paper." We are of the same opinion. The article has been advanced beyond the condition of tissue paper into something else, which may fairly be called a manufacture of paper, but which, since it is still paper, and paper only, may more appropriately be classified among the "all other paper" of paragraph 422.

The decision of the circuit court is reversed.

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#### TINGS et al. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. February 20, 1896.)

##### CUSTOMS DUTIES—PENALTY FOR UNDERVALUATION—GLOVES.

When the question whether goods are to pay a specific or an ad valorem duty depends on whether they exceed a certain value (as in the case of gloves, under paragraph 458 of the act of 1890), an appraisement is essential under section 7 of the customs administrative act of June 10, 1890; and, if the appraisement disclose that the goods have been undervalued more than 10 per cent., they are subject to the penalty of an increased duty, although the excess of over 10 per cent. on the invoice value is not sufficient to require an ad valorem instead of a specific duty.

This is an appeal from a decision of the circuit court, Southern district of New York, reversing a decision of the board of general appraisers, which reversed a decision of the collector of the port of New York exacting a penal duty for undervaluation of certain kid gloves imported under the tariff act of 1890.

Stephen G. Clark, for appellants.

Henry C. Platt, for the United States.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The rates of duty on gloves of the kind imported are prescribed in paragraph 458 of the act of October 1, 1890. It provides that:

"Gloves of all descriptions, composed wholly or in part of kid or other leather, \* \* \* shall pay duty at the rates fixed in connection with the following specified kinds thereof, fourteen inches in extreme length, \* \* \* being fixed as the standard, and one dozen pairs as the basis, namely: Ladies' and children's Schmaschen of said length or under, one dollar and seventy-five cents per dozen; ladies' and children's lamb of said length or under, two dollars and twenty-five cents per dozen; \* \* \* ladies' and children's suedes of said length or under, 50% ad valorem; all other ladies' and children's leather gloves and all men's leather gloves of said length or under, 50% ad valorem; all leather gloves over fourteen inches in length, 50% ad valorem. [Here follow other provisions for additional specific duties on other named varieties.] Provided, that all gloves represented to be of a kind or grade below their actual kind or grade shall pay an additional duty of five dollars per dozen pairs: provided further, that none of the articles named in this paragraph shall pay a less rate of duty than 50% ad valorem."

The importations in question are "ladies' and children's Schmaschen gloves, under fourteen inches in length." As such, they were dutiable at \$1.75 per dozen, unless their value exceeded \$3.50 per dozen, in which case they would be dutiable at 50 per cent. ad valorem. The appraiser advanced their value in excess of 10 per cent. of the value declared in the entry, and the propriety of this advance is not questioned. The appraised value, however, is not in excess of \$3.50 per dozen. The collector held the merchandise liable to the additional or penal duty prescribed by section 7 of the customs administrative act of June, 1890. The importer contends, and the board of general appraisers sustained his contention, that no penal duty should be exacted, because gloves of this kind and grade pay a specific duty, and because the advance, although in excess of 10 per cent., was not sufficient to require them to pay the ad valorem duty exacted by the last proviso of the paragraph above quoted.

Section 7 of the act of June 10, 1890, provides that the importer—"Of any imported merchandise which has been actually purchased may. \* \* \* when he shall make and verify his written entry of such merchandise, \* \* \* make such addition in the entry to the cost or value given in the invoice \* \* \* as in his opinion may raise the same to the actual market value of such merchandise; \* \* \* and the collector \* \* \* shall cause the actual market value \* \* \* to be appraised; and if the appraised value of any article of imported merchandise shall exceed by more than 10% the value declared in the entry, there shall be levied, collected and paid, in addition to the duties imposed by law on such merchandise, a further sum equal to two per cent. of the total appraised value for each one per cent. that such appraised value exceeds the value declared in the invoice." etc.

Section 19 of the same act provides for appraisement of value "whenever imported merchandise is subject to an ad valorem rate of duty, or to a duty based upon or regulated in any manner by the value thereof."



Where duties are purely specific, no appraisement is required, and none is made; but under the provisions of a paragraph such as 458, above quoted, where the value of the goods determines the question whether they are to pay specific or ad valorem duty, appraisement is essential; and it is to be expected that the statute should require the importer himself to state the value of his goods fairly and truthfully, and to enforce that requirement by appropriate penalties. We see no reason, therefore, for restricting the broad language of the statute, and concur with the judge who heard the case in the circuit court that "the statutes require that all imports be entered at fair value; and this provision for increasing duties for undervaluations of more than 10 per cent. makes no distinction between specific and ad valorem duties, or between undervaluations that may affect the amount of regular duties and those that will not."

The decision of the circuit court is affirmed.

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ENTERPRISE MANUF'G CO. OF PENNSYLVANIA v. SNOW et al.

(Circuit Court, D. Connecticut. February 15, 1896.)

No. 822.

1. PATENTS—INFRINGEMENT—COMBINATIONS.

There is no infringement where the defendant's machine accomplishes the results of the patented invention by the substitution of a device which the invention dispensed with. *Westinghouse v. Air-Brake Co.*, 59 Fed. 581, and *Westinghouse Air-Brake Co. v. New York Air-Brake Co.*, 11 C. C. A. 528, 63 Fed. 962, followed.

2. SAME—MEAT CUTTERS.

The Baker patent, No. 271,398, for an improvement in meat cutters, construed, and held not to be a primary invention entitled to a broad range of equivalents, and held not infringed.

This was a bill by the Enterprise Manufacturing Company of Pennsylvania against Levi T. Snow and others, for alleged infringement of a patent for a meat cutter.

Howson & Howson (C. E. Mitchell, of counsel), for complainant.  
Albert H. Walker, for defendants.

TOWNSEND, District Judge. The complainant herein asks for an injunction and accounting by reason of the alleged infringement of patent No. 271,398, granted January 30, 1880, to John G. Baker, and alleged to have been assigned to complainant herein.

The patented improvement belongs to that class of machines in which revolving disk or screw devices and cutters are combined for subdividing masses of meat into small fragments of comparatively uniform size. The patent in suit has been fully considered, and its validity sustained by Judge Shipman in *Enterprise Co. v. Sargent*, 28 Fed. 185, 34 Fed. 134, and by Judge Butler in the suit of *Wanamaker v. Manufacturing Co.*, 3 C. C. A. 672, 53 Fed. 791. These adjudications establish the fact of invention, in view

of the art then before the court, and define and classify its character and scope. They show that said Baker was the first inventor of a meat cutter, from which all preliminary cutting devices were eliminated, and in which the sole reliance for cutting was upon a knife device operating upon perforations in a discharge plate against which the said mass of meat was forced, without prior intentional disintegration of the said mass.

Baker's cutter comprises the combination of a cylindrically shaped, longitudinally grooved casing to receive and retain the crude mass, increasing in diameter towards its outer end, and a piston, or, preferably, a screw the thread of which revolves within said casing, and a system or series of knives attached to the base of said screw, and rotating upon a stationary perforated plate. The revolution of said screw, in connection with said grooves, forces the mass continuously against the perforated plate, and causes said rotating knives to sever the portions of said mass which project into said perforations, and to thus cut the whole, or nearly the whole, of said mass into pieces of practically uniform size. Patent No. 43,520, granted to Purchas Miles, July 12, 1864, represents the prior art as shown at said former hearings, so far as it is material herein. Patent No. 32,852, granted July 23, 1861, to Calvin Adams, is the only additional evidence on said point introduced at this hearing. The Adams machine comprises a cylindrical casing, with spirally inclined cams, and forcing or cutting ribs, and a revolving screw disk, also provided with forcing cams and cutting cams, and which is perforated near its outer circumference. The revolution of the disk causes the cams to carry the meat along between the cutting ribs, which, working together like shears, cut the meat, and deliver it against, and out through, the perforations. In the Miles machine the preliminary cutting before the mass reached the perforated plate was accomplished by stationary and rotating knives, which sheared the meat as it passed along. Otherwise, its construction was similar to that covered by the patent in suit. Defendants' machine has a cylindrically shaped casing like those of Miles and Baker, but the ribs therein are spiral, with cutting edges, like the Adams construction. The screw is in part like Miles' or Baker's, but it terminates in a circular base having perforations in a collar extending therefrom, similar to Adams', which, in connection with the cutting edges of the ribs, at the lower or outer end of the casing, perform substantially the same functions as the revolving knife blades and perforated stationary base of Baker.

Counsel for complainant argues that defendants have failed to support the defense of noninfringement by expert testimony as to the construction or operation of the various exhibits. But the practice, followed upon the hearing, of exhibiting the construction of the different machines, and comparing their operation by practical tests with masses of meat, was sufficient, and quite as satisfactory for understanding such simple devices as are presented herein. From the whole evidence, taken together, the following

facts appear: The practical operation by complainant of two Adams machines, one with and one without perforators, showed two things: First, that there was very slight independent, continuous, progressive motion therein, but that the strips had to be forced into the cutter by hand; second, that the masses of meat were already ground or severed into small pieces by the narrow contacting cutters before reaching the perforations, and that the office of the perforations was to further subdivide such unground portions, or to cut such portions as might not have been sufficiently severed by the grinding cutters. The practical operation of complainant's and defendants' machines showed that, in each, the screw independently forced the meat forward towards the perforations under great pressure, and that, in defendants' machine, there was a preliminary longitudinal cutting, amounting to a severance of the mass, before the meat reached the perforations, which, if repeated, was sufficient to reduce the strips to hash, while in complainant's machine the masses of meat were indented by the forcing ribs, but were not, ordinarily, preliminarily severed. There is considerable conflict upon this latter point, but the testimony of complainant's expert, and the further experiments with machines from which the perforations were removed, confirm this view. This incidental preliminary indentation, caused by the forcing apparatus of complainant's machine, is only material in so far as it serves to show similarity of construction or operation. As was pointed out by Judge Shipman, a certain amount of abrasion and consequent incidental disintegration of the meat is necessarily caused in the forcing process.

Complainant's patent comprises four elements,—a casing, a forcing screw, a stationary perforated plate, and a revolving spindle provided with knives. It is limited to a construction which relies solely upon the perforations and the knives to effect the cutting, and covers, as means for imparting direct pressure to the mass, a piston or forcing screw. The defendants' device comprises but two elements,—a casing, and a forcing screw disk. The screw forces, and, sliding upon the casing ribs, cuts. The perforations therein, rotating on said ribs, complete the cutting. There is neither a stationary plate nor a revolving knife. If Baker were a primary inventor, as is claimed by complainant, a closer question of infringement would be presented. But his patent admits the presence in the prior art of the perforated plate and knife of the Miles patent, which employed also the forcing screw. What Baker did, as shown by the prior decisions, was to eliminate the intermediate cutter, and permit the mass to be directly forced between the knives revolving across the perforated plate. "The Baker machine is not so palpable an improvement over the Miles patent of 1861 as it is over the Miles patent of 1864; but it is an improvement of the same kind, which introduced a new operating principle into the machine, and evinced invention. \* \* \* The main object of the patentee was to construct a machine which should get rid of the supposed necessity of preliminary cutting or chopping knives, and rely for its cutting character entirely upon the plate and knife at

the end of the casing. \* \* \* The cutter is an actual, and a commercial, success. It is far simpler than the Miles cutter, being composed of a much less number of parts, and is more easily taken care of and cleaned. That it is a patentable invention, as an improvement upon the Miles or Coffman machines, seems obvious. To discard the stationary and revolving knives of Miles, and to rely upon the screw, either with or without the corrugating shoulders, to force the material along and upon the knife inside the perforated plate, to cut it, and thus to make a cheaper, simpler, and more easily cared for machine, was the work of an inventor. \* \* \* To make an effective meat-cutting machine, this combination had not been found by prior inventors, although they had been close to it. \* \* \* In this case, the machine is a simple one; but it is manifest that the inventor accomplished a new and beneficial result by means which other people had been near to, and apparently wanted to find, but failed to see. The skill of his predecessors did not produce the idea which was to make an efficient improvement. Baker produced it, and is entitled to be styled an inventor." Judge Shipman in *Enterprise Co. v. Sargent*, supra. The prior art showed in Adams' a revolving screw disk provided with cutting ribs, in which respect it was like defendants' device. It lacked, however, the forcing screw, which was an essential feature of the Miles patent.

Complainant's expert, admitting that defendants' machine has a casing, perforations, and knives, similar to those of Adams', differentiates Adams' therefrom by the absence of an efficient forcing device. Defendants have merely added the forcing screw of Miles to the screw disk of Adams, and so adapted it to the old Adams cutting ribs as to secure the preliminary cutting with which Baker's construction dispensed. Baker says:

"In my invention, reliance for cutting up the substance is placed entirely on the plate and the knife and a device for imparting direct pressure to a crude, uncut substance against the plate, without any action on the substance during its passage to the plate, excepting that for effecting the desired pressure."

I think this improvement falls within the principle applied in *Westinghouse v. Air-Brake Co.*, 59 Fed. 581, and affirmed in *Westinghouse Air-Brake Co. v. New York Air-Brake Co.*, 11 C. C. A. 528, 63 Fed. 962. There the alleged infringing device accomplished the result of the patented invention by the substitution of a device which the patented invention dispensed with, and on that ground it was held that there was no infringement. Here, the patented improvement, as found by Judge Shipman, consisted in discarding the preliminary cutting. The defendants' machine retains and uses a preliminary cutting device found in the prior art. The construction and operation of defendants' perforations and knives are unlike Baker's and are like Adams'. In defendants' device reliance is not entirely placed on a plate and knife, and a crude, uncut substance is not pressed against the plate. Baker improved upon Miles'. Defendants improved upon Adams'. The Adams screw and ribs are not so longitudinally curved as those of Miles. Those of Miles are not so longitudinally curved as those of complainant's and defendants' machines. But even Adams

secures some pressure from such curves in a portion of the screw and ribs, and the difference between the first construction and the last is a mere difference of degree, which produces an analogous and unpatentable result. Defendants' machine is not the machine illustrated, described, and claimed in the Baker patent. And while Baker does not limit himself to such structure, in the view herein taken of said patent he is not entitled to claim such a broad class of equivalents as would embrace the defendants' machine. The state of the prior art precludes him from claiming said construction, every feature of which is found in prior cutters, especially when it neither appropriates the form nor accomplishes the essential function of his device.

Counsel for complainant strenuously claims that the Baker patent is a pioneer patent. But the foregoing citations from the opinions of Judge Shipman show that the mechanical functions performed by the patent in suit were not, "as a whole, entirely new," but that Baker was "a mere improver upon a prior machine, which was capable of accomplishing the same general result." *Machine Co. v. Lancaster*, 129 U. S. 263, 275, 9 Sup. Ct. 299. Even the uniform cutting was obtained by Adams, as stated in his patent:

"And it will be seen that, as the openings have cutting edges, and pass the stationary cutters, the meat must be uniformly cut, and free from strings or long pieces."

I do not find, in the prior decisions of the courts, anything which indicates that Baker was a pioneer inventor. He made a simpler, cheaper, and better machine by the omission of certain preliminary cutters. The new evidence as to Adams serves a double purpose. It still further narrows the Baker invention, and supports the claim of noninfringement by these defendants, who, by practically adopting the Adams construction, and adding the forcing screw of Miles, have made a still simpler device consisting of two parts only. The defendants' machine, by reason of its selection and combination of elements shown in the prior art of meat choppers, by its close resemblance to such constructions, and by its radical departure in construction and operation from the vital and essential elements of the patented improvement, is so differentiated therefrom that it does not infringe.

These conclusions render it unnecessary to consider complainant's failure to prove its title to the patent in suit. Let the bill be dismissed.

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#### PLATT v. BRYANT ELECTRIC CO.

(Circuit Court, D. Connecticut. February 14, 1896.)

No. 713.

#### PATENTS—INVENTION—PRIORITY—ELECTRIC SWITCHES.

The Platt & Orford patent, No. 427,521, for an electric switch for opening and closing electric circuits, and which relates to devices for insuring contact with the terminals thereof, and covers a combination whereby the contact bar is cam-actuated in one direction and spring-actuated in the other, *held invalid*, because apparently wanting invention in view of the prior state of the art, and because of priority of invention by one Bryant.

This was a bill by O. S. Platt against the Bryant Electric Company for alleged infringement of a patent relating to electric switches for opening and closing electric circuits.

Chamberlain & Newman, for complainant.  
A. M. Wooster, for defendant.

TOWNSEND, District Judge. The bill herein charges infringement of the fourth claim of patent No. 427,521, granted to O. S. Platt and J. M. Orford, May 6, 1890, for an electric switch for opening and closing electric circuits. Complainant owns the patent, and defendant has infringed said claim. The alleged invention relates to devices for insuring contact with the terminals of such switches, and covers a combination whereby the contact bar is cam-actuated in one direction and spring-actuated in the other. The defenses are invalidity, because the patentees were not the first inventors of the patented device, because it was in public use and on sale for more than two years prior to their application, and because of the prior state of the art. The defendant makes its switches under patent No. 391,943, granted to Waldo C. Bryant, October 30, 1888. Of the elements enumerated in complainant's fourth claim, the contact bar, the washers, and the ferrules are substantially identical with those shown in defendant's prior patent. The terminals also were old. The only novel element in complainant's combination is the broadly U-shaped plates. They preferably comprise an inner plate of German silver, designed to furnish the required resiliency, and an outer plate of pure copper, on account of its high conductivity. Complainant admits that it is not limited by said claim to the use of either German silver or brass. Patent No. 398,560, granted February 26, 1889, to Weller and Rietzel, which was cited as a reference to the original claim for such plates, shows a combination of a plate of soft copper and a spring of phosphor bronze attached to the base of the switch, and designed to secure the advantages of conductivity and resilience. The use of materials differing in conductivity and resilience in other electrical devices was well known in the prior art. The patents to Warren S. Hill, No. 398,510, granted February 26, 1889, and No. 406,906, granted July 16, 1889, the applications for each of them being prior to the alleged invention of the patent in suit, show terminals of substantially the same construction as that of the patent in suit, and contact bars provided with inner plates of brass and outer plates of copper. These switches were made, sold, and publicly used as early as 1887. The contact bars moved in the arc of a circle. The contact bars of the patent in suit move vertically. The plates were bent around rectangular-shaped blocks of insulating material into the shape of a U, or a V with the point squared. The plates of the patent in suit were curved into this U-shape, not bent. In these respects alone is there any material difference between said devices. From these differences there result, in complainant's device, greater resilience, and such a flexible sliding contact with the rigid terminals as insures a simultaneous contact, not at a point, but along a horizontal line, and uniformly and evenly increasing in width until such contact is effected with the whole outer

surface of the plates, whereby sparking is avoided. Did these useful improvements, in view of the advantages thereby secured, involve invention? If, in these respects, the structure of complainant were different from those of the prior art, a more difficult question would be presented. But some months prior to the alleged invention, Bryant, the patentee of defendant's patent, constructed a switch having flexible copper contacts attached to a base and vertically operating bars. As this element of vertical movement is the prime factor in securing the advantages to be derived from complainant's construction of curved plates, the other element of the broadly U-shaped plates is relatively subordinate, and comparatively unimportant. If there be a substantial difference between the prior art, as shown in the rounded plungers and bent plates of Weller and Rietzel, or the bent plates of Hill, and complainant's curved plates, and if curved plates possessed greater resiliency or caused a firmer contact, the skilled workman would adopt such a modification without the exercise of the faculty of invention, and without thereby securing any novel or nonanalogous results.

I have not referred to the claim that the metal ferrules upon the insulating material on the contact bar perform the novel and important function of taking up a portion of the electricity, and thereby cutting down the resistance of the circuit. The patent not only makes no reference to such function, but merely describes them as "preferably of conducting material surrounding the caps." The statement by complainant's expert of the method in which the alleged function is performed shows that, if true, the result, at most, is trifling and immaterial. Furthermore, if complainant's ferrule does theoretically or practically perform such function, it does not appear that the same function would not also be performed by the similar construction shown in defendant's patent. These conclusions, derived from a comparison of the claims of the patent with the state of the prior art, would dispose of the case were it not for the uncontradicted evidence of the commercial success of complainant's switch. It has therefore seemed necessary to examine the second defense, which, assuming that said device required invention, is based upon the claim that Bryant, defendant's assignor, was the first inventor thereof. The complainant claims that Platt and Orford studied over the subject together, and that on August 24 or 25, 1888, Platt first completed a switch embodying the invention covered by the claim in suit. The application for the patent in suit was made October 8, 1889. In December, 1888, Bryant completed a model embodying the construction herein claimed, and showed it to said Orford. January 14, 1889, the New England Electric Supply Company, through said Orford, gave Bryant a contract to supply it with 500 of said switches. But the existence of the alleged completed switch of August, 1888, was not otherwise proved than by the oral testimony of Platt and two pocket memoranda. Platt does not know what became of it, but his "impression is that we used parts of it to make other experiments later." He took no steps towards the development of said invention till July, 1889, when he made a model alleged to be exactly like that of 1888, as he says, "in

order to show Mr. Orford that I could make a practical switch, as well as for my own satisfaction." On the other hand, in the contract of January 15, 1889, with Orford and a Mr. English, Bryant says: "I hereby agree that the exclusive and entire sale of my switch" shall rest in the hands of said company. Orford was not called either to support Platt's claim of their prior conception and reduction to practice, or to explain said contract, or to corroborate the claim that Bryant worked under his instructions. This latter claim is unsupported by any sufficiently definite evidence. Complainant, therefore, has failed to prove either a prior completed conception or reduction to practice, or Orford's connection with the Bryant model. Walk. Pat. (3d Ed.) § 76, and cases cited. Let the bill be dismissed.

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JACKSON et al. v. BIRMINGHAM BRASS CO. et al.

(Circuit Court, D. Connecticut. February 21, 1896.)

No. 770.

1. PATENTS—INFRINGEMENT.

A patent covering a process for converting smooth, seamless, sheet-metal tubing into spheroidal bodies, by swaging and upsetting them by endwise compression between dies having the form of the body to be made, is not infringed by a process of forming spheres from corrugated tubes by compressing them endwise in dies of the proper shape, where the changes of shape are made solely by the folding or unfolding of the corrugations, without any upsetting of the metal.

2. SAME—ESTOPPEL—EXPUNGED DISCLAIMER.

A patentee is not estopped by an original disclaimer which is afterwards stricken out, but the same may nevertheless be considered for the purpose of ascertaining the inventor's conception of the true nature of his invention, and what was new and what was old.

3. SAME—PROCESS OF FORMING HOLLOW SPHEROIDAL BODIES.

The Jackson & Burkhardt patent, No. 378,412, for a method of forming hollow spheroidal bodies from sheet-metal tubes, construed, and held not infringed, as to claim 1.

This was a suit in equity by William H. Jackson and others against the Birmingham Brass Company and others for alleged infringement of a patent.

Witter & Kenyon, for complainants.

George A. Fay, C. E. Mitchell, and H. B. Brownell, for defendants.

TOWNSEND, District Judge. The complainants herein, by the usual bill, ask for an injunction and accounting because of the alleged infringement by defendants of the first claim of complainants' patent, No. 378,412, granted to them and John Burkhardt, February 21, 1888, for a "method of forming hollow spheroidal bodies from sheet-metal tubes." The claim in suit is as follows:

"The process herein described of forming hollow spheroidal bodies from thin sheet-metal, oblate at their extremities, which consists in first forming the metal into a tube, then placing a short section of said tube between two dies having the form of the body to be made, and compressing the tube in the said dies."



The patent itself, interpreted by the aid of the file wrapper, so effectually supports the defense of noninfringement, that it has been found unnecessary to consider the other defenses, of direct anticipation and nonpatentability, in view of the prior art, and by reason of the nature of the patented process. The defendants admit that they have manufactured hollow ornamental balls by the following process:

"A thin sheet metal was first in the form of a tube. This tube was corrugated by passing it through suitable dies. It was next cut into short sections. The length of each section of tubing was determined with reference to the size and shape of the ball to be manufactured, and to the process employed by the defendant for making such balls. The section of tubing was then compressed between two dies having the form of the body to be made. One die was supported in the bed of the press. The other was attached to a plunger. A short section of tubing was placed in the die, in the press bed, whereupon the upper die was brought down on the upper end of the tubing, and the tubing compressed at both ends at the same time in such a way as to flatten the corrugations at each end, causing the tubing to assume the shape of a ball, all being done at a single operation of the press. The tubing was substantially the same in diameter, before compression, as the mouth of the lower die. The dies operated to compress the ends of the tubing in the manner stated, causing it to conform to the shaping walls of the dies. Some of the dies were provided with a pin or stop at the base of the concavity, to prevent the metal from closing in further the apertures at the extremities resulting therefrom. The balls were completed and brought into their finished form, as shown in the exhibits, by this single operation of the press acting upon the corrugated tubes. \* \* \* No lining of any kind was used with the tube to support it during compression. Balls were sometimes made with raised central portions or girdles. \* \* \* The girdle is produced by cutting a section of pipe too long for the dies, so that before the two halves of the dies meet the metal is forced outward, the dies being stopped at the proper time to produce the configuration shown."

By means of this process the corrugations in the tubing were so crimped or folded together at the ends as to cause the tubing to conform to the shape of said dies. There was no shortening or thickening or thinning of the metal itself. The material remained of the same thickness. The changes in size and shape of the article were due solely to the expansion and contraction of the folds of the corrugations.

The specifications of the patent in suit describe a process for converting seamless metal tubing into spheroidal bodies by first forming thin sheet metal into a tube, and then subjecting it to endwise compression with dies having the form of the body to be made. The patentee states that this process is based upon his discovery—

"That comparatively thin tubes of large diameter can be swaged and upset into spheroidal form by dies, and that the metal can thereby be upset, without crimping, to receive the desired forms."

All the drawings which concern the claim in suit show either tubing or spheroids with plain surfaces.

In his original application for a process patent, the applicant said:

"I am aware \* \* \* that the folding together of the ends of sections of corrugated tubing for ornamental purposes is not new. But my invention relates to the conversion of seamless plain sections of tubing into ornamental hollow bodies, ready for use," etc.

This paragraph was afterwards stricken out, and in its place the following paragraph was inserted:

"Having described my improved process of forming hollow spheroidal bodies, I would state that I am aware that very small articles, like beads, have heretofore been shaped by compressing the ends only of tubular sections into a rounded form, without shaping the periphery thereof, the tube being comparatively thick in relation to size of the article to be formed, so that sufficient body is provided in the tube to prevent crimping or doubling; and I am aware that larger hollow articles have been swaged into more or less rounded form, from comparatively thin tubular metal, by first casting a thick temporary lining of soft metal into the tube, to give body thereto, and then shaping in one or more sets of rounded dies. But my invention differs from the former in making bodies of any desired size without using tubing of a thickness increased as the diameter is enlarged, and also in not only swaging and upsetting the ends of the tube into a smaller diameter, but also enlarging the diameter of the middle part thereof; and it differs from the latter most essentially in not employing lining of soft metal, or any other material; and it differs from both in that, whereas in those cases there is only a changing of the shape of the tube, there is no upsetting of the metal, making it thinner in some parts and in others thicker, my process does thus greatly change the thickness of the metal in different places; and, so far as I am aware, I am the first to discover that comparatively thin tubes of large diameter can be swaged and upset into spheroidal form by dies, and that the metal can thereby be upset, without crimping, to receive the desired forms."

It seems manifest, from these various statements of the patentee, that he thereby limited himself to a swaging or upsetting process which does not embrace the process used by defendants. Of course, he is not estopped by the original disclaimer, which was afterwards stricken out. But, as is forcibly urged by counsel for defendants, said language "is a distinct statement upon the record of the facts as he knew them to exist, and, although the statement never became a part of the patent, it nevertheless discloses the inventor's conception of the true nature of his invention, and what was new and what was old." In the patent itself the patentee says, "My process does thus greatly change the thickness of the metal in different places," by swaging and upsetting the metal, and differs from the prior art, where "there is only a changing of the shape of the tube, there is no upsetting of the metal, making it thinner in some parts in others thicker." And he claims to be the first discoverer of this capacity of such metal tubes to be thus "upset without crimping," and shows in his drawings only plain tubes as the ones possessing such capacity. Inasmuch as defendants' process is applied only to corrugated tubes, and changes the shape of such tubes solely by folding or unfolding the corrugations therein, and does not upset the metal, or make it thicker in some parts and thinner in others, in which respects it differs from the alleged discovery of the patentee, as described by him and differentiated from the prior art, there is no infringement. Let the bill be dismissed.

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PUTNAM v. BROOKER et al.

(Circuit Court, S. D. New York. August 31, 1895.)

**PATENTS—INFRINGEMENT—BOTTLE STOPPERS.**

The Morhous patent, No. 377,043, for an improvement in wire ball bottle-stopping devices, if patentable at all, must be strictly confined to the device described in the specifications and shown in the drawings, and

is not entitled to the broad doctrine of equivalents. *Held*, therefore, that it was not infringed.

This was a bill in equity by Henry W. Putnam against Smith A. Brooker and others for alleged infringement of a patent.

Arthur v. Briesen, for complainant.

Stephen H. Olin, for defendants.

TOWNSEND, District Judge. This is a final hearing on the ordinary bill praying for an injunction and accounting by reason of the alleged infringement of patent No. 377,043, granted, January 3, 1888, to Frederick P. Morhous, and assigned to complainant. An application for a preliminary injunction was denied.

This patent is for an improvement in the class of bottle-stopper devices which are attached by means of wire bails to the necks of bottles, and so arranged with a hinged stopper that the mouth of the bottle may be quickly and securely closed and easily opened. The prior art was so crowded with minor improvements upon the original device that there was scarcely standing room for invention when this patentee entered the field. A consideration of what he found therein and of what he did, and of defendants' construction, shows that he is in this dilemma: either his patent is void, or defendants do not infringe. In several of the earlier devices the stoppers both slid longitudinally upon, and rotated freely about, the bail. In patent No. 275,101, granted, April 3, 1883, to Abram V. Whiteman, while the cover rotated freely, longitudinal movement was prevented by so confining the horizontal part of the bail within the flat surface of the cover that the edges of the cover pressed against the vertical sides of the bail. Objection having been taken to the introduction of evidence as to this patent, on the ground that it was not set up in the answer, the consideration thereof has been confined to its bearing upon the state of the prior art. The patentee of the patent in suit accomplished the same result by so bending the upper part of the bail that it fitted and revolved in a hollow space, formed by a recess in the center of the stopper or cover and an elevated cap piece secured to the stopper. But, on the same day on which he took out said patent, he also took out patent No. 377,042 for a bottle stopper having the same bent bail confined in a recess in the center of the stopper, the only material difference being that, in this earlier patent, the metal portion of the stopper was first rigidly cast upon the bent bail, and the bail was then turned, as the patentee says, so as to permit slight oscillatory motion, but not complete revolution. It does not appear that it might not be further turned, so as to permit complete revolution, as in the device of the patent in suit, or that it would not naturally wear into infringement thereof in practical use.

The defendants' device operates upon the same principle as that of complainant. It has a bail similarly bent, and preventing longitudinal movement by the contact of the upwardly extending sides of the bend in the bail with a cap piece secured to the stopper.

But it has neither the recess in the stopper nor the cavity in the cap specifically illustrated, described, and claimed in the patent in suit. The means for preventing longitudinal movement is as much like that shown in said Whiteman patent as that of the patent in suit. It is practically the same as that used from time immemorial to confine the handle of the ordinary tin pail. The only feature of novelty in the patent in suit is the specific means for securing an old result, and which the patentee claimed as follows:

"1. In a bottle stopper, the combination of the bail, B, having bend or enlargement, e, stopper, E, having recess, g, for the reception of the bend or enlargement, e, and a cap, F, for holding the stopper on the bail, and permitting its rotation thereon, substantially as described.

"2. In a bottle stopper, the combination of the bail, B, having bend or enlargement, e, stopper, E, having recess, g, and cap, F, having cavity, h, over the recess, g, said cap being secured on the stopper, substantially as described."

It is at least extremely doubtful whether there is any patentable novelty in the patent in suit. But in any event, in view of said Whiteman patent and the prior Morhous patent, and the general art as shown in the pail-handle construction, this patent is of such a character that the broad doctrine of mechanical equivalents cannot be invoked in its behalf. The very elements relied on to show patentable novelty are the ones omitted from the device used by the defendants. The patentee must be strictly confined to the self-imposed limitations of the device described in his specifications, shown in his drawings, and covered by his claims. "If, however, the patent could be sustained at all, it would have to be restricted and confined to the specific combination described in the second claim, as indicated by the letters of reference in the drawings, and each element specifically pointed out is an essential part thereof. \* \* \* If any validity could be conceded to the patent, the limitation and restriction which would have to be placed upon it by the action of the patent office, and in view of the prior art, would narrow the claim, or confine it to the specific structure therein described, and, as thus narrowed, there could be no infringement on the part of appellants if a single element of the patentee's combination is left out of the appellants' device." *Knapp v. Morss*, 150 U. S. 221, 228, 14 Sup. Ct. 81.

It is unnecessary to consider the other questions raised. The admissions of this defendant, who is not the manufacturer, but is only a user of the stopper complained of, should not be permitted to affect the rights of the public upon the question of patentable novelty. Let the bill be dismissed.

## EDISON ELECTRIC LIGHT CO. v. ELECTRIC ENGINEERING &amp; SUPPLY CO.

(Circuit Court, N. D. New York. February 27, 1896.)

No. 6,071.

## PATENTS—LIMITATION OF CLAIMS—ELECTRIC LAMPS.

The Bergmann patent, No. 311,100, for an electric lamp socket, in which is used a disk of noncombustible insulating material (preferably of lava), and a circuit controller key of a special form, must be confined to the precise structures described and shown, and is not entitled to the benefit of the doctrine of equivalents. *Held*, therefore, that it is not infringed by a socket made according to the Hinds patent of 1891, in which the insulating disk is of porcelain, and the circuit controller key is of different structure and operation from that of Bergmann.

This was a bill in equity by the Edison Electric Light Company against the Electric Engineering & Supply Company for alleged infringement of a patent relating to sockets for incandescent electric lamps. On final hearing.

The patent, No. 311,100, on which this action is founded, was granted to Sigmund Bergmann, January 20, 1885, for improvements in sockets for incandescent electric lamps. The improvements relate to sockets designed to receive lamps whose terminals are a screw-threaded ring and a plate on the base of the lamp. The object was to provide a compact socket, having few parts, a small amount of insulating material and a simple circuit-controller. The specification says, among other things,

"A is a disk of insulating material. I prefer to use a non-combustible and non-carbonizable material, such as lava. This is desirable in a socket of this character, because the contacts and terminals are placed close together in a small space, so that there may sometimes be danger of a short circuit between them, and also circuit is continually being made and broken by the socket key, in some cases causing considerable spark. \* \* \* The socket, constructed as described, is of a neat appearance, is very compact, has no useless mass of insulating material, being merely a metal skeleton with just enough insulation to separate the terminals, all the circuit connections being carried by the single insulating disk instead of being divided among two or more insulating portions, as heretofore. The circuit controller making and breaking circuit upon the lamp tip employs fewer parts and is simpler in construction than any heretofore used, while it is very efficient in operation, and the whole may be put together or taken apart with great readiness, the parts being easily separable."

As stated by the patentee the socket is compact and simple. It is of the usual type and differs from those which preceded it in matters of detail only. No minute or extended description is necessary. The socket will be readily understood by reading the above excerpts in connection with the claim. The claims involved are as follows:

"1. In a socket for an electric lamp, the combination of two circuit terminals, one a sleeve adapted to make contact with the band or ring terminal, the other a spring movable into and out of contact with the bottom terminal of the lamp, substantially as set forth."

"3. In a socket for an electric lamp, the combination, with a disk of insulating material, of a contact sleeve for making contact with the band or ring terminal of the lamp, a contact piece for making contact with the bottom terminal of the lamp, and two terminals for the circuit wires leading to the socket, all said socket contacts and terminals being carried by the said insulating disk, substantially as set forth."

"4. In a socket for an electric lamp having two terminals for making connection with corresponding lamp terminals, the combination of a metal supporting portion and a disk of insulating material carried thereby and car-

rying all the terminals and contacts of the socket, substantially as set forth."

"9. The combination, with a contact spring, substantially of the form described, of a separate turning key bearing against said spring, whereby it may be forced upward to make contact, substantially as set forth."

"13. In a socket for electric lamps, the insulating body which supports the terminals or connections, formed of non-combustible material, substantially as set forth."

Claims 1 and 9 relate to the circuit controller; the others to the insulating disk. The defense is that these claims, if valid, must be limited to the precise construction shown and, as so limited, the defendant does not infringe.

Charles E. Mitchell and Richard N. Dyer, for complainant.

Alfred Wilkinson, for defendant.

COXE, District Judge (after stating the facts). It is unnecessary to discuss at length the many questions presented by the elaborate record and briefs for the reason that when subjected to analysis it must be found that Bergmann's claim to invention rests upon two narrow foundations; first, the character of the insulation, and, second, the form of the circuit controller or key. Unless invention can be found in these two features it can be found nowhere.

The use of incombustible insulating material in this art was very old. Soapstone, glass and plaster of paris had been used and porcelain had been suggested by Gordon in 1880. The patentee says: "I prefer to use a non-combustible and non-carbonizable material, such as lava." The character of the insulation is left optional, the patentee merely expressing a preference for material having the characteristics of lava. He does not claim lava or any other material specifically. Assuming that he discovered lava as applied to this art and that its substitution for the materials previously used constituted invention, and, assuming further, that the claims can be limited to lava, it is not easy to see upon what principle he acquired a monopoly of porcelain which is the material used by the defendant. Especially is this true when it is remembered that Bergmann did not use porcelain until two years after the date of his patent, although, as above stated, its use was suggested by Gordon five years prior to that date.

An examination of this record must convince the impartial reader that the use of non-combustible insulating material in this and analogous situations was not new with Bergmann and that its advantages were recognized by a number of electricians long prior to the date of his patent. If the disk claims are construed broadly as covering all kinds of non-combustible insulating materials they are clearly void because non-combustible material had been used in similar combinations, and if these claims are limited to lava the defendant does not infringe for the reason that it uses porcelain and not lava.

If the court were dealing with a foundation patent it is not unlikely that porcelain would be regarded as an equivalent for lava in the same way that soapstone and glass, broadly speaking, might be so regarded. But, as will be seen hereafter, Bergmann is not entitled to the benefit of the doctrine of equivalents. He was the first to use lava. It would seem from the record that no one cares

to dispute his right to its exclusive use. Lava is not the commercially successful insulating material of to-day; porcelain is. To give Bergmann a monopoly of porcelain and all similar substances because he was the first to adopt a material which no electrician wishes to use at the present time, would not only do injustice to the defendant, but to all others who have made or are endeavoring to make improvements in this art.

Circuit breakers in the sockets of incandescent lamps were old at the date of the patent in suit. One of these was before the court in *Schuyler Electric Co. v. This Defendant*, 62 Fed. 588; *Id.*, 13 C. C. A. 491, 66 Fed. 313. It was there held that as early as 1881 a claim for such a device must be limited to the precise mechanism shown and described. Since that date, and prior to the date of Bergmann's application, key circuit controllers operating in a great variety of ways were devised by a number of electricians including Bergmann himself. It is not, of course, pretended that a circuit controller located in a lamp socket was new with Bergmann. All that is claimed for his key is that it is simpler and better than those which preceded it. The specification says:

"The circuit controller making and breaking circuit upon the lamp tips employs fewer parts and is simpler in construction than any heretofore used."

In short, as to both branches of the controversy, it is perfectly obvious that Bergmann was in no sense a pioneer. Unquestionably he produced a simple, compact, durable and efficient socket, but the art did not begin with him and it ought not to be held to end with him. He has originated no new principle of operation; he has produced no new result. He improved upon existing structures. Other inventors should be permitted to do the same. With the exception of claim 13, which, it would seem, is too broad to be upheld upon any rational theory, the claims in question may be sustained if confined to the precise structures described and shown. They cannot, however, be held to suppress improvements which differ from Bergmann as essentially as he differs from the prior art.

When it is remembered that in 1884 and 1885 all experimenters along this line had to deal with a well known lamp and an almost equally well known form of socket, which, of necessity, was required to conform to the changes made from time to time in the lamp base, it is plain that the area of action was necessarily circumscribed. For years both lamp and socket have been of a conventional type. Admitting that the material of the disk and the details of the key construction were new, is it not manifest that the assembling of these well known elements in an old form of socket to receive an old form of lamp did not involve any high order of inventive skill and that the combinations thus formed must be restricted to the mechanism shown?

The defendant's sockets, of course, resemble the Bergmann socket as they do all the sockets in use, but they resemble it only in points which are common to all. They are made under patents granted to Jessie L. Hinds in 1891. The insulating disk is porcelain instead of

lava. The circuit controller is different in many essential particulars. Bergmann's key is insulated at its tip, moves forward and back in the arc of a circle of about 90 degrees, has a slow break, unless care is used, and is provided with a metal hand piece.

The defendant's key has a porcelain hand piece, the key proper being in the circuit. It operates with a cam action and can be turned in either direction an indefinite number of times. There is no possibility of turning the key the wrong way as in the patented device and the circuit is broken by an instantaneous separation of the parts. The defendant does not have the key sleeve and its insulating disk differs from the disk of the patent in structure and operation. The Thomson-Houston socket of the defendant does not have the sleeve terminal of the first claim, but a screw-threaded plug, which, though making mechanical and electrical connection, can in no true sense be termed a sleeve.

Many other points of difference might be pointed out were it necessary to do so, but it is not. To pursue the discussion further would only lead to inconsequential findings as to matters of detail without useful result. If the broad construction contended for by the complainant were permissible the defendant would, unquestionably, infringe, but with the limited construction made necessary by the prior art and by the language of the patent it is equally manifest that the defendant does not infringe. Upon the whole case the court is satisfied that Bergmann was simply an improver upon the prior art in matters of detail only and that he must be confined strictly to what he has described and shown. Hinds was also an improver and in using the socket covered by the Hinds patents the defendant does not trespass on any territory belonging to Bergmann. There are many points of similarity between Hinds and Bergmann, but they are features free to both. The features which were new with Bergmann the defendant does not use.

The bill is dismissed.

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YPSILANTI DRESS-STAY MANUF'G CO. v. VAN VALKENBURG et al.

(Circuit Court, N. D. New York. February 29, 1896.)

No. 6,198.

1. PATENTS—NOVELTY AND INVENTION—GARMENT STAYS.

The Bowling patent (original No. 362,568, reissue No. 11,009), for improvements in stays for garments, consisting in securing the stiffening blade between sheets of rubber projecting beyond the blade both at its ends and edges, the rubber being covered with fabrics of similar dimensions, which are made to adhere thereto by pressure between warm plates, *held void* as to claim 1, for want of patentable invention, in view of the prior state of the art.

2. SAME—INVENTION.

Invention cannot be predicated of the popularity of the article alone, as the success thereof may be accounted for by superior workmanship, attractive manner of display, and the energy and ability with which it is introduced to the market.



## 8. SAME.

The Bowling patent No. 378,080, for an improvement upon the garment stay covered by patent No. 862,568, to the same inventor (reissue No. 11,009), held void for want of invention.

This was a bill in equity by the Ypsilanti Dress-Stay Manufacturing Company against Wells Van Valkenburg and others for alleged infringement of two patents relating to garment stays. On final hearing.

This action is based upon two patents granted to Enoch C. Bowling and now owned by the complainant. Both are for improvements in stays for garments. The patent principally relied on is reissue No. 11,009, dated July 2, 1889. The original, No. 362,568, is dated May 10, 1887. The specification states that it was common to form in a garment a series of pockets by stitching, into which steel or whalebone stiffeners were inserted. This method was not only expensive, but the stiffeners, being loose, soon wore through the garments and dropped out. The object of the patentee was to obviate these and other difficulties by securing the stiffening-blade between sheets of rubber projecting beyond the blade both at its ends and edges, the rubber being covered with a suitable fabric, so that when subjected to pressure between warm plates the parts adhere and a stitching edge around the stiffener is provided. The stiffening-blade may be of steel, whalebone, wood or any other suitable material. The outer covering may be of any suitable cloth. The strips of rubber between the stiffener and the outer fabric must be unvulcanized and very thin. The specification says: "The parts constituting the stay, when placed in position, are subjected to pressure between heated clamps or plates, whereby the rubber strips become softened or melted, thereby passing into the meshes of the covering fabrics around and over the stiffener, the rubber sheets joining each other, so that when congealed they form a solid mass, firmly cementing the parts together, inclosing the stiffener D within a rubber covering, thus holding said parts firmly in position between the fabrics, and when using steel for the stiffeners D the rubber prevents moisture or perspiration from the body of the wearer from reaching the stiffener, thereby preventing the rusting of the steel, as is now common with steel stays." The first claim only is involved. It is as follows: "(1) The stay herein described, comprising the stiffening-blade D, having sheets of rubber t t lying upon each side thereof and projecting over the edges and ends of said blade, with the covering fabrics B B" having a like projection and adhering thereto, whereby a stitching-edge is provided surrounding the stiffening-blade, as and for the purposes specified." The specification and the first claim of the original and the reissue are the same. No attack is made upon the reissue, as such, so long as the controversy is confined, as it is here, to the first claim. The defenses are that the claim is anticipated, does not involve invention, and that it is not infringed by the stay manufactured by the defendants at the present time.

The second patent is No. 378,080, dated February 21, 1888. "This patent," says the complainant's brief, "differs from reissue No. 11,009 only in capping the ends of the steels before making up the stay." The patentee says in the specification: "I am aware that metallic end caps secured to the ends of stiffening-blades for corsets and stays have long been in use, and therefore do not claim, broadly, such matter; but I am not aware that stiffening-blades having such metallic end caps have heretofore been secured within a covering of fabric having interposed layers of gutta-percha tissue, with a marginal or fabric stitching-edge surrounding said protected blade and metallic end caps, whereby said blades and metallic end caps are provided with an impervious coating having an outer textile covering, the gutta-percha tissue cementing the end caps firmly to the ends of the blade and within the textile fabric coverings, whereby said metallic parts are prevented from rusting or corroding, the metallic end caps being cemented within the fabrics, thereby preventing said caps from pulling off the blade, as is common when attached in the ordinary way to the exterior of the stay, by simply pressing said caps onto the ends of the stay." The claim is for "the herein-described stay, com-

prising the stiffening-blade having metallic end caps, and fabric coverings projecting beyond the edges and capped ends of the stiffening-blade, with interposed sheets of gutta-percha tissue, said parts adhering together and forming the textile fabric stitching-edges f f, as and for the purposes specified." The defense is that the claim is void for want of invention.

Edmund Wetmore and George H. Lothrop, for complainant.  
Charles H. Duell, for defendants.

COXE, District Judge (after stating the facts). The first claim of the reissue is not for a process or method, but for a product, a new article of manufacture—a garment stay. This stay has the following features: First. A stiffening blade. Second. Two sheets of rubber, one lying on each side of the blade and projecting over its edges and ends. Third. Covering fabrics similar in dimensions to the rubber sheets and adhering thereto. Fourth. Projections sufficient to provide a stitching edge entirely around the blade. Such a stay, no matter how produced, would infringe, and such a stay, made prior to March, 1886, would anticipate.

The prior art shows a very large variety of stays. In January, 1883, Austin Kelley made a dress stay by covering a capped blade, precisely like the blade of the patent, with "gutta-percha tissue" which is conceded the equivalent for the "very thin" rubber strips of the patent. Kelley's stay was also covered with a textile fabric which was wrapped round the gutta-percha, the parts being made to adhere by heat and pressure. Kelley's object, like Bowling's, was to cover the stay so "as to exclude moisture," and provide means for fastening it securely to the garment to be stayed. Although the Kelley patent says that "a line of stitching is run near the edge of the busk, so as to pass through the four-fold outer covering, as well as the inner layer of muslin and gutta-percha," it is not contended that this is the means of attachment shown in the patent at bar. On the other hand, it can hardly be disputed that the Kelley patent shows all of the features of the Bowling stay, except the stitching edge. The complainant's brief admits this, by implication, when it says: "The Kelley stay has been brought into use only by adding the stitching edges of Bowling." In other words, if the former had shown the edges of the latter it would have been an anticipation. Other patents might be cited showing, substantially, the same combination. For instance, Brown, in 1863, described a thin strip of steel covered with a woven fabric "the inner face of which is coated with India-rubber," and the Smith specification describes the corset stay of that patent (1879) as follows:

"A is the stay; a, the interior steel portion; b, the rubber coating between the steel and the outer cloth covering; c."

References might be multiplied, but it is unnecessary. There can be no doubt that at the date of Bowling's application it was old to cover a steel busk with India-rubber, or equivalent materials, and an outer covering of cloth completely enveloping the busk, adhesion of the parts being produced by heat and pressure. It cannot, then, be disputed that the prior art shows all the features of

the claim as enumerated above except the fourth, viz.: "A stitching edge entirely around the blade."

Starting with the Kelley patent, which, for present purposes, is as pertinent a reference as any, the question of patentability may be reduced to the simple proposition, did it involve invention to provide a stitching edge for Kelley's stay? It is obvious that with no assistance from the prior art the problem which Bowling had to solve was not particularly difficult. Before him was a waterproof dress stay designed to be attached to garments. The garment was there, the stay was there. How shall the stay be attached? Did it require any severe strain upon the "intuitive faculty of the mind" to suggest sewing? But it is said that not only was it necessary to think of sewing, but also to provide projections to hold the stitches. This is true, but in view of the ordinary expedients resorted to when it is desired to sew one article, through which a needle will not penetrate, to another, did it involve invention? It would seem that the weight of authority would require a negative answer. Thus far we have proceeded on the hypothesis that the prior art furnished no hint as to the manner in which rubber and cloth covered stays might be attached to the garment by sewing, but it will be found, on examination, that the way adopted by Bowling was well known as applicable to this particular art. The Brown patent, before alluded to, describes "a selvage of woven fabric on each side of the crinoline" by means of which it "may be sewed onto any fabric by merely stitching down the sides instead of sewing over the metallic strands." The fact that the Brown patent relates to stays for ladies' skirts instead of dress or corset stays is immaterial as they both belong to the same art. The record abundantly proves that in the eye of the patent law they are one and the same thing.

The patent to Van Orden, 1877, contains the following statement:

"The impervious covering is, preferably, made of the substance known as 'celluloid,' which is very strong and tough as well as elastic, and is sufficiently soft, or may be made so, as to permit of its being stitched through or sewed onto the cloth portion of the corset."

The patent also says, that vulcanized rubber or other plastic compound may be used, and that the stay is attached to the corset "by sewing through one or both edges of the impervious covering."

Nettleton, in 1885, described a stay having the covering material projecting at the ends. He says:

"The stitches in seams H, which pass through the portions E of the stays, are thus made to perform the additional function of securing the stays in place."

The "German stay," which was on the market long prior to 1886, shows a steel stay with a cloth covering projecting on both sides so that it may be sewn to the garment by a line of stitches through these projecting edges. It is true that this is not a waterproof stay and that the stitching edges do not extend around the ends, but it certainly shows that there was nothing new in sewing a dress stay to a garment by stitching through edges projecting at

the sides, and Nettleton shows the same through end projections. The question may, therefore, be still further narrowed to the inquiry, did it require invention to provide the Kelley stay with the German and Nettleton projections? The court is constrained to answer this question in the negative. Bowling did not invent a new stay or a new means of attaching an old stay. His stay is, very likely, more convenient than any which preceded it, but the features of which it is composed were ready at his hand in the prior art. To put them together did not require the genius of the inventor, but the skill of the mechanic. The ideas were all old, their application obvious, and the result the same.

In *Cluett v. Claffin*, 140 U. S. 180, 11 Sup. Ct. 725, the court had before it a patent for an improvement in shirts. One of the claims was as follows:

"In combination with a shirt body, a shirt bosom bound on the outer edge with a folded and stitched binding, and attached to the shirt body by a separate line of stitching through such binding."

The court says, after stating the facts:

"What then was left for Cluett to invent? Nothing, apparently, but a separate line of stitches through the binding attaching the bosom to the shirt. But whether a separate line of stitches shall be used for this purpose, or whether such stitches shall pass through the binding or inside of it, is obviously a question of mere convenience, involving nothing which, under a most liberal construction, could be held to be an exercise of the inventive faculty. \* \* \* We think this case must be added to the already long list of those reported in the decisions of this court wherein the patentee has sought to obtain the monopoly of a large manufacture by a trifling deviation from ordinary and accepted methods."

The applicability of this language seems obvious. If it be not invention to bind a bosom and sew it to a shirt, it is not invention to bind a dress stay so that it may be sewn to a dress.

The popularity of the complainant's stay has been abundantly demonstrated by the proof, but, of course, invention cannot be predicated of this alone. *McClain v. Ortmyer*, 141 U. S. 419, 428, 12 Sup. Ct. 76; *Walk. Pat. (3d Ed.)* § 40. Sufficient reason for the success of the complainant's stays is found in the attractive manner in which they are displayed, their superior workmanship and the ability with which they have been introduced to the market.

Patent No. 378,080 requires but a passing comment. It seems too plain for discussion that there is no patentable novelty in adding end caps to the steel of the former patent, especially when it is conceded that end caps identical in structure had been attached to similar steels as shown in at least seven different prior patents.

The bill is dismissed

## THE MOONLIGHT.

## BURGER et al. v. THE MOONLIGHT.

(District Court, E. D. New York. February 8, 1896.)

## SALVAGE SERVICES—COMPENSATION.

Assistance rendered by a tug to another tug and her barges, which had grounded in the East river in a place involving comparatively little danger, *held* a salvage service for which a total sum of \$230 should be awarded,—\$25 apiece being charged against two barges which were not aground, but which required assistance for the purpose of mooring, and \$150 against a boat and cargo of coal, worth \$4,000, which was aground, the remainder, of \$30, being charged against the tug for the assistance rendered her.

This was a libel by Frank P. Burger and others against the Moonlight and other barges and the tug Zouave.

Wing, Putnam & Burlingham, for libelants.

Stewart & Macklin, for the Moonlight and the Zouave.

Robinson, Biddle & Ward and Mr. Hough, for Barges Nos. 9 and 12.

BROWN, District Judge. On the 11th of January, 1895, as the tug Zouave was going up the East river, in the flood tide, towing the barges Moonlight and No. 9 on her port side, and No. 12 on her starboard side, she was overtaken by thick fog when about midway up Blackwell's Island, going in the easterly channel. She endeavored to make the cove to the eastward of Brown's Point just below the Astoria ferry; but in rounding to the eastward for that purpose, in the thick fog, she was caught upon the point. No. 9 had some planks broken on her side; the Moonlight was caught fast on her bottom; the Zouave, which drew three feet less than the Moonlight, I am satisfied, was not aground; nor was No. 12. The libelants' tug R. W. Burke, had shortly before moored at the dock a few hundred feet to the eastward of the Point, and on hearing the noise of the grounding of the barges, and the snapping of lines, immediately went to their assistance. Nos. 9 and 12 were taken by her to the dock; and afterwards she aided the Zouave and Moonlight in getting off the Point, and upon the clearing of the fog, she assisted in taking on the other boat, and accompanied them through the Gate to the Sunken Meadows.

The captains of the two tugs differ considerably in their version of the situation, and as to the request made for assistance. The case, however, is not one for any considerable award of salvage. The place where the boats grounded was not one involving very much danger. The flood tide, indeed, tended to hold the boats upon the rocks; but they would naturally come off at high tide, either with a little assistance easily obtainable, or possibly without further aid than the Zouave herself might furnish. In the meantime, however, there was danger of some additional damage; and I have no doubt, therefore, that the Burke is entitled to some award, and that the captain of the Zouave had no right to suppose that her services were tendered gratuitously.

Although No. 9 and No. 12 were not aground, it was necessary that they should be moored. This was effected in a short time for each boat. I allow \$25 against each.

The Moonlight being aground, had need of immediate aid to prevent further injury. The value of boat and cargo (coal) was about \$4,000. For the service to her I allow \$150; and \$30 additional for the aid rendered to the Zouave.

Of the above total of \$230, \$150 should go to the owners; \$20 to the master, and the residue, \$60, divided between the master and officers of the tug in proportion to their wages.

A decree may be entered accordingly, with costs.

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THE GRACIE MAY.

CARPENTER v. RITSCHER et al.

(Circuit Court of Appeals, Second Circuit. February 18, 1896.)

MARITIME LIENS—SUPPLIES.

Grocers in Jersey City furnished supplies for three seasons to a small pleasure yacht, on the order of her reputed owner, a man without property and generally "short of ready money," who lived in New York, and who controlled and navigated her entirely alone. He was accustomed to pay the bills for one season at the beginning of the next season. In May, 1893, he ordered supplies as usual, and continued to order until the autumn. They knew little of him, except as disclosed in these dealings. *Held* that, under these circumstances, the application of the rule in relation to the presumption of the necessity of the credit of the vessel for supplies furnished in a foreign port on the order of a master would be a strained one, but that, the material men having testified that the goods were sold upon the credit of the vessel, the circumstances corroborated their testimony, and indicated that they relied, in part at least, on the credit of the yacht, and their claim should be enforced against her.

Appeal from the District Court of the United States for the Southern District of New York.

This was a libel by Peter C. Ritscher and others against the yacht Gracie May (Philip Carpenter, claimant), to recover the sum of \$106.57, with interest and costs, for supplies furnished on board said yacht. The district court made a decree against the yacht, and the claimant appealed.

Mark Ash, for libelants.

Philip Carpenter, pro se.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. Prior to July, 1890, George M. Rolins, then of New York City, owned the Gracie May, a pleasure yacht of about 30 feet in length and of about 5 tons burden. He was engaged in a number of electrical enterprises, and in the formation of car trusts, but he had no property, and was generally "short of ready money." He owed the claimant, who was his law-

yer, and whom he frequently consulted, and with whose family he and his family were on intimate terms, quite a large bill, and in July, 1890, offered to let him (Mr. Carpenter) have the yacht in payment of the bill up to that time. To this proposition Mr. Carpenter assented, and, a few days after, took formal possession of the boat, and, with Mr. Rollins, sailed in her on the Sound. She was thereafter left in Mr. Rollins' care and apparent sole control, at the Jersey City Yacht Club House. He was a member of this club, and during the summer seasons sailed the boat frequently upon short excursions, in neighboring waters. He managed her alone, without sailing master or crew. For three or four years before May, 1893, Rollins was in the habit of buying the necessary supplies of provisions for these occasional trips from the libelants, Peter C. Ritscher & Co., grocers in Jersey City, who had a shop near the water, and whose business it was to supply vessels. They supposed that Rollins owned the boat, knew that he was the only person who was managing her, and delivered the goods on board of her as they were purchased. Rollins was in the habit of paying his preceding bill at the beginning of each season, and on May 27, 1893, paid the previous bill, ordered a bill of \$9.84, said, "Let the bill run for the season as previously," and thereafter purchased supplies from time to time until October 7, 1893, when the entire account, which was exclusively for necessary supplies for the boat, amounted to \$108.57. He died March 4, 1894, without any property, and the bill is still unpaid. The account was kept exclusively in the libelants' day book. The items were generally charged to "Rollins"; occasionally to "Rollins. Yacht Gracie May"; and once to "Gracie May." A bill was sent by mail to Rollins in the autumn of 1893, which was made out to "Gracie May and Owners." The libelants testified that they gave credit to the yacht for the amount of the bill.

The libelants' counsel place their case upon the fact that they furnished necessary supplies to a vessel in a foreign port, upon the sole order of the master, in the absence of the owners, and that, under such a state of facts, the presumption is that there was a necessity for the credit of the vessel. The supplies were furnished upon the order of the reputed owner, who was also master and crew, and who was the only person who apparently had any connection with the boat. The application, to a case of this sort, of the rule respecting a lien for repairs and supplies furnished in a foreign port, upon the order of the master, would be a strained one. The rule had its origin in necessities of commerce, and to apply it to the case of supplies furnished to this tiny pleasure craft upon the order of the person who seemed to be the owner, and who was amusing himself with its management, is irrational. The question of credit must depend upon the facts and the probabilities, without the aid of technical presumptions. The material men were grocers, whose special business it was to supply vessels. The reputed owner and the purchaser lived, at the time, in Brooklyn, and was without property. The libelants had no other

business with him than to furnish his boat, and apparently knew very little, if anything, about him. They knew that he had paid his bills annually, and had the bearing of a gentleman, and they were willing to sell him goods. The careless way in which the account was kept throws very little light on the question of credit. They testify that they relied upon the boat, but this bare statement would not satisfy the mind unless it was corroborated by the surrounding circumstances and probabilities. It is difficult to believe that these material men, whose business it was to furnish goods to vessels, and whose sole business with Rollins was to supply the yacht with stores, were placing their exclusive reliance for payment upon a comparative stranger, who, during the summer season, made his occasional calls in behalf of his yacht which lay at the wharf. Credit, but not exclusive credit, was given to Rollins, whose appearance and annual return and annual payment of bills had gained for him the belief that he would continue the same course; but credit was also given to the visible property within their sight.

The decree of the district court is affirmed, with interest and costs.

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BRITISH & FOREIGN MARINE INS. CO. v. SOUTHERN PAC. CO.

(Circuit Court of Appeals, Second Circuit. February 20, 1896.)

1. SHIPPING—PAYMENT OF FREIGHT—BILL OF LADING.

Where the bill of lading is silent as to the time for payment of the freight; the law implies that it is to be paid on delivery of the goods at the port of discharge.

2. SAME—CONNECTING CARRIERS—DAMAGE TO CARGO—PRO RATA FREIGHT.

Cotton in course of transportation from Southern ports by way of New York to Liverpool, by various connecting carriers, but under through bills of lading, which stipulated that each carrier should not be liable for loss or damage beyond its own line, was in part damaged and in part totally destroyed by fire while on the pier at New York awaiting shipment by another line of steamers to Liverpool. The owners abandoned to the insurers, and the cotton, which was damaged only, was sold at New York, with the knowledge and acquiescence of the insurers, who received the proceeds less pro rata freight retained by the carrier. *Held*, that in respect to the cotton so sold the carrier was entitled to pro rata freight, because the acts of the insurers were in effect a voluntary acceptance of delivery at the intermediate port; but that pro rata freight was not payable upon that part of the cargo which was totally destroyed, since the contract to deliver at Liverpool was never performed or performance waived. 55 Fed. 82, affirmed.

Appeal from the District Court of the United States for the Southern District of New York.

This was a libel by the British & Foreign Marine Insurance Company against the Southern Pacific Company to recover certain sums withheld by respondent as pro rata freight on certain cotton, which was in part damaged and in part destroyed while in possession of carriers. The decree was for libellant in respect to the freight on



the goods destroyed, but against it in respect to those merely damaged. 55 Fed. 82. Both parties appealed.

Wilhelm Mynderse, for libellant.

Robert D. Benedict, for claimant.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. A large number of bales of cotton were shipped under 52 bills of lading from various points in Louisiana and Texas to points in Europe. Thirty of the bills of lading are railroad bills acknowledging receipt of such and such bales at various points on the Houston & Texas, etc., Railroad, to be carried to Liverpool or Genoa, in this way, viz. by railroad to Galveston, thence by the Morgan Line of steamers to New York, and thence by some line of trans-Atlantic steamers to Liverpool or Genoa. The other 22 bills of lading cover shipments from Galveston or New Orleans to Liverpool, Bremen, or Genoa by way of New York; the carrier to New York being the Morgan Line of steamers, and the carrier thence to port of destination being some trans-Atlantic line, named in the bill. There are variances in the phraseology of these bills of lading, which may be grouped into five different forms, but the variances are immaterial to the case made here, and need not be rehearsed. In all of them the rate of freight named in the bill is a through rate from the place of shipment to the place of delivery at so much per pound. Three of the forms provide expressly for payment of freight "immediately on landing the goods"; the other two forms are silent as to the time for payment of the freight, but it is well settled that in such cases the law implies that it is to be paid upon delivery of the goods at the port of discharge. Carv. Carr. by Sea (2d Ed.) § 543. By slightly variant phraseology all the bills of lading provide that the liability of each carrier shall cease on his delivery to the next carrier.

The cotton reached the Morgan Line pier in New York, and on February 28, 1887, while certain portions of the shipments were either on the pier or on partially loaded lighters alongside the pier, a fire occurred, by which some of the bales were destroyed and other bales were injured to such an extent that, instead of being reconditioned, and forwarded to destination, they were sold here. The libellant was insurer upon the cotton covered by the 52 bills of lading, and in consequence of the fire paid to its respective insured total losses in respect to the cotton destroyed or sold in New York, and took assignments of the rights of the assured on the proceeds. An adjustment was made, the details of which need not be recited, and from the net proceeds of the sale the respondent reserved \$2,318.60 as pro rata freight on the cotton sold and \$614.72 as pro rata freight on the cotton destroyed, turning over to the insurance company only the balance left after making these deductions. Libellant sued to recover both sums, and the district court sustained the claim as to the second item, viz. pro rata freight on cotton sold, and dismissed the libel as to the other. Both sides appeal.

The libellant's counsel has discussed at some length the leading authorities on the subject of pro rata freight, but, in view of the undisputed facts set out in the record, it is unnecessary to review them here. He quotes, and does not question the accuracy of, Dr. Lushington's statement in *The Soblomsten*, L. R. 1 Adm. & Ecc. 297, that a claim for pro rata freight is justified where there had been "a voluntary acceptance of the goods by their owner at an intermediate port in such mode as to raise a fair inference that the further carriage of the goods was intentionally dispensed with." Although the libel alleges that certain of the said bales "were so damaged that they could not be forwarded to destination,"—an allegation admitted by the answer,—such averment is not necessarily to be taken as implying any more than that the condition of these bales was such that they could not go forward without such expensive reconditioning as would make an effort to forward them a losing venture. So long as the cotton still existed,—and the language quoted imports a continued existence as damaged bales,—it is difficult to understand why it was not physically possible for the shipowner to load and carry it to Europe. As to each damaged bale, therefore, there arose the question whether it should be reconditioned and forwarded or sold for the benefit of all concerned. It appears from the evidence that the insurance company, which, as abandonee of the damaged cotton, represented the cargo owners, was from the beginning in communication with the representatives of the carrier; that it was informed as to every important step taken; that when there was any question as to whether a bale of cotton should be reconditioned for forwarding or be sold here it was informed and consulted with; and that whatever course was taken, was taken with its approval and concurrence. There is no contradiction of this testimony, and, in our opinion, it clearly makes out a case of voluntary acceptance at the intermediate port, any further carriage of those particular bales being intentionally dispensed with by the owner, and implies a contract to remunerate the carrier for the service actually performed. The district court offered to take further proofs if any question was made as to the proper proportion of the whole freight to be applied pro rata itineris, and, no objection being made there by libellant, it is to be presumed that the sum fixed by that court is fair and just.

From the decree of the district court the respondent also appeals, insisting that the carrier should be allowed to reserve from the proceeds of the damaged cotton pro rata freight for the bales which were totally destroyed, and which, of course, were never accepted by the owner at the intermediate port, and, being no longer in existence, could not be reconditioned and forwarded as damaged bales. No authority is cited in support of this contention. Presumably none could be found, for it is elementary that, except in those cases where by express contract the freight is stipulated to be paid in advance, delivery at the port of discharge is a condition precedent to the shipowner's right to have the freight. "Unless the

goods have been carried to that port, and are there ready to be delivered, the freight has not been earned. \* \* \* If the ship-owner has been prevented from carrying the goods to their destination, although by causes which he could not control, he cannot claim any part of the freight; for he has not earned it." Carr. Carr. by Sea, §§ 543, 547. The only exceptions to this rule are where the completion of the voyage has been prevented by the freighters, or where the cargo owner takes delivery of the goods or their proceeds at a different place from that originally agreed, under circumstances which show that that was intended to be treated as a substituted performance of the contract. No question arises here of substantial delivery of cargo, some small part having been lost, under a contract for payment of a lump freight. The freight stipulated here is so much per pound transported. It is urged that since the bills of lading provide for successive transportations by successive carriers, with a provision that the liability of each carrier for loss or damage of the goods shall cease on his delivery of the cotton to the next carrier, each separate transportation should be treated as a separate voyage. But the contract is a single one for the entire transportation from the port of original loading to the port of ultimate destination. The carrier who received the goods agreed with the shipper, directly for himself and as agent for the two other carriers, that they would transport the cotton the entire distance for a stipulated freight, to be paid upon delivery at destination. The shipper sought carriage for his goods, not to New Orleans, nor to New York, but to Europe; and when three carriers, having formed a combination for the entire carriage, take his goods under a contract by the terms of which the entire compensation for that carriage is made dependent upon delivery at final destination, there is no reason why a court should alter those terms. Had the carriers chosen to apportion the freight in advance, and to require the shipper to pay separately for each successive stage of the voyage, it was competent for them to insert such provisions in the contract. Not having done so, their contract must be interpreted as such contracts of affreightment always have been, and their right to demand freight be held dependent upon delivery at destination.

The decree of the district court is affirmed, but, as both sides appealed, without interest or costs.

**SCOTT v. HAMNER. WAPLES-PLATTER CO. et al. v. TURNER. MILLER v. CHOCTAW, O. & G. RY. CO. LONG-BELL LUMBER CO. v. THOMAS et al.**

(Circuit Court of Appeals, Eighth Circuit. February 3, 1896.)

Nos. 622, 643, 654, 693.

**CIRCUIT COURT OF APPEALS—JURISDICTION—UNITED STATES COURT IN THE INDIAN TERRITORY.**

The act of March 1, 1895 (28 Stat. 695, c. 145), creating a court of appeals for the Indian Territory, deprived the circuit court of appeals for the Eighth circuit of the power to entertain writs of error and appeals from the United States court in the Indian Territory, and writs of error to said circuit court of appeals allowed by the United States court in the Indian Territory after March 1, 1895, must be dismissed.

**In Error to the United States Court in the Indian Territory.**

William T. Hutchings (Richard B. Shepard and Harrison O. Shepard were with him on the brief), for plaintiff in error John S. Scott.

A. G. Moseley (S. S. Fears was with him on the brief), for plaintiffs in error Waples-Platter Company, C. H. Low, and J. S. Hancock.

N. B. Maxey (S. S. Fears was with him on the brief), for plaintiff in error John T. Miller.

W. R. Cowley filed brief for plaintiff in error Long-Bell Lumber Co.

N. B. Maxey (G. B. Denison was with him on the brief), for defendant in error James B. Hamner.

William T. Hutchings, for defendant in error Clarence W. Turner.

J. W. McLoud, for defendant in error Choctaw, O. & G. Ry. Co.

E. J. Fannin filed brief for defendants in error J. J. Thomas and D. J. Thomas.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. In these cases writs of error were not allowed by the United States court in the Indian Territory until after March 1, 1895, when an act entitled "An act to provide for the appointment of additional judges of the United States court in the Indian Territory and for other purposes" (28 Stat. 695, c. 145) took effect. The necessary operation of section 11 of that act was to deprive this court, from and after March 1, 1895, of the power to entertain writs of error and appeals to review judgments and decrees of the United States court in the Indian Territory, which power was originally conferred on this court by section 13 of the act establishing circuit courts of appeals. 26 Stat. 826, c. 517. Section 11 of the act of March 1, 1895, vested the court of appeals of the Indian Territory with appellate jurisdiction over the United States courts in the Indian Territory, in the following language:

"Said court shall have such jurisdiction and powers in said Indian Territory and such general superintending control over the courts thereof as is conferred upon the supreme court of Arkansas over the courts thereof by the laws of said state, as provided by chapter 40 of Mansfield's Digest of the Laws of Arkansas, and the provisions of said chapter, so far as they relate to the jurisdiction and powers of said supreme court of Arkansas as to appeals and writs of error, and as to the trial and decision of causes, so far as they are applicable,

shall be, and are hereby, extended over and put in force in the Indian Territory; \* \* \*. Writs of error and appeals from the final decision of said appellate court shall be allowed and may be taken to the circuit court of appeals for the Eighth judicial circuit in the same manner and under the same regulations as appeals are taken from the circuit courts of the United States."

The provision found in the act of March 1, 1895, last quoted, necessarily deprives this court of the appellate jurisdiction heretofore exercised over the United States court in the Indian Territory by virtue of section 13 of the act of March 3, 1891; and as the writs of error in the above-entitled cases were allowed after the act of March 1, 1895, had taken effect, it follows that they were improperly sued out, and that this court has no power to entertain the same. *Railroad Co. v. Grant*, 98 U. S. 398, and cases there cited; *Cincinnati Safe & Lock Co. v. Grand Rapids Safety-Deposit Co.*, 146 U. S. 54, 13 Sup. Ct. 13. The several writs of error are therefore dismissed.

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ANDREWS et al. v. THUM et al.

(Circuit Court of Appeals, First Circuit. February 15, 1896.)

No. 89.

1. APPEAL—FINAL DECREE—MOTION FOR REHEARING.

A final decree is suspended by a motion for rehearing, and does not take effect and become operative for the purposes of an appeal until such motion is overruled.

2. SAME.

Where, after the entry of a final decree, a motion was made for a rehearing and to reopen the case, which was denied after a hearing, *held*, that an appeal subsequently taken was from the final decree itself, and not from the order denying the said motion.

3. SAME—FORM OF MANDATE.

It is not necessary to recite in the mandate every step in the various stages of the cause.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

This was a suit by Otto Thum and others against John A. Andrews and others for infringement of patents No. 278,294 and 305,118, issued to said Otto Thum for an improvement in fly paper. The alleged infringement consisted in the sale by defendants of fly paper manufactured by Benjamin F. B. Willson, carrying on business under the name of Willson & Co. Upon complainants' threatening suit against defendants for such infringement, John W. F. Willson and said Benjamin F. B. Willson had entered into an agreement with defendants, that in case any suit should be brought against defendants for infringement of any patent, by the use or sale of such fly paper, the said Willsons would assume the defense of such suit, and carry on the same to final judgment at their own sole expense; and that in case the plaintiffs, in any such suit, should obtain a judgment or decree, said Willsons would pay all sums that defendants should be adjudged to pay as damages, profits, or costs of suit. In accordance with this agreement, the Willsons assumed and carried on the defense of this suit. On February 7, 1893, the circuit entered an interlocutory decree, sustaining the patents, finding infringement, awarding a perpetual injunction, and referring the cause to a master, to take an account of profits and damages. 53 Fed. 84. On May 6, 1893, the Willsons filed a motion for defendants to reopen the case, for the purpose of introducing a prior patent to a third party, alleged to be

precisely similar to complainants' patent, and also a motion to dissolve the injunction. On May 13, 1893, upon a stipulation by complainants, to which the nominal defendants consented, a final decree was entered, waiving the reference to the master, and ordering defendants to pay the complainants the sum of \$2,500, as damages and profits for the infringement and as costs of the suit. Afterwards, and on June 23, 1893, the motions to reopen the case and to dissolve the injunction were heard, and an order was entered denying the same. On November 17, 1893, the Willsons filed a prayer for appeal and an assignment of errors; and on the 5th day of February, 1894, the appeal was allowed, bond filed and approved, and citation issued. The cause having been docketed in this court, the appellees moved to dismiss the appeal on various grounds, which motion was denied on June 23, 1894. 12 C. C. A. 77, 64 Fed. 149. The case was afterwards heard upon the merits, and a decree was entered reversing the decree below holding that the patents sued on, or the claims thereof in controversy, were void for want of patentable novelty, and directing the court below to dismiss the bill. 15 C. C. A. 67, 67 Fed. 911. A rehearing was afterwards allowed, which resulted in a reaffirmance of the previous decision. 16 C. C. A. 677, 70 Fed. 65. The case was afterwards heard in this court upon a question as to the form of the mandate. 71 Fed. 763. After the foregoing proceedings, a form of mandate was prepared by the clerk of the circuit court of appeals, in accordance with the practice prevailing in this circuit. This mandate recited in full the interlocutory decree for an injunction and account which was entered in the circuit court on February 7, 1893, and also the final decree of May 13, 1893, but made no reference to the order of the circuit court denying the motion to reopen the case and dissolve the injunction. After these recitals and the further recitals in relation to the hearing and arguments in the appellate court, the mandate continued as follows:

"On consideration whereof, it is now, to wit, January 23, 1896, ordered, adjudged, and decreed as follows: The decree of the circuit court is reversed, and the case remanded, with directions to dismiss the bill, with costs. This court reserves to the defendants, John A. Andrews et al., liberty to file in the circuit court a petition for restitution of the sum paid by them to the complainants under the decree of the said circuit court of May 13, 1893, or to adopt other appropriate methods for presenting their claim for restitution, and to proceed thereon as that court may determine. Costs in said United States circuit court of appeals for which execution is to issue from said circuit court against said Otto Thum et al., and in favor of said John A. Andrews et al., in whose name said John W. F. Willson and Benjamin F. B. Willson appealed, are taxed at three hundred and thirty-one dollars and thirty-eight cents (\$331.38). You, therefore, are hereby commanded that such execution and further proceedings be had in said cause, in conformity with the aforesaid decree of this court, as, according to right and justice and the laws of the United States, ought to be had, the said appeal notwithstanding.

"Witness, the Honorable Melville W. Fuller, chief justice of the United States, the twenty-eighth day of January, in the year of our Lord one thousand eight hundred and ninety-six.

"John G. Stetson,

"Clerk of the United States Circuit Court of Appeals for the First Circuit."

The appellees thereupon filed a motion to stay the issuing of the mandate as thus prepared, and to direct the clerk as to the form thereof. The objections of the appellees to the mandate as drawn were stated in their motion as follows: "(1) Said mandate, as drawn, does not recite or reverse the decree of the circuit court of June 23, 1893, from which decree alone the appeal to this honorable court was taken, but does recite and reverse decrees of said court from which no appeal was taken. (2) Said mandate, as drawn, recites and reverses the decree of the circuit court of May 13, 1893, from which no appeal was taken, and to which no error was assigned in the prayer for appeal, and which was a decree by consent between the complainants, now appellees, and the defendants, acting by other counsel than the counsel of the appellants John W. F. Willson and Benjamin F. B. Willson, and in which decree the said appellants John W. F. Willson and Benjamin F. B. Willson

have no interest whatever." The appellees therefore moved that the said decree of June 23, 1893, should be set out at length in the recital part of the mandate, together with the proceedings had in this court; and they further moved that the decretal part of the mandate should read as follows: "On consideration whereof, it is now ordered, adjudged, and decreed as follows: The said decree of the circuit court of June 23, 1893, is reversed, and the case remanded, with directions to dissolve the injunction and dismiss the bill, with costs, as to the appellants John W. F. Willson and Benjamin F. B. Willson, from the date of the filing of their petition for appeal and assignment of error, November 17, 1893. This court reserves to the defendants, John A. Andrews et al., liberty to file in the circuit court a petition for restitution of the sum paid by them to the complainants under the decree of the circuit court of May 13, 1893, or to adopt other appropriate methods for presenting their claim for restitution, and to proceed thereon as that court may determine."

**Walter B. Grant, in favor of motion.**

The contentions in this motion are: (1) That the decree of the lower court of June 23, 1893, should alone be recited and reversed by the mandate in accordance with the opinions of this honorable court, and that the decrees cited in the mandate, as drawn, should be stricken therefrom. (2) That the decree of May 13, 1893, should be disregarded in the mandate, it being (a) a consent decree, and not reviewable by this court, and (b) the parties defendant who consented thereto are not the appellants, and are not before this court on appeal.

As to the first contention: This appeal was taken November 17, 1893, from said decree of June 23, 1893, and from none other. See prayer for appeal and assignment of errors. This honorable court decided that the appeal was from said decree of June 23, 1893, and from none other, and that the same was final so far as it affected the appellants John W. F. Willson and Benjamin F. B. Willson. The court (Putnam, J.) stated as follows: "On the 23d day of June, 1893, the court heard, on its merits, the motion filed May 6, 1893, and denied it. This left the injunction in full force, and, so far as concerns it, a judgment which binds the manufacturers, unless reopened on appeal or otherwise. The manufacturers took this appeal in the names of the nominal defendants within six months from June 23, 1893." *Andrews v. Thum*, 12 C. C. A. 77, 64 Fed. 149. The appellate jurisdiction of the court in this case is to review said final decree or decision, and determine it. Act March 3, 1891, c. 517, § 6. For the reasons as stated, it is submitted that the mandate should recite the said decree of June 23, 1893, and none other.

As to the second contention: The decree of May 13, 1893, ought not to be regarded in the mandate. It was a consent decree. The appellate court has jurisdiction of a consent decree, when appealed from, only to consider whether the court below had jurisdiction of the cause, so as to authorize it to enter any decree. It cannot consider any errors assigned to such decree. It cannot reverse such decree. *Railroad Co. v. Ketchum*, 101 U. S. 289; *U. S. v. Babbitt*, 104 U. S. 767. The said decree of May 13, 1893, was the order of the court upon an agreement made between the complainants (now appellees) and the then defendants, John A. Andrews et al., and said Andrews et al., by said decree, closed their connection with the case. They are not parties to the appeal, nor before this court except nominally. See their protest "that they do not desire, nor consent to, nor authorize, an appeal." The Willsons alone are the appellants, because (1) they applied and were permitted to come in and take the appeal, November 17, 1893; (2) their appeal was allowed; (3) they gave bond as principals; (4) this court has recognized said Willsons as the appellants. "The manufacturers took this appeal." *Andrews v. Thum*, 12 C. C. A. 77, 64 Fed. 149.

For the reasons as stated, the court having no jurisdiction to review, and the parties to the decree of May 13, 1893, not being before this court, it is submitted that said decree should not be recited or regarded in the mandate, at least, beyond the reference made to it in the order of this honorable court of January 23, 1896.

The question of costs is within the control of the appellate court. The matter of the costs between the original parties was adjusted by the decree of May 13, 1893, and settled. Costs for the intervening parties, defendants, should not relate back of the time of their petition for intervention, November 17, 1893.

Frederick P. Fish and W. K. Richardson, contra, submitted the following brief on the form of mandate, as the rights of their clients, the nominal appellants, to restitution, might be affected thereby:

Appellees are plainly in error in saying that the appeal is from the denial on June 23, 1893, of the motions to reopen the case and dissolve the injunction, and not from the final decree of May 13, 1893.

(1) Motions for rehearing and to dissolve injunction are addressed to the discretion of the lower court; and it is elementary law that there is no appeal therefrom. *Boesch v. Graff*, 133 U. S. 697-699, 10 Sup. Ct. 378; *Buffington v. Harvey*, 95 U. S. 99, 100; *Steines v. Franklin Co.*, 14 Wall. 14-22; *Bondholders & Purchasers of Iron R. R. v. Toledo, D. & B. R. Co.*, 10 C. C. A. 319, 62 Fed. 166-169. That the appeal was not from the decision on these motions is also made plain by the decision of this court upon the merits (15 C. C. A. 67, 67 Fed. 911), which holds that the Peck patent cannot be considered, because it "was first introduced as evidence in the court below in support of a motion for rehearing, and to reopen the case, which was denied." If the appeal had been from the decision on that motion, the Peck patent would have been the principal issue before this court.

(2) Appellees' point that there can be no appeal from the final decree by consent was fully presented to this court on appellees' motion to dismiss the appeal; and this court decided in its opinion on the merits (15 C. C. A. 67, 67 Fed. 911) that, since the decision on that motion, "the objections to the validity of the appeal are not open." It is perfectly plain that this court, in refusing to dismiss the appeal (12 C. C. A. 77, 64 Fed. 149), held that the appeal was from the final decree, but that the time of appeal from the final decree did not begin to run until the motion for rehearing had been decided. This is the precise point of the two opinions of the supreme court (*Smelting Co. v. Billings*, 150 U. S. 31, 14 Sup. Ct. 4, and *Vorhees v. Manufacturing Co.*, 151 U. S. 135, 14 Sup. Ct. 295) cited by this court, in both of which it was held that the six months within which to appeal from the final decree "does not begin to run until the motion or petition is disposed of. Until then the judgment or decree does not take final effect for the purposes of the writ of error or appeal."

We therefore submit that the mandate should recite the final decree, and order it to be reversed, as has been ordered in both the opinions of this court on the merits. 15 C. C. A. 67, 67 Fed. 913; 70 Fed. 65. The untenability of appellees' contention is shown by the fact that a reversal of the order of June 23, 1893, would simply lead to a reopening of the cause, to take further evidence against a patent which this court has already held to be invalid upon the original record.

We have no concern with the subject of costs.

Before COLT, Circuit Judge, and WEBB and ALDRICH, District Judges.

**PER CURIAM.** The mandate has been correctly drawn. Although the record shows a final decree in May, yet, in fact, that decree was suspended by a motion for rehearing, and did not take effect and become operative till that motion was overruled, in June. The appeal was from this decree when it took effect, and became the final decree in the cause. It is unnecessary in the mandate to make recitation of every step in the various stages of the cause.

The mandate as drawn by the clerk is ordered to issue.



## MINCHEN v. HART et al.

(Circuit Court of Appeals, Eighth Circuit. January 7, 1896.)

No. 647.

## 1. PRACTICE—FORM OF OBJECTIONS.

Neither an objection to evidence, that it is "incompetent," without stating why, nor an objection to a notice to produce documents, because it "does not comply with the statute in some respects," without stating in what respects, is sufficient.

## 2. SAME—FINDINGS BY COURT.

A decision by the court to which a case has been submitted without a jury, in which the facts specially found are mingled with a statement of the evidence and a discussion of the law, cannot be regarded as a special finding of facts.

## 3. PRACTICE ON APPEAL—REVIEW OF FACTS.

The circuit court of appeals has no authority, in any case, to examine the testimony with a view of determining whether it was sufficient to support a finding of the trial court to which a case has been submitted without a jury.

In Error to the Circuit Court of the United States for the Southern District of Iowa.

This action was brought in the circuit court of the United States for the Southern district of Iowa, by Hart, Schaffner & Marx, against W. T. Minchen, to recover \$3,447.75, the value of certain goods sold by the plaintiffs to Jonas Nichols upon the following written guaranty of the defendant.

"Carroll, Iowa, August 14, 1893.

"Hart, Schaffner & Marx, Chicago—Gentlemen: I will guaranty the payment of such purchases as Jonas Nichols may make of you in the line of merchandise in [which] you deal for this [fall] and winter trade.

"Yours respectfully,

W. T. Minchen."

The answer was a general denial. By a stipulation in writing, signed by the parties and filed with the clerk, a jury was waived, and the cause tried before the court, which rendered a judgment for the plaintiffs for the value of the goods sold on the faith of the guaranty (69 Fed. 520), and the defendant sued out this writ of error.

A. U. Quint (Ross & Ross were with him on the brief), for plaintiff in error.

D. K. Tenney, H. K. Tenney, S. P. McConnell, M. L. Coffeen, and C. H. Wells filed brief for defendants in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge, after stating the case as above, delivered the opinion of the court.

Exceptions were taken to the admission of the testimony of one of the plaintiffs, to the effect that he acknowledged, by letter, the receipt of the defendant's letter of guaranty, and that he sold Nichols the goods on a credit on the faith of that guaranty. The only objection interposed at the time to the admission of this testimony was the common, if not meaningless, formula, that it was "incompetent, immaterial, and irrelevant." It was clearly material and relevant, and why it was incompetent was not stated. The exception, therefore, goes for nothing. If a reason had been

given why it was incompetent, it would probably have been that the letter acknowledging the receipt and accepting the guaranty was the best evidence, and should be produced. If the exception had been stated in this form, it would have been unavailing, because it was shown that written notice was served on the defendant to produce the original letter, and that he refused to produce it, and thereupon the court properly admitted a duly authenticated letterpress copy of the same.

It is assigned for error that "the court erred in holding that the notice to produce documentary evidence, as served on the attorneys for the defendants, was sufficient." What the documentary evidence was, and why it was error to admit it, is not stated in the assignment of errors. It appears, from the record, that the defendant objected to the introduction of certain "documentary evidence," because the notice to produce it "does not comply with the statute in some respects." But in what respect it fell short of the statutory requirements was not stated, and the objection was, therefore, rightly overruled. Like insufficient objections were taken to a few words, or short sentences, in the testimony of two other witnesses. The testimony objected to had no bearing on the merits of the case, and is so irrelevant and immaterial as not to require or justify a further reference to it.

The assignment of error chiefly relied on is that the court erred in its finding on the testimony. It is not very easy to determine from this record whether the court's finding of facts was intended to be general or special. We call attention again to the very unsatisfactory practice that obtains in some of the circuit courts in the trial of cases before the court without a jury. The finding in such cases may be general, like the general verdict of a jury, or it may be special, like the special verdict of a jury. When the finding is special, the facts found should be stated as they would be in a special verdict of a jury. In stating the facts found, no reference whatever should be made to the evidence upon which those facts are found. Neither the evidence nor any discussion of it should be injected into the ultimate finding of facts, upon which the court rests its judgment. The special finding of facts should be a clean-cut statement of the ultimate facts, without importing into it the evidence, or the reasoning by which the court arrived at its finding. If the court desires to edify the beaten party by setting out and discussing the evidence, and giving the reasons for its finding thereon, it may do so; but the paper which contains all this should not be a part of, or in any way connected with, the special finding of facts. In the opinion of the court, found in the record, the facts specially found are so mingled with a statement of the evidence, and a discussion of law and facts, and the reasons for the court's conclusions thereon, that we cannot say that it is any more than an opinion of the court intended to vindicate the correctness of its general finding of the issues of fact and law in favor of the plaintiffs. An opinion stating evidence, instead of facts found, is not a statement of facts, or a special finding of facts. *Adkins v. Sloane*, 8 C. C. A. 656, 60 Fed. 344; on rehearing,

10 C. C. A. 69, 61 Fed. 791; *Dickinson v. Bank*, 16 Wall. 257; *Town of Ohio v. Marcy*, 18 Wall. 552; *Flanders v. Tweed*, 7 Wall. 425.

But the sufficiency of the facts found, whether the finding be treated as general or special, to support the judgment, is not questioned. The assignment of error is that the evidence did not warrant the court in finding the issues of fact as it did, and not that the facts as found by the court did not support the judgment. As was said by the supreme court in *Lehnen v. Dickson*, 148 U. S. 71, 77, 13 Sup. Ct. 481, "the duty of finding the facts is placed upon the trial court. We have no authority to examine the testimony in any case, and from it make a finding of the ultimate facts." Moreover, if it were permissible for this court to examine the testimony, with a view of determining whether it was sufficient to support the court's finding of facts, the bill of exceptions does not show that the record contains all of the evidence.

The judgment of the circuit court is affirmed.

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SAWYER et al. v. WILLIAMS et al. (three cases).

(Circuit Court, D. Maryland. February 27, 1896.)

**SURETY FOR COSTS—EXTENT OF LIABILITY.**

When a plaintiff, in a case which has been removed from a state court to a federal court, gives security, in the latter court, for costs, by a stipulation signed by sureties, who bind themselves as security "for costs and fees in" the case, such sureties, upon judgment being rendered against the plaintiff for costs, are liable for the costs accrued in the state court before removal, as well as for the costs in the federal court, and, under the rules of the circuit court for the district of Maryland, for all taxable fees due from the plaintiff to the clerk, marshal, and commissioners, and the docket fees of plaintiff's attorney, as well as for the costs recoverable by the defendant from the plaintiff.

Henry C. Kennard, for plaintiff.

John H. Thomas, for defendant.

De Este K. Fisher, for Gill and Fisher, sureties.

MORRIS, District Judge. The plaintiffs in the three above-entitled cases were citizens of New York, and upon petition of defendants, in July, 1884, these were removed into the circuit court of the United States for the district of Maryland. Before the removal the defendants had obtained in the state court a rule in both the law cases requiring the plaintiffs to give security for the defendants' costs. In January, 1885, after the cases had been removed, security was given by the plaintiffs in all three cases, Messrs. Gill and Fisher becoming their sureties. The plaintiffs are now alleged to be insolvent, and, all three cases having been dismissed, with judgment against the plaintiffs for costs, the question now presented is, for what costs are the sureties liable? The form of the obligation was in each of the three cases a written stipulation, signed by the sureties, in these words: "We hereby bind ourselves, jointly and severally, as security for costs and fees in the above cases."

First, as to whether the costs in the state court are to be taxed by this court as costs of the case with which the plaintiffs are chargeable. The removal does not separate the case into two parts. When it is removed, the proceedings which have been had in the state court come with the case into this court, and have the same effect given them as if they had taken place in this court. The removal act provides that the federal court "shall proceed therein as if the suit had been originally commenced in said circuit court and the same proceedings had been taken in such suit in said circuit court as shall have been had therein in said state court prior to its removal." The state court, upon the filing of the petition for removal and bond, could, under the removal statute, proceed no further, except to order the removal, and could make no order awarding costs. After that, any order with regard to costs must be had in the federal court, as the state court was without jurisdiction. It would appear, therefore, that the costs which had already been incurred by either party in the state court are matters to be adjudicated in the federal court to which the case is removed; and, as there is but one continuous case, the costs incurred in the state court are part of the costs of that case, to be taxed and payment enforced in the court which has jurisdiction of it. *Steamship Co. v. Tugman*, 67 Fed. 16; *Car Co. v. Washburn*, 66 Fed. 790. In *Clare v. National City Bank*, 14 Blatchf. 445, Fed. Cas. No. 2,793, the state costs disallowed were not the costs already incurred and payable in the state court at the time of removal, but costs which would have been taxable under the state law if the case had remained in the state court, and there gone to judgment. The matter in dispute was the allowance of the fees to the attorney of the prevailing party which, under the state law, he would have been entitled to upon judgment. The court held that there was no vested right to those costs until judgment, and that only such fees could be taxed as were allowed by the law governing the court which entered the judgment. The case of *Chadbourne v. Insurance Co.*, 31 Fed. 625, would seem to merely follow *Clare v. National City Bank*. In *Wolf v. Connecticut Mut. Life Ins. Co.*, 1 Flip. 377, Fed. Cas. No. 17,924, and also in *Cleaver v. Insurance Co.*, 40 Fed. 863, it was distinctly held, upon reasoning which is persuasive, that costs actually accrued in the state court prior to the removal are taxable in the circuit court upon final judgment.

The other question is whether the stipulation given by the sureties in these cases is to be held to cover the taxable costs due by the plaintiffs to the clerk, marshal, and commissioners, and the docket fees of their attorneys, as well as to those which the defendants are entitled by the judgment to recover. If the plaintiffs could, under the rules applicable, be required to give security only for the costs of the defendants, the sureties could rightly claim to have their liability restricted to the defendants' costs. The circuit court rules are as follows:

No. 49: "Every plaintiff non resident of this state shall give security for costs on or before the first return day after the defendant appears, or the

action shall be non prossed or discontinued, unless the court for cause shall allow further time."

No. 50: "In all actions at law or suits in equity the plaintiff shall give security for fees before issuing the writ, and in default of such security the attorney or solicitor shall be held answerable for the fees payable by such plaintiff; and in cases where security has not been given pursuant to this rule the attorney or solicitor shall be answerable for all costs and fees which may accrue in such action or suit."

These rules are not restricted to the costs to be paid by the plaintiff to the defendant if he prevails, but embrace all costs and fees, whether due to the prevailing party or chargeable to the plaintiff in favor of any of the officers or attorneys of the court. It is to be held, therefore, that the stipulation for costs signed by the sureties in which they bound themselves as security for the costs and fees in each case covers all the costs and fees in the case for which the plaintiffs could be required to give security; and under the rules it is apparent that the plaintiffs were required to give security, not only for the defendants' costs, if they should be adjudged to pay the defendants their costs, but also for the costs chargeable to the plaintiffs themselves, if not paid. *Henning v. Telegraph Co.*, 40 Fed. 658.

It has been urged that the plaintiffs intended by rules 49 and 50 are only plaintiffs who, by original writs, institute cases in this court, and not those who are brought in by the removal of a case from the state court. I do not think this contention can be sustained. The act of 1875 (18 Stat. 470), under which these cases were removed, provides "the case shall then proceed in the same manner as if it had been commenced in the said circuit court"; so that it would seem clear that rules 49 and 50 were as applicable to these cases as if they had been originally commenced in this court; and that in giving security for all the costs and fees the plaintiffs were only doing what the rules required them to do. My ruling, therefore, is that sureties are liable for the defendants' costs in both the state court and in this court, and for all the taxable fees due by the complainants in both courts which they have not already paid.

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#### NATIONAL BUTTON WORKS v. WADE.

(Circuit Court, S. D. New York. February 1, 1896.)

COURTS—JURISDICTION IN PATENT CASES—WHERE SUIT MAY BE BROUGHT.

A resident of the Eastern district of New York, who is doing business in the Southern district, and is "found" and served therein, may be sued therein for infringement of a patent by a corporation of another state. In *re Hohorst*, 14 Sup. Ct. 221, 150 U. S. 659, followed.

Motion to Dismiss Bill for Want of Jurisdiction.

The complainant is a Pennsylvania corporation; defendant a citizen of New York, doing business in the Southern district, but a resident of the Eastern district, of that state. He was "found" in the Southern district, and there served with process. The suit is for infringement of a patent.

W. P. Preble, Jr., for the motion.  
Jerome Carty, opposed.

LACOMBE, Circuit Judge. Subsequent to the passage of the act of 1887, and prior to the decision of the supreme court in *Re Hohorst*, 150 U. S. 659, 14 Sup. Ct. 221, applications such as this, when made upon like facts, were uniformly granted in patent causes in this circuit, and the decided preponderance of authority in other circuits approved such a disposition of them; the act of 1887 being construed as operating in restriction of jurisdiction. The opinion in the *Hohorst Case* has been held to apply to all patent causes by Judge Wheeler in *Smith v. Manufacturing Co.*, 67 Fed. 801, and by Judge Townsend to apply only to such suits when brought against aliens. *Union Switch & Signal Co. v. Hall Signal Co.*, 65 Fed. 625. See, also, opinion of Judge Colt in *Donnelly v. Cordage Co.*, 66 Fed. 613. The latter construction commended itself to the judge now sitting, and has been followed in at least two cases, not reported. It is doubtful, however, whether the *Hohorst Case* can be thus distinguished in view of the later opinion of the supreme court in *Re Keasbey & Mattison Co.* (Dec. 16, 1895) 16 Sup. Ct. 273, where that court says that the *Hohorst Case* was "a suit for infringement of a patent right, exclusive jurisdiction of which had been granted to the circuit courts of the United States by sections [of the Revised Statutes] re-enacting earlier acts of congress; and was, therefore, not affected by general provisions regulating the jurisdiction of the courts of the United States concurrent with that of the several states." The motion to dismiss is therefore denied.

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GOWEN v. BUSH. DAVISON v. GIBSON. ST. LOUIS & S. F. RY. CO. v. BARKER.

(Circuit Court of Appeals, Eighth Circuit. February 3, 1896.)

Nos. 535, 605, 615.

CIRCUIT COURTS OF APPEALS—JURISDICTION—EFFECT OF CHANGE ON PENDING APPEALS.

Act March 1, 1895 (28 Stat. 693, c. 145), creating a court of appeals for the Indian Territory, containing no clause saving the jurisdiction of the circuit court of appeals for the Eighth circuit over pending appeals and writs of error, the latter court has no power to hear and determine any cases coming from the United States court in the Indian Territory which were pending and undetermined on its docket on March 1, 1895.

In Error to the United States Court in the Indian Territory.

J. W. McCloud, for plaintiff in error Gowen.

William H. H. Clayton (James Brizzolara, James B. Forrester, and James Parks were with him on brief), for defendant in error Bush.

S. B. Dawes (S. S. Fears was with him on brief), for plaintiff in error Davison.

William T. Hutchings (Nathan A. Gibson was with him on brief), for defendant in error Gibson.

P. L. Soper (Edward D. Kenna was with him on brief), for plaintiff in error St. Louis & S. F. Ry. Co.

R. Sarlls, for defendant in error Barker.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. In the above-entitled cases the several writs of error were sued out before the act of March 1, 1895 (28 Stat. 693, c. 145), creating a court of appeals for the Indian Territory, and giving it appellate jurisdiction over the United States courts in that territory, took effect. The several writs of error now in question were therefore properly sued out and returned to this court. But the cases had not been heard when the act of March 1, 1895, went into operation. The point is now made that, inasmuch as the act of March 1, 1895, contains no saving clause reserving to this court the power to hear and decide such cases coming from the United States court in the Indian Territory as might be pending and undetermined at the time the act of March 1, 1895, took effect, this court is now without power to hear and decide such cases. We are constrained to hold that this point is well taken. The act of March 1, 1895, unquestionably deprived this court of the appellate jurisdiction theretofore exercised over the United States court in the Indian Territory, and it contained no express reservation of power to hear and decide such cases as might be pending when the act in question took effect. The case is therefore on all fours with *Railroad Co. v. Grant*, 98 U. S. 398, where it was held that when the jurisdiction of an appellate court over cases coming from an inferior court is taken away by statute, the statute operates to deprive it of the power to hear and decide cases already pending on its docket which came from such inferior court, unless the power to hear and decide such cases is expressly reserved. With reference to this question Mr. Chief Justice Waite said:

"A party to a suit has no vested right to an appeal or a writ of error from one court to another. Such privilege, once granted, may be taken away, but, if taken away, pending proceedings in the appellate court stop just where the rescinding act finds them, unless special provision is made to the contrary. The Revised Statutes gave parties the right to remove their causes to this court by writ of error and appeal, and gave us the authority to re-examine, reverse, or affirm judgments or decrees thus brought up. The repeal of that law does not vacate or annul an appeal or writ already taken or sued out, but it takes away our right to hear and determine the cause if the matter in dispute is less than the present jurisdictional amount. The appeal or the writ remains in full force, but we dismiss the suit, because our jurisdiction is gone." See, also, *Butler v. Palmer*, 1 Hill, 324.

In view of this decision it seems obvious that this court has no power to hear and decide any cases coming from the United States court in the Indian Territory that were pending and undetermined on its docket on March 1, 1895. Following the practice indicated in *Railroad Co. v. Grant*, *supra*, the writs of error in each of the above-entitled cases will be dismissed, each party to pay his own costs.

## WHEELER et al. v. BILLINGS et al.

(Circuit Court of Appeals, Eighth Circuit. December 30, 1895.)

No. 554.

## 1. EQUITY PRACTICE—ACCOUNTING—DIRECT ACTION OF COURT.

It is not necessary that an account decreed in a suit in equity should be stated by a master, but it is within the discretion of the court, if for any reason it deems it proper to do so, to state the account itself, after an examination of the testimony taken by one or more masters.

## 2. SAME—APPORTIONING INTERESTS—ABSENCE OF PARTIES—FORM OF RELIEF.

The owners of the D. mining claim and the owners of sundry adjacent claims, between whom and the owners of the D. claim there had been disputes as to their respective rights in certain locations, organized the C. Mining Co., and conveyed to it their various rights in the disputed locations. One-half the stock was assigned to the owners of the D. claim. The other half was placed in trust for the owners of the other claims, who could not agree upon a division of the stock, with the understanding that an account should be kept of the ore taken from the several locations, and the proceeds, after deducting one-half for the owners of the D. claim, should be paid to the grantors of the several claims. Subsequently, in a suit brought by third parties against the assumed owners of the E. Mine, one of the locations, it was adjudged that an interest in the location belonged to such third parties. *Held* that, in the absence of some of the parties interested in the stock of the C. Mining Co. held in trust, the court could not, in such suit, apportion the stock so held, and direct a transfer of the shares, but that the most that could be done was to adjudge that the assumed owners of the E. Mine should transfer a proper proportion of such interest as they had in such stock to the parties found to have had an interest in the location.

## 3. RATIFICATION—UNAUTHORIZED SALE—ESTOPPEL.

*Held*, further, that said assumed owners of the E. Mine should not be excused from transferring to those found to be the true owners their interest in the stock of the C. Mining Co., on the ground that their transfer of the location to the C. Co. could be attacked, and the location recovered from the C. Co., by such true owners, since the latter, by claiming and accepting the stock, would be held to have ratified the sale, and to be estopped from taking such action to recover the location.

## 4. FRAUD—FOLLOWING PROCEEDS OF PROPERTY.

Large sums having been paid, under the agreement by which the stock of the C. Co. was placed in trust, to the assumed owners of the E. Mine, who were also owners of other claims sold to the C. Co., *held*, that the true owners of the E. Mine were entitled to recover from the assumed owners only such part of said money as could be shown to have been paid them as the proceeds of ore taken from the E. Mine.

## 5. SAME—SUCCESSIVE ACTORS—INDIVIDUAL—CORPORATION.

The assumed owners of the E. Mine, as against whom the true owners were adjudged to be entitled to the same, or the proceeds thereof, were one W., who held the mine for a time individually, and a corporation organized by W., to which he conveyed the mine, and of which he was a stockholder, officer, and active manager. *Held*, that no decree for the profits of the mine during the time of W.'s individual holding could be rendered against the corporation, but that a decree could properly be rendered against both W. and the corporation jointly for the profits of the period during which the mine was held by the corporation.

## 6. EQUITY PRACTICE—DEFENSE INTERPOSED OUT OF TIME—PROOF.

When a defense in an equity suit is withheld until a late stage in the litigation, after the issues, as at first raised, have been decided, and the



case is proceeding before a master, such defense, if its introduction can be permitted at all, must, in order to prevail, be established by evidence of the most satisfactory and convincing character.

Appeal from the Circuit Court of the United States for the District of Colorado.

This case was before this court at the October term, 1891, on appeal from a decree dismissing the bill of complaint. The decree appealed from was reversed, and the case was remanded to the circuit court, with instructions—First, “to permit William G. Scott, as representative of Matilda Scott, deceased, to become a complainant in the bill, and to require Richard J. Doyle to be made a defendant to the proceedings, in order that any right or claim he may hold to the property in dispute may be settled by the final decree herein”; second, to enter a decree “canceling the deeds and powers of attorney executed by Margaret Billings, James O. Wood, and Charles E. Wood to David Robertson, James Devereux, or other parties, purporting to convey their interests in the mining property in the bill described, and which are set forth in the bill herein filed,—said decree to declare and establish the rights and title of the widow and children of William J. Wood to the one-third of said Emma mining property, as against the defendants, Jerome B. Wheeler and the Aspen Mining & Smelting Company”; and, third, “to direct a proper accounting between the parties upon the basis of the rights thus decreed.” 10 U. S. App. 1, 65, 2 C. C. A. 252, 264, 51 Fed. 338; Id., 10 U. S. App. 322, 3 C. C. A. 69, 52 Fed. 250. In obedience to the aforesaid order the circuit court on January 21, 1893, entered a decree which canceled the several deeds and powers of attorney referred to in said order, and established the title of the widow and children of William J. Wood, deceased, to an undivided one-third interest in said Emma Mine and mining claim, as against the appellants, Jerome B. Wheeler and the Aspen Mining & Smelting Company, who were the defendants below. The decree of the circuit court further adjudged and determined that the appellees, who were the complainants below, “are entitled to \* \* \* one-third of the entire proceeds of said mine and mining claim from the time the same became a productive mine to the date of this decree, after deducting all reasonable and necessary expenses and outlays by said Wheeler and said Aspen Mining & Smelting Company in the working and developing of said mine and mining claim, and in purchasing the necessary tools, engines, cars, and other mining machinery and necessary mining apparatus, and everything necessary to the working of said mine; \* \* \* that said defendant Wheeler and said Aspen Mining & Smelting Company account to the said complainants for the value of one-third of all the capital stock of said Compromise Company, mentioned in the separate answers of said Wheeler and said Aspen Mining & Smelting Company to the said bill of complaint, which the said Wheeler and said company received in consideration of their conveying to the said Compromise Company that portion of the said Emma Mine and mining claim mentioned and described in the separate answer of the said Aspen Mining & Smelting Company; \* \* \* and that the said complainants and said widow and children of the said William J. Wood, deceased, are entitled to the value of the one-third of the whole amount of the capital stock of the said Compromise Company received by said Wheeler and said Aspen Mining & Smelting Company in consideration of the said consolidation of the said portion of said Emma Mine and mining claim with other portions of mining ground owned by said Compromise Company, and for the purpose of mining all of said consolidated mining ground together and to better advantage, as shown by the said answers and pleadings in this suit; \* \* \* that the said complainants and said widow and children of the said William J. Wood, deceased, are entitled to the one-third of all the dividends and sums of money received from time to time by said Wheeler and said Aspen Mining & Smelting Company from the said Compromise Company, from the time of its organization up to the present time, in consideration of the consolidation of said portion of said Emma Mine and mining claim before mentioned with the other mining ground owned by said Compromise Company; \* \* \* that

the said Jerome B. Wheeler, or the Aspen Mining & Smelting Company, as his grantee, is entitled to, and the owner of, the one forty-second part of said Emma Mine and mining claim, \* \* \* and the one forty-second part of the said stock realized from said Compromise Company as aforesaid by virtue of said consolidation of said portion of said Emma Mine and mining claims with mining grounds belonging to the said Compromise Company as aforesaid, and is also entitled to one forty-second part of the dividends paid them on said stock as aforesaid by virtue of the said Wheeler having purchased the one forty-second part or interest in said Emma Mine belonging to the said Maggie Cavern, one of the complainants in the said bill, and whose conveyance of her said interest to said Wheeler was held good and binding by the \* \* \* United States circuit court of appeals." It was further ordered and adjudged, in substance, that the case be referred to Sanford C. Hinsdale, master in chancery, to take and state an account between the complainants and the defendants, pursuant to the aforesaid provisions of the decree, and to ascertain the amount of money due to the complainants on account of their ownership of an undivided  $\frac{1}{2}$  interest in and to said mining claim, less the  $\frac{1}{42}$  part thereof belonging to Maggie Cavern, which was adjudged to have been lawfully acquired by the defendants. Proceedings to state the account were begun before the master, pursuant to the provisions of the aforesaid decree, on February 2, 1893; but they were interrupted and suspended by an appeal taken on March 21, 1893, to the supreme court of the United States from an order made by the circuit court (53 Fed. 561) overruling certain objections to its jurisdiction. This appeal was subsequently dismissed (*Smelting Co. v. Billings*, 150 U. S. 31, 14 Sup. Ct. 4), whereupon, by an order made on June 18, 1894, the former master, Sanford C. Hinsdale, was directed to return into court the testimony theretofore taken by him, and the case was referred to Adolphus B. Capron, Esq., a master in chancery, to complete the taking of the testimony. By the same order the complainants below were given two days in which to take additional testimony; the defendants were required to complete their proofs by July 12, 1894; and the master was directed to file a final report of the evidence taken before him on July 14, 1894. The case was set down for hearing on July 19, 1894, and was heard on that day by the circuit court, upon the testimony taken and returned by the several masters.

As a result of such hearing the circuit court on August 22, 1894, rendered the following decree, in substance: First. That there was due and owing to the following heirs of William J. Wood, deceased, to wit, Margaret Billings (formerly the widow of William J. Wood, deceased), James O. Wood, Charles E. Wood, Thomas E. Wood, Hiram H. Wood, and William Wood (surviving sons of William J. Wood, deceased), on the 16th day of July, A. D. 1894, from Jerome B. Wheeler and the Aspen Mining & Smelting Company, for ores raised and sold by said defendants from the said Emma lode and mining claim, after deducting all necessary expenses and disbursements, and adding lawful interest, computed according to the laws of the state of Colorado, the sum of \$434,008.58; said sum being the value of the ores, with lawful interest added, and all necessary expenses and disbursements deducted, which, under the terms of the decree entered on the 21st day of January, 1893, belonged to the above-named heirs of William J. Wood, deceased, which were sold by the said defendants, Jerome B. Wheeler and the Aspen Mining & Smelting Company, and the proceeds thereof retained by said defendants, for which they are required to account to the said Margaret Billings, James O. Wood, Charles E. Wood, Thomas E. Wood, Hiram H. Wood, and William Wood. Second. That the said complainants were the owners of 304 shares of the capital stock of the Compromise Mining Company, the same being their proportion of the capital stock of the said Compromise Mining Company received by the defendants, Jerome B. Wheeler and the Aspen Mining & Smelting Company, in consideration of a conveyance made by the Aspen Mining & Smelting Company to the said Compromise Company of 3,988 acres of surface ground of the said Emma lode mining claim,—said 304 shares of the capital stock of said Compromise Mining Company to be apportioned among the complainants according to their respective interests therein, as heirs of William J. Wood,

deceased, under the laws of the state of Colorado; that said defendants, Jerome B. Wheeler and the Aspen Mining & Smelting Company (or D. M. Van Hoesvenbergh, trustee, if said shares of stock are held by him), shall forthwith assign and transfer said stock, upon the books of said Compromise Company, to the above-named heirs of William J. Wood, deceased; and that any and all unpaid dividends upon said shares of stock, now due or hereafter to become due, shall be paid to the above-named heirs of William J. Wood, deceased. Third. That there was due and owing to the complainants aforesaid on the 16th day of July, 1894, from Jerome B. Wheeler and the Aspen Mining & Smelting Company, for moneys realized by the said Compromise Mining Company, for ores raised and sold prior to the 1st day of January, 1893, with lawful interest added up to July 16, 1894, the sum of \$104,984.05; said moneys having been by the said Compromise Mining Company paid to and retained by the said defendants, Jerome B. Wheeler and the Aspen Mining & Smelting Company, and for which they are required to account to the said complainants. The decree further declared that inasmuch as the interest of Maggie Cayner had been acquired by the defendants, and that inasmuch as William G. Scott had withdrawn his application to be made a party complainant to the suit, the interest of both of said parties, as heirs of William J. Wood, deceased, amounting to  $\frac{2}{42}$ , had been excluded from the accounting and the decree. After the terms of the decree had been announced, the defendants below petitioned the circuit court to reform and modify the aforesaid decree of January 21, 1893, by striking out so much thereof as adjudged that the complainants, as heirs of William J. Wood, deceased, were entitled to the value of one-third of the whole amount of the capital stock of the Compromise Mining Company, which the defendants Wheeler and the Aspen Mining & Smelting Company had received in consideration of the consolidation of a portion of the Emma Mine with other mines of the Compromise Mining Company. They also moved to expunge so much of said decree as adjudged that the complainants below were entitled to one-third of the dividends received by said defendants from the Compromise Mining Company in consequence of said consolidation. This motion was denied by the circuit court. The case comes to this court on an appeal taken and prosecuted by the defendants from the final decree which was entered on August 22, 1894.

Joel F. Vaile (Edward O. Wolcott and James M. Downing were with him on brief), for appellants.

T. A. Green, for appellees.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

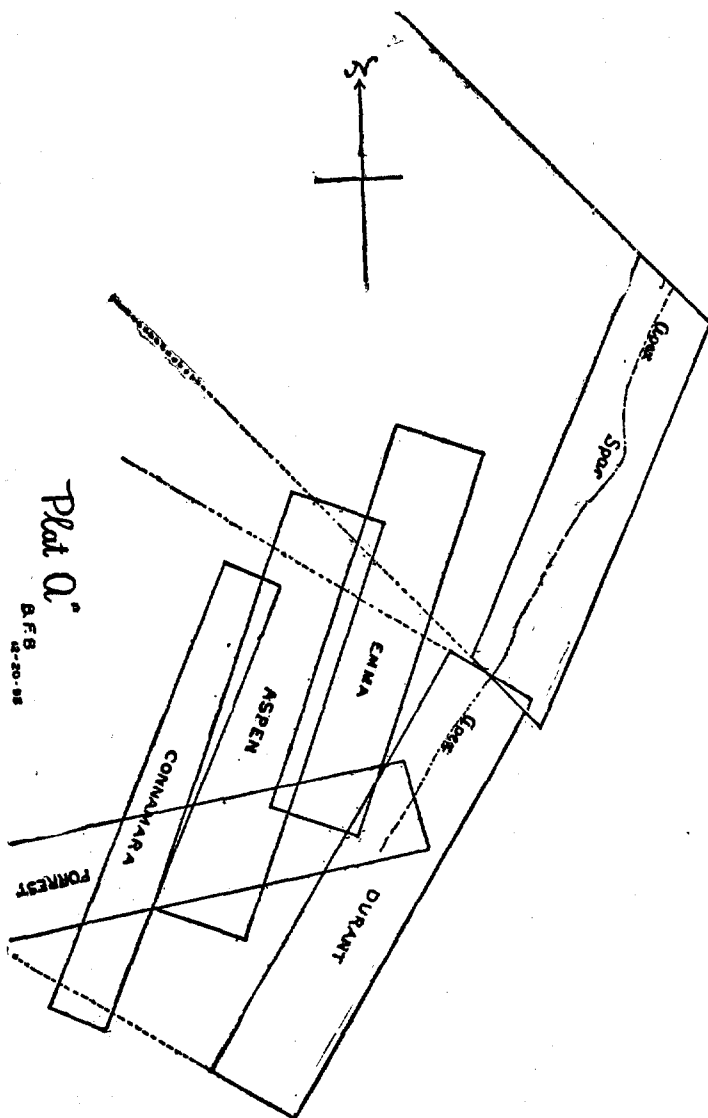
THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The first question to be considered has reference to the action of the circuit court in assuming to state the account itself, after an examination of the testimony which was taken and returned by the respective masters, instead of requiring the masters, or either of them, to report their individual conclusions upon the testimony so taken. It is contended in behalf of the appellants that such action on the part of the circuit court deprived them of the rights secured by equity rule 83, and that the decree should, for that reason alone, be reversed. With reference to such contention, it is only necessary to say that the action in question was doubtless at variance with the ordinary practice, but it affords no ground for reversing the decree, if it was for the right party and for the right amount. Notwithstanding the fact that it is ordinarily the duty of a master to file a written report containing his conclusions

upon questions of fact that may have been submitted to him, yet it is within the discretion of the chancellor to relieve the master of the duty of making such a report, if, for any reason, he thinks proper so to do. A chancellor has all the powers that can be exercised by a master, and if, in a given case, he sees fit to discharge a part of the functions that are ordinarily discharged by a master, the parties to the litigation have no just ground for complaint. In the present case the circuit court probably assumed, in view of the magnitude of the interests involved, that, if the master filed a report in the ordinary form, it would doubtless be compelled, on exceptions filed thereto, either by one or both of the parties, to examine and review all the testimony on which the master's findings were based. The action which the circuit court saw fit to take doubtless had the effect of speeding the cause, and neither party can be heard to complain in this court merely on account of the departure from the ordinary course of procedure; it being within the discretion of that court to state the account for itself, on an inspection and examination of the testimony, if it seemed expedient to undertake that labor.

It is next insisted by the appellants that those provisions of the decree of January 21, 1893, were and are erroneous, which required the defendants, Jerome B. Wheeler and the Aspen Mining & Smelting Company, to account for the shares of stock and dividends derived by them from the Compromise Mining Company, and that that portion of the final decree of August 22, 1894, was likewise erroneous which adjudged that the complainants below were entitled to 304 shares of the capital stock of the Compromise Mining Company, and that they were further entitled to have and recover from the defendants \$104,984.05 on account of ores taken by the Compromise Mining Company from the Emma Mine prior to January 1, 1893. These propositions necessitate a further statement of certain facts disclosed by the record, and, as the several contentions are closely related, for convenience they will be considered together. When the case was formerly before this court, we alluded to the fact that the Aspen Mining & Smelting Company had conveyed about four acres of the Emma mining location to the Compromise Mining Company, and that the latter company, which had not then, and has not since, been made a party to the suit, claimed to be the owner of that portion of said mine under conveyances executed by said Jerome B. Wheeler and by the Aspen Mining & Smelting Company. The former record, however, did not disclose any material facts relative to the organization of the Compromise Mining Company, further than the fact that there was such a company, and that it had acquired the title to a portion of the Emma mining claim. It now appears, as will be more fully shown by the annexed diagram, marked "Plat A," that there were in the same neighborhood a number of mining claims or locations belonging to different persons; among others, the Durant, the Emma, the Aspen, the Spar, the Connamara, and the Forrest.

Some time prior to the year 1887 the owner of the Durant Mine, which is represented on Plat A, laid claim to a large portion of the mineral-bearing ore found in the several mining locations which lay adjacent to the Durant claim on the west, among which were the



Emma, the Aspen, the Connamara, the Forrest, and one or two other claims not shown by the plat. The claim so preferred by the owner of the Durant Mine was based on the ground that the lode which was found underneath the several adjacent mining

claims had its apex within the limits of the Durant location, and that the owner of that location was accordingly entitled, under section 2322 of the Revised Statutes of the United States, to follow the lode outside of the west side line of the Durant claim, and underneath the adjacent locations, provided he kept within the north and south end lines of the Durant location, extended westwardly. Considerable litigation was occasioned by this controversy between the owners of the several conflicting claims, which was finally settled in the year 1887 by the formation of what is known as the Compromise Mining Company. The testimony in the present record shows that the owner of the Durant claim conveyed to the Compromise Mining Company so much of his lode, if any, as lay outside of the west side line of the Durant claim extended downward vertically, and that the several adjacent mine owners conveyed to the same company so much of their respective locations as lay within the north and south end lines of the Durant location extended westwardly. In this way the consolidated mining company acquired a title from the Aspen Mining & Smelting Company to a portion of the Emma location embracing about four acres, being that portion of the Emma location, shown on Plat A, which lies south of the north end line of the Durant claim extended westwardly. The capital stock of the Compromise Mining Company appears to have consisted of 10,000 shares, one-half of which were apportioned and delivered to the owner of the Durant Mine. The residue of the stock appears to have been placed in the hands of a trustee for the benefit of the owners of the adjacent claims who had conveyed portions thereof to the Compromise Mining Company; the arrangement between them being that an account should be kept of the ore extracted by the Compromise Mining Company from the territory which they had respectively conveyed to that company, and that each grantor should receive the net proceeds of all ores taken from the ground that he had so conveyed to the Compromise Company, less one-half thereof, which was to be paid to the owner of the Durant claim. This arrangement was adopted by the adjacent mine owners in lieu of a division of the one-half of the capital stock of the Compromise Mining Company, which was held in trust for their benefit, because they were unable to agree upon the comparative value of their several contributions to the territory of the Compromise Mining Company. The 304 shares of the capital stock of the Compromise Mining Company, which, by the final decree of August 22, 1894, were adjudged to belong to the heirs of William J. Wood, deceased, and were ordered to be assigned to them on the books of the company, are a part of the capital stock of the Compromise Mining Company which was held under the arrangement heretofore explained, and had never been apportioned among the several mine owners for whose benefit it was originally placed in trust.

In view of the foregoing facts, we think that the point is well made, in behalf of the appellants, that the circuit court erred in attempting to subdivide and apportion the stock of the Compro-

mise Mining Company so held in trust as aforesaid, and in directing a transfer of 304 shares thereof to the heirs of William J. Wood, deceased. The persons for whose benefit the stock in question is so held have never been able to agree upon a division thereof among themselves, for the reason that they disagreed as to the value of their several contributions to the property of the company; and it goes without saying that the circuit court was powerless to make such a division, because a number of the persons interested in the apportionment had not been made parties to the suit, and could not be bound by any order in that behalf made. As the other beneficiaries in the trust, besides the present appellants, are not before the court, the utmost relief that can be afforded in the present suit is to require Jerome B. Wheeler and the Aspen Mining & Smelting Company to transfer and assign to the heirs of William J. Wood, deceased,  $\frac{12}{42}$  of whatever interest the said Wheeler and the said Aspen Mining & Smelting Company now have in the Compromise Mining Company's stock, growing out of the conveyance of a portion of the Emma mining claim to that company. The transfer must be limited to  $\frac{12}{42}$ , because, for reasons already disclosed, only  $\frac{12}{42}$  of the Wood interest is represented or involved in the present suit.

The point is made by the appellants that they should not be compelled to surrender  $\frac{12}{42}$  of the interest in the Compromise Mining Company's stock, which they acquired in the manner aforesaid, and that they should not be compelled to account for the dividends, if any, which they have received from the Compromise Mining Company by virtue of their having acquired an interest in that company's stock. It is urged, in substance, that as the deeds and powers of attorney conveying the one-third interest of William J. Wood, deceased, in the Emma Mine, to Jerome B. Wheeler, have been canceled and annulled, the complainants below may hereafter proceed against the Compromise Mining Company for so much of the Emma mining location as has been conveyed to that company. It is further suggested that the complainants should be left to seek relief against that company for so much of the Emma Mine, and the ores taken therefrom, as it now claims to own under the conveyance made to it by the Aspen Mining & Smelting Company. We are not able, however, to assent to that view of the case. The complainants below have not appealed from the final decree, which gave them an interest in the Compromise Mining Company's stock, and required the defendants, Wheeler and the Aspen Mining & Smelting Company, to account for the dividends received thereon from the Compromise Mining Company. By not appealing from that portion of the decree, they have elected to receive and accept from the said defendants their due proportion of the consideration which was paid for the conveyance of a portion of the Emma Mine to the Compromise Mining Company. Such action on the part of the heirs of William J. Wood, deceased, who are parties to this suit, amounts to a ratification of the conveyance made by the Aspen

Mining & Smelting Company to the Compromise Mining Company of a portion of the Emma Mine, and they cannot hereafter maintain a suit against the latter company to recover that portion of the Emma Mine which it now holds. The Compromise Mining Company, we think, can plead the aforesaid action on the part of the complainants below as a bar to any future suit which they may see fit to bring against the Compromise Mining Company to recover that portion of the Emma Mine which it now holds, notwithstanding the fact that it has not been made a party to the present bill. A person cannot accept or recover from a fraudulent grantee of property the consideration which he has received for the sale of the property to a third party, and thereafter maintain an action against such third party for a recovery of the property itself. We are also of opinion that the averments of the bill of complaint, and the mandate of this court on the former hearing, are sufficient to justify the entry of a decree against the defendants below, such as is above indicated; compelling them to transfer a portion of their interest in the stock of the Compromise Mining Company, and also compelling them to account for a proper proportion of the dividends, if any, which they have heretofore received, that were derived from that interest. We think that the objections to such a decree, based on the character of the bill and the form of the mandate, are without adequate foundation, and are therefore untenable. Moreover, this litigation has now extended over many years, and has proven to be expensive to the litigants and burdensome to the courts. This fact furnishes an additional reason why the court should, if possible, so mold its decree as to terminate the controversy, instead of opening the door to additional litigation by requiring the complainants to seek further relief against the Compromise Mining Company.

It remains to be further decided, on this branch of the case, whether the circuit court erred in awarding to the complainants the sum of \$104,984.05 as their just proportion of the moneys received by Jerome B. Wheeler and the Aspen Mining & Smelting Company from the Compromise Mining Company, on account of ore extracted by it from that portion of the Emma Mine which was conveyed to the Compromise Mining Company. We are of the opinion, as heretofore stated, that the complainants are entitled to recover from the appellants <sup>12</sup>/<sub>42</sub> of whatever dividends were paid to them by the Compromise Mining Company on account of ores taken from the Emma Mine; but the important question to be determined is whether the evidence introduced on the hearing before the masters warranted a finding against the appellants in the sum of \$104,984.05, or in any other amount, on account of dividends thus received. This is an issue of fact to be determined in the light of all the evidence, and it is only necessary to state the conclusion that has been reached after an attentive reading of the testimony.

Large sums of money, by way of dividends, were doubtless paid to Jerome B. Wheeler, from time to time, after the formation of



the Compromise Mining Company, on account of an interest which he owned in the stock of that company; but as Wheeler was the owner of a large interest in the Aspen, Connamara, and the Forrest mining locations, which had contributed a large portion of their territory to the formation of the Compromise Mining Company, as will appear from Plat A, the fact that he received such dividends is no evidence that the Compromise Mining Company extracted ore from that portion of the Emma Mine which was conveyed to the Compromise Mining Company, or that it realized any profit from working that mine. The books of the Compromise Mining Company, as well as the testimony of the president of that company, show that no money was made out of mining operations that were carried on within the territory of the Compromise Mining Company which was covered by the Emma location. They further show that no dividends were paid, either to Wheeler or to the Aspen Mining & Smelting Company, on that account. We see no reason to distrust the accuracy of the books that were produced by the Compromise Mining Company. They appear to have been regularly kept, and bear no evidence of alterations. These books also show that the territory covered by the Aspen and Forrest claims yielded most of the valuable ore that was mined by the Compromise Mining Company, while other testimony tends to show that that portion of the Emma Mine lying south of the north end line of the Durant claim extended westwardly, had been extensively worked before the organization of the Compromise Mining Company, and that it had been, to a large extent, denuded of its valuable ores. In short, the proof contained in the present record is plenary—and there is little or no evidence to the contrary—that the appellants have not received any dividends from the Compromise Mining Company on account of mineral extracted from the Emma claim. Without going further into details of the evidence, it will suffice to say that we are satisfied that the circuit court erred in charging the appellants with the sum of \$104,984.05 on that account, and the charge so made must be expunged from the decree.

At this point it becomes necessary to notice a defense interposed on the last hearing before the circuit court, by which the defendants below sought to evade all liability to account to the heirs of William J. Wood, deceased, for any ore extracted by them from the Emma Mine, except such as may have been taken from that small triangular portion of the claim which lies between the south end line of the Spar claim and the north end line of the Durant claim, both lines extended westwardly. See Plat A. Jerome B. Wheeler, as it seems, is the owner of the Spar claim indicated on Plat A, lying to the east of the south end of the Emma location. The contention is, in substance, that the lode on which the Emma claim was originally laid, and from which all the ore mined underneath the surface of that claim has been taken, has its apex in the Spar and Durant claims, which lie east of the Emma, and on higher ground. It is insisted, therefore, that inasmuch as Wheeler and the owner of the Durant claim hold the

apex of the lode which underlies the Emma claim, they, or their successors in interest, are entitled to all the ore that has heretofore been taken from underneath the Emma location, with the exception above stated, and that the Wood heirs have no title thereto, or right to recover any part of the value thereof. This defense was not pleaded by the defendants below in their answer to the bill of complaint, but was raised for the first time on the hearing before the master, more than one year after the order of reference had been made, by the introduction of certain expert testimony, all of which was objected to at the time, which had some tendency, perhaps, to show that the apex of the Emma lode was found in the Spar and Durant claims. Moreover, when the interlocutory decree of January 21, 1893, was signed, which expressly adjudged that the Wood heirs were entitled to one-third of the net proceeds of the Emma Mine, and further required the defendants to account therefor from the time said mine and mining claim became productive, no exception was taken thereto, nor was the court asked to so frame the interlocutory decree as to permit the master to hear testimony and to make a report concerning the apex contention, which is now deemed of such importance as to deprive the complainants below of the fruits of the litigation, to wit, of all right to participate in the profits derived from working the Emma Mine. In what we have thus said, we would not be understood as deciding that the appellants were and are barred of their right to make the apex defense because it was not pleaded in their answer to the bill. We express no decisive opinion on that question, but we allude to the facts above stated, and to the conduct of the defendants in holding a defense of such supreme importance in reserve until such a late stage of the litigation, as a good and sufficient reason why the trial court, and this court as well, should view the defense with disfavor, and require it to be established, if it is considered at all, by testimony of the most satisfactory and convincing character. The burden of establishing the defense in question is certainly upon the appellants, and, in view of the circumstances which tend to discredit it, the defense should be made out by proof which leaves little or no room for doubt that all the ores taken from underneath the surface of the Emma location were taken from a lode which in fact belonged to the owners of the Spar and Durant claims. The record now before us contains abundant evidence that the apex question, which was injected into the case on the hearing before the master, is not a new, nor by any means a settled, question in the locality where the several mining claims heretofore mentioned are situated. It is evident that it always has been, and still is, a debatable question, which has given rise to much speculation and to different theories. It has also occasioned considerable litigation among mine owners, and has developed a marked difference of opinion among practical miners and mining experts. The Compromise Mining Company, as heretofore shown, owes its origin and its present existence to the same apex controversy. The sev-

eral mine owners whose interests were vitally affected thereby evidently found it difficult, if not impossible, even by a great outlay of time and money, to settle the dispute before a jury, probably because an equal number of persons of equal skill and experience in the determination of such questions differed so widely in their views, and were able to give equally satisfactory reasons in support of their respective theories. They accordingly organized the Compromise Mining Company, in the manner heretofore explained, to avoid further controversy. On the hearing before the master, two witnesses were produced by the appellants, and examined at some length, with a view of showing that the apex of the Emma lode is found within the Spar and Durant locations. The complainants below offered no evidence in rebuttal; claiming, as they did, that the question was not submitted to the master, and that the evidence was therefore irrelevant. The testimony of these witnesses, as is usual in such cases, consists, in a great measure, of opinions and theories formed on an examination of the several mines, and an inspection of the physical characteristics of the surrounding country. One of the witnesses was an employé of the Aspen Mining & Smelting Company, and for that reason was most likely affected by a natural desire to be loyal to its interests. It is fair to presume that both witnesses have expressed opinions as highly favorable to the appellants as the circumstances of the case would warrant, and that neither of them was watchful to observe, or overcareful to state, such facts as would tend to overthrow the theory and to discredit the defense which the appellants sought to maintain. In view of the foregoing considerations, we have reached the conclusion that we would not be justified in finding, on the evidence contained in the present record, that the lode on which the Emma location was laid in fact belongs to the owners of the Durant and Spar claims, even if we felt satisfied that the issue was properly raised in the circuit court, and that it is properly before us for determination. The issue in question, upon the evidence now before us, is involved in too much doubt and uncertainty to justify a decision in favor of the appellants. The fact may be as contended by them, but it has not been proven with that degree of certainty which would warrant us in making a finding in accordance with their contention.

The next question for consideration is whether the circuit court erred in awarding to the complainants below the sum of \$434,008.58 as their just proportion of the value of all ores extracted from the Emma Mine by Jerome B. Wheeler and by his grantee, the Aspen Mining & Smelting Company. The record shows that the gross sum last mentioned contains an allowance for interest on the value of ores mined and sold, computed up to July 16, 1894, and that it is made up of two items, to wit, the sum of \$195,252.97, which was the amount allowed, together with interest, on account of ores mined and sold by Jerome B. Wheeler prior to January 1, 1886, which is hereafter termed the "Wheeler Period," and the sum of \$238,755.61, which was the sum allowed for

ores raised and sold by the Aspen Mining & Smelting Company subsequent to its organization, and after its purchase of the Emma Mine, in December, 1885, which is hereafter termed the "Smelting Company Period." It is contended by the appellants that both of these allowances were and are excessive. This contention raises an issue of fact that has necessitated a careful examination of all the testimony contained in a voluminous record, including numerous statements of account and exhibits. We shall only undertake to state the conclusion that has been reached after such an examination of the testimony, the accounts, and the exhibits.

In a petition for a rehearing that was filed by the appellants after the announcement of the terms of the decree, the appellants conceded that the gross receipts from the Emma Mine, including interest allowances, during the smelting company period, amounted to \$1,803,668.64. They further admitted that the total disbursements for necessary mining expenses during the same period did not exceed \$1,071,017.32, leaving the sum of \$732,651.32 as the net balance for distribution among the several owners of the Emma Mine, of which latter sum it was conceded that the complainants below, representing  $\frac{12}{42}$  of the interest of William J. Wood, deceased, were entitled to \$209,328.95. The amount apportioned to the complainants by the circuit court, including interest, on account of their share of the proceeds of the mine during the same period, was, as above stated, \$238,755.61. After a patient investigation of the testimony and the accounts, we have concluded that the evidence contained in the record is insufficient to warrant an allowance against the appellants on account of ores mined and sold during the smelting company period in excess of \$209,328.95, and that sum has accordingly been fixed as the correct amount of the allowance. It does not give credit to the appellants for what are termed "general expenses" of the Aspen Mining & Smelting Company, or "litigation expenses," because the evidence before us is insufficient to enable us to determine with any degree of accuracy what portion of such expenses ought to be apportioned to and charged against the Emma Mine, as distinguished from the numerous other mines belonging to the Aspen Mining & Smelting Company, on account of which such expenses were incurred. The appellants having failed to furnish any satisfactory evidence as to these alleged outlays, or to make any apportionment thereof on the books of the Aspen Mining & Smelting Company when the money was expended, they were, as we think, properly disallowed as credits in the accounting.

Greater difficulty has been experienced in determining the amount that ought to be awarded to the complainants below on account of the product of the Emma Mine during what is termed the "Wheeler Period." The mine, as it seems, became productive some time during the year 1884, but at what precise date is not shown with certainty; and it was thereafter worked by Wheeler until about January 1, 1886, when it was conveyed by him to the Aspen Mining & Smelting Company. The circuit court awarded to the complainants, including

interest, the sum of \$195,252.97, on account of ores mined and sold during that period, whereas, in the petition for a rehearing heretofore mentioned, the appellants insisted that they were only entitled to recover the sum of \$95,915.02. In other words, the allowance for this period is claimed to be excessive in the sum of \$99,337.95. The computation made in behalf of the appellants to show the result aforesaid is based upon the assumption that the total receipts from the Emma Mine during the Wheeler period amounted only to the sum of \$348,412.64, not including interest, whereas the complainants below contended, and the circuit court evidently found, that the total output during the period in question was a much larger amount. With reference to this controversy, it will suffice to say that we have become satisfied by an examination of the testimony that the sources from which the information relative to the early yield of the mine was compiled by the appellants are not reliable. No regular account appears to have been kept of the yield of the mine during the Wheeler period, or, at least, no such account was produced by the appellants at the hearing before the masters. Such information relative to the output of the mine as was obtained from books of account appears to have consisted of stray entries found in a journal, cash book, and ledger of the firm of J. B. Wheeler & Co., and of some entries found in the books of the Aspen Smelting Company, which was a corporation other and different from the Aspen Mining & Smelting Company. During the Wheeler period, according to the testimony of James H. Devereux, one of his confidential employes, one or two suits were brought against the defendant Wheeler by persons who claimed to have an interest in the Emma Mine, and other suits of a similar character were threatened. A controversy appears to have existed during most of the Wheeler period as to the persons who were entitled to an interest in the mine, and as to the extent of their several interests. Under these circumstances, and inasmuch as the defendant Wheeler was in possession of the property, and was extracting large quantities of valuable ore therefrom, and would very likely be called upon to account for some portion of the proceeds of the mine, it is a little remarkable, we think, that an authentic account of the amount of ore extracted from the mine was not kept, and that the same was not produced on the hearing before the masters and before the circuit court. In the opinion rendered by this court on the former hearing of the case (*Billings v. Smelting Co.*, 10 U. S. App. 1, 60, 2 C. C. A. 252, 51 Fed. 338) we alluded to the fact that the testimony of James H. Devereux showed that within a period of five or six months preceding the month of April, 1885, the Emma Mine had yielded \$300,000, and that, from indications given by ore then in sight, it would certainly produce as much more. The same witness further testified, in substance, in the course of the same examination as a witness for the present appellants, that the largest net output of the Emma Mine within any one month was about \$150,000. This latter statement, as we understand, must relate to the Wheeler period, inasmuch as the books of the Aspen Mining & Smelting Company fail to show that it produced that amount during any one month of the smelting company period. An-

other witness, A. W. Rucker, who owned a  $\frac{1}{24}$  interest in the Emma Mine, also testified that prior to April, 1885, the Emma Mine had yielded as much as half a million dollars, and that his estimate was based on the share of the proceeds of the mine which he had himself received. This testimony was properly before the circuit court for consideration on the last hearing of the case. In view of these considerations, we do not feel at liberty to disturb the finding of the circuit court relative to the output of the Emma Mine during what is known as the "Wheeler Period." The finding in question is not without good reasons to support it, and, in any event, it is entitled to the presumption which always attends the finding of a chancellor on an issue of fact,—that a correct conclusion has been reached,—unless it appears that an obvious error has intervened in the application of the law, or that some serious and important mistake has been made in the consideration of the evidence. *Tilghman v. Proctor*, 125 U. S. 136, 8 Sup. Ct. 894; *Warren v. Burt*, 12 U. S. App. 591, 600, 7 C. C. A. 105, 58 Fed. 101; *Latta v. Granger*, 15 C. C. A. 228, 68 Fed. 69, 72. It might possibly be suggested that because of the great discrepancy between the amount found to be due, and the sum claimed by the appellants to have been realized during the Wheeler period, the case is one which would justify a re-reference, and an additional investigation before a master relative to the output of the mine during the period in question. But the answer to this suggestion is that, if the appellants have other and better evidence of the gross yield of the mine than is found in the present record, they should have produced it on the hearing before the master, as it was their duty to do. If they have no such additional proof, nothing is to be gained by a re-reference. In a case-like the one at bar, where a defendant has been required to account for money and property wrongfully appropriated and retained, a court of equity will not grant him the privilege of a rehearing on account of the weakness of the case made by his adversary, if there is any data to establish the amount of his liability, where it seems probable that he has withheld any information that it was within his power, by proper diligence to have produced. The decree of January 21, 1893, establishing the liability of the appellants, and directing them to account, made it their duty to be active and diligent in discovering and in producing reliable proof before the master, which would show, with reasonable certainty, the gross output of the mine from the time it became productive, and the necessary expenses that had been incurred in working it. There is another reason as well why a re-reference of the case should not be ordered. The suit has now been pending in the courts for nearly eight years. It has already occasioned three appeals, and from time to time has given rise to acrimonious controversies. It is high time, therefore, that the litigation was terminated.

One further question remains to be noticed and decided. The circuit court rendered a decree against Jerome B. Wheeler and the Aspen Mining & Smelting Company, jointly, for  $\frac{12}{42}$  of the value of the ores taken from the Emma Mine during the Wheeler period, and also during the smelting company period. Such action on its

part is claimed to have been erroneous. The point thus raised is well taken, we think, with respect to ores mined during the Wheeler period. No reason has been assigned, and none, we think, can be given, why the Aspen Mining & Smelting Company should be held responsible for the value of ores appropriated by its codefendant, Wheeler, before the smelting company was organized and had acquired an interest in the property. But the case is different with respect to ores mined and sold during the smelting company period. Wheeler was the president of the Aspen Mining & Smelting Company, and its largest stockholder. He was a fraudulent grantee of the Wood interest in the Emma mining claim. He conveyed that interest in the claim, as well as his own, to the smelting company, that the claim might be worked to better advantage, and with the expectation that it would be worked and denuded of its valuable ores, and in the end rendered valueless. It was so worked for a number of years by his direction, and under his supervision, and, as a stockholder, he received, personally, a very large proportion of the total output of the mine. Under these circumstances, and for these reasons, we have concluded that he was a wrongdoer during the smelting company period, and that he cannot be permitted to shield himself from liability, behind the corporation of which he was president, for ores extracted during the smelting company period, and thereby compel the complainants to resort to the Aspen Mining & Smelting Company alone, which may or may not be financially able to answer for the wrongs committed. We think, therefore, that the circuit court acted properly in holding the defendant Wheeler to be jointly liable with the Aspen Mining & Smelting Company for  $\frac{12}{42}$  of the net value of the ores that were taken from the mine during the smelting company period.

For the reasons heretofore fully indicated, the final decree rendered by the circuit court on August 22, 1894, should be modified as follows: First. The sum of \$434,008.58, specified in the first paragraph of said decree, should be expunged therefrom, and in lieu thereof the sum of \$404,581.92 should be inserted. Second. The entire second and third paragraphs of said decree should be stricken out and expunged therefrom, and in lieu thereof the circuit court should adjudge, determine, and decree that the complainants, Margaret Billings, James O. Wood, Charles E. Wood, Thomas E. Wood, Hiram H. Wood, and William Wood are justly entitled to  $\frac{12}{42}$  of whatever interest the said Jerome B. Wheeler and the Aspen Mining & Smelting Company have, or have heretofore had, in the stock of the Compromise Mining Company, growing out of the conveyance of a part of the Emma mining claim to the said Compromise Mining Company; that within 20 days from the entry of the modified decree the said Jerome B. Wheeler and the said Aspen Mining & Smelting Company do cause to be executed, and filed with the clerk of the circuit court of the United States for the district of Colorado, a good and sufficient conveyance or assignment to the said complainants of an undivided  $\frac{12}{42}$  of the aforesaid interest in the stock of the Compromise Mining Company so held and acquired by them as aforesaid; that thereupon the said

complainants succeed to and stand subrogated to all the rights, of whatsoever nature or character, that were theretofore enjoyed, held, or exercised by the said Jerome B. Wheeler and the said Aspen Mining & Smelting Company in consequence of their ownership of the aforesaid interest in the stock of the Compromise Mining Company that shall be so conveyed and assigned; and that the said Jerome B. Wheeler and the said Aspen Mining & Smelting Company be forever enjoined and restrained from asserting, as against the complainants or the Compromise Mining Company, or any other person or persons, any right, title or claim whatsoever to the interest in the stock that shall be so conveyed, or to any dividends, rights, benefits, or privileges that may be incident thereto. Third. The last clause of the sixth paragraph of the decree, beginning with the words, "It is further ordered, adjudged, and decreed," should be stricken out, and in lieu thereof the circuit court should order, adjudge, and decree that the defendant Jerome B. Wheeler, within 30 days after the modification of the decree, shall pay, or cause to be paid, unto the complainants above named, the sum of \$195,252.97, with interest computed thereon at the rate of 8 per cent. per annum from July 16, 1894, until such payment is made, and that the defendants, Jerome B. Wheeler and the Aspen Mining & Smelting Company, do pay or cause to be paid to said complainants the further sum of \$209,328.95, with interest computed at the same rate as aforesaid, from July 16, 1894, until said payment is made, together with all costs incurred in the circuit court, and that, in default of making such payments within the time limited, executions for the several amounts aforesaid be issued in the ordinary form. The costs of the present appeal will be divided equally between the appellants and the appellees. The case is remanded to the circuit court, with directions to cause its decree of August 22, 1894, to be modified in the respects heretofore indicated.

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#### HAZLETON TRIPOD-BOILER CO. v. CITIZENS' ST. RY. CO.

(Circuit Court, W. D. Tennessee. January 17, 1896.)

##### CONTRACT OF SALE—PAROL EVIDENCE TO VARY—FRAUD.

An agreement was made by a boiler company to furnish certain boilers, yet to be made, to a corporation, "at cost." The cost, however, was figured by the selling agent, and inserted, as a specified sum, in a written contract of sale, which was signed by the purchasing company after being submitted to its president and board of directors, who were experienced business men. In a suit to enforce a mechanic's lien for the price, defendant claimed that the sum named in the contract was much more than the real cost. *Held*, that to avoid the written contract, under such circumstances, would require very formidable evidence of fraud in procuring the insertion in it of the sum named, especially as the word "cost" is of very indefinite meaning, as applied to the various elements of expense which might be considered as going into the production and delivery of the boilers.

This is a bill to enforce the mechanic's lien for the erection of boilers in the defendant's power house, the stipulated price being



**\$17,000.** The defendant company sets up fraud in the execution of the written contract, and asks to have it set aside. It is willing to pay only the cost of the boilers, which it avers was the real agreement, and was much less than the stipulated sum. The fraud charged is that Holmes, the agent of the plaintiff company, induced the president and board of directors to sign the written contract by false representation that it had been approved by Billings, the substantial owner of the defendant company, with whom the previous negotiations were made. It is admitted by the plaintiff company that it was the agreement to charge only the cost of the boilers, but that the sum of \$17,000 was figured as that cost, and inserted in the written contract with Billings' knowledge and consent. At the hearing the court, being dissatisfied with the inconclusive character of the proof as to the cost, and what should be included in the calculation, referred the cause to a master to take further proof and report the facts as to the actual cost of the boilers to the plaintiff. The master reported as follows:

#### Master's Report.

To the Honorable the Judges of said Court, Sitting in Equity, at Memphis, Tennessee: The undersigned respectfully reports that under a decree of said court made and entered of record on July 11, A. D. 1894, reciting that it was "material to inquire into and determine what was the actual cost to the plaintiff company of furnishing and erecting for the defendant company the three boilers referred to in the pleadings and evidence" in said cause, it was referred to the master "to take proof and report what was the cost to the plaintiff company of the boilers furnished to the defendant company; and inasmuch as the parties hereto are at variance on the question of the mode of constructing, the cost of furnishing and erecting, said boilers,—the plaintiff company contending that the same should be estimated on the basis of including therein all the costs, either direct, or indirect and incidental, embracing in the incidental and indirect cost a proper and just proportion of the general expense account of the plaintiff, and the defendant company contending that the same should be confined to the first and direct cost of manufacturing and erecting same,"—the master being by said decree specifically directed to "report the cost of said boilers upon each of said theories, itemizing in detail every element reported as entering into the cost under each theory." Since the entry of said decree of reference the complainant company has taken, and on November 17, 1894, filed, the deposition of G. W. Griffin, previously secretary, and now assignee, of said company, which made an assignment in December, 1892; and the defendant on October 16, 1894, filed the deposition of Henry Pratt. Griffin has charge of complainant's books, and with his deposition are filed, as exhibits, its accounts and bills, etc., accruing from the construction and erection of these boilers, the items of which all appear on the books. Exhibit 1 thereto shows the summary of all these accounts, as well as the "statement of expenses of conducting the business of the Hazleton Tripod-Boiler Co. for the year ending March 1, 1892." Complainant had no manufactory or plant for the manufacture of boilers. This deposition of Griffin, and the accounts, etc., filed with it, show that complainant actually expended, directly, in the construction and erection of these boilers, the following sums, viz.:

To draftsman for making plans of boilers.....	\$ 87 50
For materials used in the construction.....	9,738 63
For freight transporting boilers to Memphis, etc.....	870 06
For expenses at Memphis in erecting boilers.....	1,100 75
For traveling expenses, etc., of employés.....	560 80
For salaries of four men so employed.....	737 50

Making as the direct, first cost or actual expense..... \$13,095 24

Plaintiff claims there should be added to this first or direct cost a proper proportion of the general expense of conducting the business of the company, as an element in the entire cost of these boilers, and Mr. Griffin arrives at such proportion by charging  $\frac{1500}{4935}$  of the year's expenses to the further cost of these boilers; the company having sold during that year 26 boilers, having an aggregate of 4,935 horse power, the three constructed for defendant having 1,500 horse power. These general expenses are tabulated in Exhibit 1 to said Griffin's deposition, as follows:

1. Wages of employes, the sum of.....	\$ 9,739 67
2. Advertising expenses.....	4,086 93
3. Traveling .....	3,467 01
4. Commissions on sales.....	2,592 50
5. Expense account.....	2,313 03
6. Printing and stationery.....	1,292 59
7. Rent of office.....	1,333 34
8. Litigation expenses.....	676 35
9. Telegrams .....	120 89

\$24,622 31

And from the foregoing sum the witness deducts the amount of the wages and traveling expenses embraced in the direct expense, \$13,095.24, which leaves \$24,124.61, or \$4.88 per horse power, general expense on the engines sold that year.

On 1,500 horse power, at \$4.88, this would be.....	\$ 7,320 00
Which added to the first or direct cost.....	<u>13,095 24</u>

Make the plaintiff's full claim of all cost..... \$20,415 24

But the proof does not show just what is included in "wages of employes," though, from all the proof, it is inferred that this sum embraces, not only the regular wages of the men actually employed in superintending the construction of and in erecting boilers, but also the salaries of the officers of the plaintiff company. The monthly salaries of the four men who superintended the construction and erection of these three boilers amounted to \$737.50, or within a small fraction of 50 cents per horse power. At that rate per horse power, the like expenses to the company of such salaries on the remaining 23 boilers, of 3,435 horse power, would have

been .....	\$1,717 50
Which added to said sum on these three.....	<u>737 50</u>

Shows the proportion to be the sum of..... \$2,455 00

—For the company's like monthly wages proper. This being deducted from this entire item of \$9,739.67, "wages of employes," would leave as the sum of the official salaries embraced therein for the year the sum of \$7,284.67, or \$1.48 per horse power, and at this rate, on 1,500 horse power, would amount to the sum of \$2,220. To which the master reports there should be added a proportion of these items:

5. Expense account for the year.....	\$2,313 03
6. Printing and stationery.....	1,292 59
7. Office rent.....	1,133 34
8. Expense of telegrams.....	<u>120 87</u>

In all the sum of.....	\$4,859 83
Or $98\frac{1}{2}$ cents per horse power, and on 1,500 horse power....	<u>\$ 1,477 50</u>

Or in all, as general expenses, the sum of.....	\$ 3,697 50
Which, added to the first or direct cost.....	<u>13,095 24</u>

Makes the cost of these boilers..... \$16,792 74

—Reported by the master on the plaintiff's theory.

The items for advertising (\$4,086.93), traveling expenses (\$3,467.01), commissions on sales (\$2,592.50), and an expense of litigation (\$676.35), have not been included by the master in the foregoing computation, because, though the proof shows that the sum expended for advertising was so paid, as well

as about one-third that sum the preceding year and one-half the sum in 1890, yet the company went into the hands of an assignee in the fall of 1892, and the volume of business transacted by the company during the two preceding years is not shown, and there is nothing in this record to enable the master, from the proof, to compute what proportion, if any, ought properly to be embraced in the cost of these three boilers; and there having been proven no expense of litigation, or commissions or traveling expenses of salesmen, incurred in or about the sales of these boilers, such items are, of course, omitted, as forming no part of their expense.

The master, in qualification of the sums so reported above, computed according to the horse power of the boilers, likewise reports that the same is not strictly accurate, because the expense per horse power of constructing and erecting large boilers is manifestly less in proportion than in case of small ones, and Mr. Griffin, in his testimony, concedes this; but there are no data in the record by which this difference can be ascertained. The method of computation employed is, of course, unfavorable to defendant, because these three are the only boilers of 500 horse power sold by the complainant company during the year; the other 23 all being smaller, only three of them being above 300 horse power, and 13 of them being each 100 horse power or less. If the proof showed specifically that, during the time of the construction and erection of these boilers for the defendant, the plaintiff was engaged in no other business, a proper proportion of these general expenses might, perhaps, be more satisfactorily arrived at by charging of the general expense for the whole year that proportion to the expense of these boilers which the time employed in their construction and erection bears to the whole year. But it does not.

The master respectfully submits that there should be allowed to him, as compensation for his services upon this reference, the sum of twenty-five dollars.

Respectfully submitted,  
Memphis, Tennessee, December 5, 1894.

John B. Clough, Master, etc.

The report was filed December 10, 1894. To this report the defendant company excepted as follows:

Exceptions taken by the defendant, the Citizens' Street-Railway Company, to the report made herein by J. B. Clough, one of the masters of this court, to whom this case was referred by an order of this court made and entered on the 11th day of July, 1894:

First exception: For that the said master, in his said report, states that the first cost or actual expense of the boilers was the sum of \$13,095.24, whereas the said master should have reported and stated that the proof failed to disclose what the first cost or actual expense of said boilers really was. It is admitted, or, if not admitted, it is established by all the proof, that the plaintiff did not manufacture said boilers, but had them manufactured by corporations and firms engaged in the general business of manufacturing and making boilers. It is equally true that the sum of \$13,095.24 so reported by said master embraces a proportionate part of the expenses and the profits of said corporations and firms which actually made said boilers; hence the real first cost of said boilers is not shown anywhere in the report or record.

Second exception: For that the said master, in his said report, has stated that the sum of \$3,697.50 is the proper proportion of the general expense of the plaintiff to be charged to these boilers, when said master should have reported that the proof fails to show what part or proportion of the general expenses of the plaintiff was really chargeable to said boilers on the theory of the case insisted upon by counsel for the plaintiff. The report of the master itself shows that said figures of \$3,697.50 are not accurate, and are unfavorable to this defendant. It further shows that there are no data in the record by which any accurate estimate can be made of what proportion of the general expense account of plaintiff should be charged to said boilers. The only evidence offered by the plaintiff on this point is that in the second deposition of G. W. Griffin. He attempts to arrive at the proportion of the general expenses to be charged to these boilers by finding the total horse power made

and sold by the plaintiff during the year 1892, and then dividing the general expense by total horse power; yet he admits that these boilers were the largest ever made by the plaintiff, and that a large boiler can be made cheaper per horse power than a small one. No other method of arriving at the proportion of the general expenses to be charged to these boilers is suggested or offered by the plaintiff.

Turley & Wright, Attorneys for Defendant.

The exceptions were filed February 1, 1895.

Metcalf & Walker, for complainant.

Turley & Wright, for defendant.

HAMMOND, J. (after stating the facts as above). The investigation before the master to ascertain the "cost" of the boilers, as shown by his report and the exceptions to it, convinces me that the right of the parties must be governed solely by the written contract. That was my impression at the hearing, but because Holmes admitted that he was to furnish the boilers at cost, without profit, and the defense was that, by fraud, he had procured a written contract for more, it seemed desirable, before final determination, to definitely ascertain precisely what the cost had been, which the proof did not then disclose. It seems, from the master's report, that it is quite impossible to fix this satisfactorily; and this in the very nature of the thing, unless we give a meaning to the word "cost" that is more restricted than the plaintiff is willing to concede was meant in the negotiations for the sale. We are all familiar with the seemingly insuperable difficulty of ascertaining the cost, for example, of producing a pound of cotton or of making a yard of cloth; and perhaps no two persons engaged on the problem would agree on the prime elements of the calculation, as none of the parties, witnesses, or the master can agree on them in this case. Even in the simpler application to mere bargain and sale of a thing already in existence, and not to be manufactured, the term is ambiguous, and so much so that it is not impossible that often it will be found to avoid the contract for incurable uncertainty, though I have not found it necessary to go into that subject. Specific performance of such a contract was refused, because it would be to make a contract for the parties and then execute it, where it had been agreed that arbitrators should fix the cost, and they had failed by disagreement about it; and in another case where it was so agreed, and one of the parties died, a court of equity would not specifically perform it, because of the incompleteness and uncertainty, such a case not being analogous to a recovery of the price of goods upon a quantum valebat. Frye, Spec. Perf. 165. In searching for the legislative meaning of the word "cost" in a customs act, Mr. Justice Washington said, "The term is certainly of an equivocal meaning"; and in argument illustrates by saying:

"The actual cost of a bale of goods purchased at Liverpool is composed of the price paid for it, or, in other words, the prime cost and charges, including commissions on the purchase, the packages, if any; and, if the goods were purchased at the manufactory, then it includes, not only the prime cost and all charges attending them to the place of exportation, but also the charges before mentioned, and perhaps many others." Goodwin v. U. S., 2 Wash. C. C. 493, Fed. Cas. No. 5,554.

He laments that a court is called on to interpret "expressions of such doubtful import, without a clue to ascertain with precision what was the real intention."

It would be interesting to search the cases which have, under varying circumstances, defined the term; but none has been produced, and I have found none, which limits the meaning as the defendant does, nor expands it as the plaintiff does. Indeed, they seem quite short of any direct bearing on the word as used by these parties, respectively. It would be comparatively easy to measure or weigh the materials used in these boilers, count the price or value of it, keep account of the hours of labor, and its value or price, and find these two primary factors of the problem, and also quite easy to avoid all the rest by counting these and ordinary freight and charges as the only cost; but that is hardly fair to the plaintiff, and so far from merely cutting away its "profit," which was agreed to be surrendered, would probably entail a loss. Yet the master concedes the cost, ascertained as he does it, is not wholly fair to the defendant; and one might easily suggest other elements of calculation largely increasing the cost, which, for a problem in economics, might be counted. Hence it was eminently desirable that these parties should beforehand do just what the plaintiff contends they did,—settle exactly what this "cost" was to be. If the defendant company, eminent as it is known to be for its high business character and enterprise, did not revise Holmes' offer before signing it, and see that the sum demanded was not too large, I cannot see that it can call on a court of equity to make such a revision now, after they have had the boilers in use, and the only possible question is what shall be paid for them. It would take the strongest proof of fraud or mistake to induce a court to set aside a written contract signed by the parties, distinguished business men as they were, upon the charge of imposition and overreaching such as is made in this case. And there is no such proof here; Billings and Holmes, upon whose testimony, respectively, the case depends, quite evenly balancing each other in the scales with which we judicially weigh the evidence. Even on the theory of the defendant, that it has only to pay the "cost" of the boilers, Holmes' testimony that, before he prepared the contract for signature, he and Griffin calculated the cost to the plaintiff company at \$17,200, finds corroboration in the finding of the master in one calculation he makes of the cost at \$16,792.74. It is urged against this that Holmes and Griffin now calculate the cost to be something over \$20,000, and demand that sum, if the case is to be settled on the basis of the cost, and not the contract. But this is only a thing of calculation, and in such an inquiry it is open to them, if we break away from the writing, to make the final sum as large as possible on any theory of cost they may adopt, or find a sensible pretext for suggesting to us. They testify that in one of their calculations they came to a few hundred dollars over \$17,000, and, because a rival manufacturer offered the defendant a bid for \$17,000, they put that offer in the written contract, which explains the restraint they felt in figuring

the cost at as low a sum as anyone else would do the work. But the plain answer to all this is that business men, like those composing this defendant company and acting for it, should have known what they were doing when they signed the paper; and, with such men dealing with him, it would require very formidable proof to set the contract aside for any overreaching of them by Holmes. They should not be allowed to save their own negligence in not looking closely after this contract by any charges of fraud against Holmes not apparent without much reliance on a too loose weighing of seemingly inconsequential circumstances like those of Mr. Billings' age, his trustfulness of Holmes, and friendly desire to help him. In *Richardson v. Hardwick*, 106 U. S. 252, 1 Sup. Ct. 213, the parties had a written contract, and the plaintiff, in his bill, alleged that one of the "unexpressed" terms was to a certain effect. The court said it was a matter of dispute between the parties,—one affirmed, the other denied,—and the burden of proof was on the plaintiff to establish it, as here it is on the defendant company, or Billings, which is the same thing in effect. But the court ruled that, all previous negotiations and understandings having resulted in the contract, it alone should govern; and although the proof was in favor of the defendant, as against the burden of the plaintiff, it was rejected as wholly inadmissible to vary the writing. When parties have deliberately put their engagements into writing, in such terms as import a legal obligation, without any uncertainty as to the object or extent of such engagement, it is conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking, was reduced to writing; and all oral testimony of a previous colloquium between the parties as would tend in many instances to substitute a new and different contract for the one which was really agreed upon, to the prejudice, possibly, of one of the parties, is rejected. *De Witt v. Berry*, 134 U. S. 306, 315, 10 Sup. Ct. 536. In another case, where the burden was on the plaintiff, and his own testimony on which the issue rested was "inconclusive," the court put the decision on the rule that in the absence of fraud, accident, or mistake, this rule of evidence is the same in equity as at law. *Forsythe v. Kimball*, 91 U. S. 291. Until the contract is reformed on some of these grounds by a court of equity, all previous verbal engagements are merged in the written agreement, for the very purpose of avoiding any controversy or question respecting them. *Insurance Co. v. Mowry*, 96 U. S. 544, 547. And so are all the cases. *Van Ness v. Washington*, 4 Pet. 234, 284; *Potomac Steamboat Co. v. Upper Potomac Steamboat Co.*, 109 U. S. 672, 3 Sup. Ct. 445, and 4 Sup. Ct. 15; *Culver v. Wilkinson*, 145 U. S. 205, 12 Sup. Ct. 832; *Seitz v. Machine Co.*, 141 U. S. 510, 12 Sup. Ct. 46; *Johnson v. Railroad Co.*, 141 U. S. 602, 12 Sup. Ct. 124; *Bailey v. Railroad Co.*, 17 Wall. 96; *Oelricks v. Ford*, 23 How. 49. Here the defendant company would avoid this rule by charging Holmes with fraudulently procuring the writing in the terms in which it is couched, but substantially the proof of it rests wholly upon Billings' testimony, and it is mainly a struggle between these two as to their recollection of the preceding occurrences. This does not

answer that burden which the above authorities put on him who alleges fraud as against the writing signed by parties who are not affected by any infirmity, or feebleness of capacity to take care of themselves in a transaction like this. Holmes really concedes quite all that Billings claims as to their understanding about the contract for boilers which were to be furnished at cost without profit, and the substantial controversy is whether the \$17,000 written in the contract is more than that cost, and the struggle over this relapses into contentions as to what is the proper basis for the calculation. The master reports that it is quite impossible to calculate it with satisfactory precision, and no doubt that is true; but the general fact remains that, on a fairly reasonable theory, it may be figured out to the sum which was charged and written in the contract, and there is no sort of pretense that Holmes and Billings had any agreement as to the theory or method of ascertaining the cost, and the fact that another bidder figured out the same price for his boilers,—of a different construction, however,—leaves it reasonably sure that the value of the thing wanted was in that neighborhood.

Holmes, perhaps, is justly subject to some criticism as a witness; but, after all, taking into consideration the adverse criticism of Billings' evidence, I think it is not proved that Holmes committed any fraud on the defendant company, in procuring its signature to this contract. The basic fact for the charge is that Holmes wrote into the contract a sum very much larger than the cost of the boilers, and this is not proved at all, unless we strip the calculation to its least possible factors, and adopt a theory of lowest possible cost,—the bare price of material and labor, almost. But this is only a construction put by the defendant company on the word "cost," and there is no proof of a specific agreement that Holmes should work the cost down to a minimum like that, in Billings' interest. Billings, for reasons given in the proof, arising out of their anterior business and personal relations, seems to think Holmes an ingrate, if he did not do this, and possibly, for similar reasons, believed that Holmes would do it, and also that he should have come to him, and gone over the figures with him, before writing up the contract; but, Holmes not having unequivocally agreed to do so, it was not a fraud on Billings to disappoint his expectations, which are no doubt much more vivid now, after the fact, than pending the negotiations, during which he was really neglectful about having some more precise understanding than his own unexpressed conception of the meaning of the word "cost." In this state of the proof, I conclude to reject the testimony, for all purposes, except as it tends to prove the fraud alleged; and, being inconclusive as to that, it is useless as against the contract. The exceptions to the master's report will be overruled, and it will be confirmed, with the allowance claimed by him for making it. The plaintiff to have a decree on the basis of the sum stipulated in the written contract, with interest, subject to such credits as the defendant may be entitled to, if any, with a reference to the master to fix this amount, if the parties disagree about it. Defendant to pay the costs.

## HAZLETON TRIPOD-BOILER CO. v. CITIZENS' ST. RY. CO.

(Circuit Court, W. D. Tennessee. February 1, 1896.)

**1. EQUITY PRACTICE AND PLEADING—TRANSFER OF CAUSE OF ACTION—SUPPLEMENTAL BILL.**

After the direction of a decree for complainant, a stranger will not be given leave to file a bill in the nature of a supplemental bill, for the purpose of setting up a purchase of the cause of action by him, until a decree has actually been entered in favor of the original complainant.

**2. SAME—EQUITY RULE 57.**

Equity rule 57, which provides for granting leave to file a supplemental bill, or bill in the nature of a supplemental bill, where the suit has become defective by reason of a change of interest, etc., is to be construed as applying to the case of a transfer of the cause of action by voluntary deed or contract, as well as by operation of law.

**3. SAME—FORM OF PLEADING.**

One purchasing a contract which is the subject of a pending suit in equity may set up his interest, and obtain the benefit of the proceedings already had, by obtaining leave to file an original bill in the nature of a supplemental bill. This is the appropriate form of pleading in such a case, and leave to file such bill cannot be denied, even after final hearing, and the direction of a decree in favor of the original complainant.

**4. SAME—BOND FOR COSTS.**

Where a purchaser of a contract forming the subject-matter of a pending suit obtained leave to file an original bill in the nature of a supplemental bill, after a final decree had been directed and large costs incurred, *held*, that he would be required to give a cost bond adequate to cover both past and probable future costs.

This was a bill by the Hazleton Tripod-Boiler Company against the Citizens' Street-Railway Company to enforce a mechanic's lien for the purchase price of certain boilers. A final hearing was heretofore had, which resulted in the direction of a decree in favor of the complainant. 72 Fed. 317. One William McDougal now presents an original bill in the nature of a supplemental bill, setting up a purchase by him of the contract of sale of the boilers, and asks leave of the court to file the same in the cause.

Percy & Watkins, for petitioner.

Metcalf & Walker, for complainant.

Turley & Wright, for defendant.

**HAMMOND, J.** Since the opinion in this case directing a decree for the plaintiff was handed down, and before the decree has been entered, but while it is in course of preparation by counsel, one William McDougal presents his "original bill in the nature of a supplemental bill" against the plaintiff and the defendant and one Griffin, the assignee in insolvency of the plaintiff company, and asks leave of the court to file the same in this cause. The purpose of the bill is to set up a purchase by the plaintiff McDougal of the chose in action which is the foundation of the original suit. It alleges that the contract of the original plaintiff company with the defendant company for the construction of boilers was pledged to one Linyard as collateral security for a note due by the plaintiff company for \$10,000, and that, in strict conformity to the powers contained in the col-



lateral assignment of the boiler contract, this new plaintiff has become the purchaser of that contract, and is entitled to have the money decreed to be due the original plaintiff paid to him. The bill prays that the proceeds of the judgment against the street-railway company shall be paid to this new plaintiff, that execution may issue in his behalf and for his use, and for general relief. It also prays process, etc., in the usual form. Having received a notice of the application for leave to file this bill, the original plaintiff objects to this intervention of McDougal, and insists that whatever right he has must be prosecuted independently, by original bill, and not by any proceeding in this cause. No objection is made at this time to its filing, so far as it is an original bill, as to which, it is contended, no leave is needed; but the objection is that it should not be filed as in any sense a supplemental bill in this cause.

We need not at all consider what is to be the effect of this proceeding upon the rights of the parties, if the applicant has a right to file the bill and is entitled to leave of the court for that purpose, except so far as this effect may influence our judgment in determining whether that right exists; because, when defense is made to this new bill by any parties interested, these other questions will arise, and can be then disposed of. But I think it is proper to say that this bill now offered should be treated as if the offer came after the decree was entered, and that under the circumstances of the case it should not be allowed to interrupt, in any sense, the entry of the decree in favor of the original plaintiff as already directed. Whatever discretion the court has in the premises should protect the right of the original plaintiff to have the decree entered as it has been ordered, and I do not understand that the new bill asks for any more than this; and, in the very terms of its prayer, it treats the decree as having been already entered according to the opinion directing it. But, however this may be, the decree, when it comes in, should either be entered *nunc pro tunc* as of the day when ordered, or else the new bill should not be filed until after that decree has been entered. With this restriction, I have concluded that there is no doubt of the right of this new plaintiff to file the bill as he asks to do, and that, strictly and technically, it is what he calls it,—“an original bill in the nature of a supplemental bill.”

There is some obscurity and a good deal of confusion on the subject of making new parties because of an alienation pending a suit in equity. This arises from treating the alienation by a defendant of his interest in the thing in controversy, and the alienation by a plaintiff of his right and title, as substantially alike, when in fact they are quite widely different. A purchaser of a defendant's interest *pendente lite* is bound to the suit, and it is very difficult for him to become a party for any purpose without the consent of the plaintiff, except under enabling statutes which confer this right, and are now quite common in the practice under codes. Our own statutes in Tennessee have been claimed to give this right quite liberally as well to the plaintiff as to the defendant, but, obviously, they have no influence here, and we need not notice them. But the

alienation by a plaintiff of his interest in the thing in litigation, either partially or entirely, stands upon an altogether different footing. Owing to familiar principles of equity, somewhat different in proceedings at law, a decree will not be made in favor of a plaintiff who has no interest in the subject-matter of the decree. Therefore, if the plaintiff, by any alienation, so absolutely divests himself of all interest as to leave nothing for him to take, the suit becomes not abated, as it might be at law, but defective; and, until the party having the proper right is in some way brought before the court, the case cannot proceed after the fact of alienation has been, in proper form, brought to the attention of the court. For example, if the defendant in this case should, by proper petition, or by a supplemental proceeding, appropriate to the purpose, bring to the court a knowledge of the fact of this alleged transfer of the property involved, and of the assignment by the plaintiff of its interest in the boiler contract, the court would direct the cause to stand over until, by proper proceedings, the party in interest should appear and demand a decree.

It is not impossible that our fifty-seventh equity rule might be held not to apply to a case like this, but only to such defects as occur by the devolution of title or interest by operation of law to representatives or successors in representation,—privies in law, and not privies in deed. But considering the time of the promulgation of that rule, and its place in the code of rules designed to regulate our practice, I am led to believe that it relates as well to defects arising from the voluntary alienation of interest by the deed or contract of the parties, as to those defects arising from the devolution of any interest by operation of law. The language of the rule is broad enough to cover all such defects, and, being a rule of practice, it is best to so liberally construe it as to include all; and so, under the ninetyeth equity rule, we have only to consider what was the "practice of the high court of chancery in England" at the time these rules were promulgated.

Mr. Daniell, in his first edition of his *Chancery Practice*, printed about that time, says:

"If a person, *pendente lite*, takes an assignment of the interest of one of the parties to a suit, he may, if he pleases, make himself a party to the suit by supplemental bill; but he cannot, by petition, pray to be admitted to take a part as a party defendant. All that the court will do is to make an order that the assignor shall not take the property out of the court without notice." 1 Daniell, *Ch. Prac.* (Ed. 1846) 378.

He refers to the often-cited case of *Foster v. Deacon, Madd. & G.* (6 Madd.) 59. But that case was a petition by the assignee of a defendant, which was dismissed; the court remarking that he might file a supplemental bill, if he chose, and directing, in the meantime, that the assignor should not take the property out of court without notice to the petitioner. Again, in defining and explaining "an original bill in the nature of a supplemental bill," he says that in cases which frequently occur in practice, where the interest of an original party to a suit is completely determined, and another party becomes interested in the subject-matter by a title not derived from

the original party, but in such a manner as to render it but just that he should have the benefit of the former proceedings, it is proper to file that kind of a bill. And he continues:

"So, also, must a bill of this nature be filed wherever the interest of a sole plaintiff is transferred to another, either by voluntary alienation, or by the fact of bankruptcy or insolvency." 3 Daniell, Ch. Prac. (Ed. 1846) pp. 188, 189.

And yet, again, in speaking of the case in which the assignment has been only partial, and enough is left to the plaintiff to proceed, or where there are other plaintiffs joined with him who might proceed, he says:

"The case, however, is different where a sole plaintiff, suing in his own right, is deprived of his whole right in the matters in question by an event subsequent to the institution of the suit, as in the case of a bankrupt or insolvent debtor whose whole property is transferred to his assignees; if in case such a plaintiff assigns his whole interest to another, then the plaintiff being no longer able to prosecute, for want of interest, and his assignee claiming by a title which may be litigated, the benefit of the proceedings cannot be obtained by him by means of a supplemental bill, but must be sought by an original bill in the nature of a supplemental bill. This distinction may, at first sight, appear artificial, but it is attended by considerable difference, in its practical results," etc. 3 Daniell, Ch. Prac. p. 164.

I cite this edition of Daniell for the reasons stated by Mr. Justice Bradley in his note to the case of Thomson v. Wooster, 114 U. S. 112, 5 Sup. Ct. 788, and my own note in the case of U. S. v. Anon., 21 Fed. 766, and to avoid the confusion of authorities and cases that are based upon statutes, or the local practice in the state courts more or less affected by changes which have not been made in the federal courts by any legislation for that purpose.

In Toosey v. Burchell, Jac. 159, an assignee of a plaintiff's interest was allowed, upon his petition, to attend the master, on a reference that had been made, without prejudice, however, to the right of the plaintiff to litigate his assignment, and on condition that he should pay the costs of such attendance and examination as he chose to make,—which shows that courts of equity will do all they can to protect the rights of assignees under such circumstances. Even courts of law do this, and, wherever and however they can, will permit an assignee to come in to assert or protect his rights, adopting for that purpose, as much as possible, the rules of equity under similar circumstances; and in many of our Codes, perhaps in our own Tennessee Code, the statutes regulating the practice are broad enough to permit an assignee to become a party and assert his rights even in an action at law. Shriner v. Lamborn, 12 Md. 170; Andrews v. Bank, 77 Md. 28, 25 Atl. 915; Mandeville v. Welch, 5 Wheat. 277, 1 Wheat. 233, 7 Cranch, 152; Platt v. Jerome, 19 How. 384.

Mr. Justice Bradley, in Anderson v. Railroad Co., 2 Woods, 628, Fed. Cas. No. 358, mentions purchasers pendente lite as one of the classes of cases where a stranger may become a party to the record by supplemental bill, or an original bill in the nature of a supplemental bill. We formerly had occasion to consider this subject somewhat carefully in the case of Chester v. Association, 4 Fed. 487,

in which were considered most of the cases cited by counsel here, and many others. In that case the petition of an insolvent assignee of a defendant company, to become a party defendant, was rejected; but the plaintiff was allowed to file his supplemental bill, for the reasons therein stated. The difference between an abatement of an action at law by a change of the interest of the parties, and that kind of a defect which is produced in a suit in equity by a purchase of the thing involved pendente lite, is considered by Mr. Justice Brown in the case of *Electrical Accumulator Co. v. Brush Electric Co.*, 44 Fed. 602, 605, 606, and an analogous effect upon the jurisdiction of the court in *Clarke v. Mathewson*, 12 Pet. 164. In *Hoxie v. Carr*, 1 Sumn. 173, Fed. Cas. No. 6,802, Mr. Justice Story remarks that a purchaser pendente lite may file a bill in equity like this; and *Tappan v. Smith*, 5 Biss. 73, Fed. Cas. No. 13,748, is directly in point,—that being the case of a general assignment by the plaintiffs in the equity bill, the assignee being required to file an original bill in the nature of a supplemental bill in order to be made a party, a demurrer being sustained to a bill which was only a supplemental bill; and there the learned court cites the case of *Greenleaf v. Queen*, 1 Pet. 138, as the only direct authority for the practice in the supreme court. In that case—of a substituted trustee—it was held that a supplemental bill in the nature of a bill of revivor was required, which is very analogous to an original bill in the nature of a supplemental bill. This is well illustrated by the case of *Slack v. Walcott*, 3 Mason, 508, Fed. Cas. No. 12,932, where Mr. Justice Story considers the subject quite at length, in its most technical bearings; taking the distinctions between the different classes of privies in law and privies in deed, and holding that a devisee could not file a bill of revivor, strictly and technically so called, but must resort to an original bill in the nature of a bill of revivor, because he was a privy in deed, and not a privy in law, such as an heir at law or an administrator would have been. Considered on principle, that case is also a direct authority for the ruling I make in this case, which is that this new plaintiff, being, by virtue of the sale to him under the collateral pledge, a privy in deed, must resort to an original bill, but at the same time, for the reasons stated, has a right also to take the benefit of the former proceedings in this case, by way of supplement to that proceeding, and this cannot be denied him. The case of *Campbell v. City of New York*, 35 Fed. 14, is another case directly in point for this practice.

In the case of *Shaw v. Bill*, 95 U. S. 10, a succeeding trustee was allowed to file merely a supplemental bill, and it was held to be an adjunct of the original bill, and that no further subpoena was required. Whether there is any conflict between the ruling in this case and that of *Greenleaf v. Queen*, supra, we need not inquire at this stage of the proceeding, for I shall not now undertake to determine whether new process is required or not. The order presented to me does not ask for any notice to the parties to defend this bill, nor proceed upon the theory that they may be now directed to do so without formal process, but simply grants leave to file the bill upon executing the ordinary bond for costs. In the case of *Ex parte Railroad Co.*,

95 U. S. 221, the court remarks upon the effect of an assignment pendente lite of a defendant, and states that such an assignee may, by appropriate application, make himself a party, but it does not settle any question of practice like that we have. The case of *Eyster v. Gaff*, 91 U. S. 521, involved an assignee in bankruptcy of a mortgagor, appointed during the pendency of proceedings for foreclosure, and it was said that he might be substituted for the bankrupt or be made a defendant upon petition; but the question arose in an action of ejectment, and the case does not decide the question of practice with which we are concerned. Besides, these cases involving bankrupt assignees are somewhat peculiar, are often influenced by particular provisions of bankruptcy statutes, and, except in general principle, they need not be considered here. Mr. Foster, in his *Federal Practice* (page 269, § 186), also considers the rule that the assignee need not be made a party unless the assignment disables the assignor from taking a decree or performing a decree, and states the general rule, as here stated, of the right of such assignees to become parties plaintiff or defendant by appropriate proceedings for that purpose.

It is said in *Snead v. McCoull*, 12 How. 407, 421, that amendments should not be allowed to make a new case after a hearing has been had, or after the case has been set down for hearing, and, if this interference arose in that way, I should have no doubt but what the court should refuse it; but, as shown by Mr. Justice Brown in *Electrical Accumulator Co. v. Brush Electric Co.*, supra, where new facts asking affirmative relief by reason of a purchase pendente lite are shown, this rule does not apply. Technically, if the original plaintiff has been divested of the interest and title upon which this suit was founded, it cannot proceed until the real party in interest is in court to take the benefit of that decree to which it was entitled, but which now belongs to its alienee under any valid assignment.

The result is that the application to file this original bill in the nature of a supplemental bill will be granted, upon giving bond for costs, but this bond should be large enough to include the costs already accumulated; for, if the assignee is to have the benefit of the former proceedings, he must take the place of the original plaintiff, in his liability for costs, and this being already a very large record, with accumulated costs more than \$600, and as further litigation may ensue upon the filing of this new bill, the plaintiff will be required to give a cost bond in the sum of \$1,000. As before suggested, counsel for the original plaintiff may take their choice of entering the decree which has been ordered in favor of the original plaintiff *nunc pro tunc*, or this leave to file the new bill will be withheld until the decree in the original suit goes down. So ordered.

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CURRELL et al. v. VILLARS et al.

(Circuit Court, W. D. Tennessee, W. D. February 28, 1896.)

1. EQUITY PRACTICE—ABATEMENT AND REVIVAL.

When a suit in equity, which seeks, with other relief, the recovery of real estate, abates in consequence of the death of a complainant, whose

interest in the real estate devolves upon other persons, the proper method of reinstating the suit is by a supplemental bill, or bill in the nature of a supplemental bill, and not by a bill of revivor.

2. **WILLS—EFFECT AS CONVEYANCE—FOREIGN PROBATE—TENNESSEE CODE.**

When a will is executed in a foreign country, and is proven, as required by section 3012 of the Tennessee Code, before a foreign court having the requisite probate jurisdiction, the record of the probate affirmatively showing the probate by such proof, and authenticated as provided in section 4550, it will pass title to real estate in Tennessee, as a common-law conveyance, without registration.

3. **SAME—CONTENTS OF CERTIFICATE OF PROBATE.**

A certificate of probate in a foreign court which states that the will was "proved by \* \* \* the executors," though showing, by the exemplification, that it was duly attested by two witnesses, does not show probate in accordance with section 3012 of the Tennessee Code, providing that written wills, with witnesses, when not contested, shall be proved by at least one of the subscribing witnesses, if living, and, if contested, by all the living witnesses, if to be found.

C. F. Vance, for complainants.

W. M. Randolph & Sons, for respondents.

TAFT, Circuit Judge. This is an action in equity for relief, part of which is the recovery of real estate situated in Memphis. Andrew Currell, one of the complainants, has died since the bringing of the bill, and the cause now comes on, upon a bill in the nature of a bill of revivor, to revive the cause in the name of the executor and trustee under the will of Andrew Currell.

Section 955, Rev. St. U. S., provides as follows:

"When either of the parties, whether plaintiff or petitioner, or defendant, in any suit in any court of the United States, dies before final judgment, the executor or administrator of such deceased party may, in case the cause of action survives by law, prosecute or defend any such suit to final judgment. The defendant shall answer accordingly, and the court shall hear and determine the cause, and render judgment for or against the executor or administrator as the case may require. And if such executor or administrator, having been duly served with a scire facias from the office of the clerk of the court where the suit is depending, twenty days beforehand, neglects or refuses to become party to the suit, the court may render judgment against the estate of the deceased party, in the same manner as if the executor or administrator had voluntarily made himself a party. The executor or administrator who becomes a party as aforesaid shall, upon motion to the court, be entitled to a continuance of the suit until the next term of said court."

It is in reliance upon this statute that counsel for the complainants presses the bill for the revivor. A certified copy of the proceedings, in which the will of Andrew Currell was probated in Ireland, has been filed, and this bill of revivor is brought in the name of William Gihon, trustee and executor thereunder; the other executor, John Workman, named in the will, having renounced the office of executor and trustee. Objection is made to granting the revivor, on the ground that the will is not properly certified as a foreign will, and, secondly, on the ground that the will was not so proved in the court where it was probated in Ireland as to pass real estate under the law of Tennessee.

A preliminary objection not made by counsel addresses itself to the court, and that is whether this cause can be revived at all

in the strict meaning of that term. It was held by the supreme court, in the case of Macker's Heirs v. Thomas, 7 Wheat. 530, that the section relied upon (section 955 of the Revised Statutes, which was the thirty-first section of Judiciary Act 1789, c. 20), related only to personal actions, because the power to prosecute or defend is given to the administrator of the deceased party, and not to the heir or devisee. It was also decided, in that case, that, in real actions, the death of either party abated the suit, and Green v. Watkins, 6 Wheat. 262, was cited in support of this conclusion. This is a real action in equity. It abated on the death of Andrew Currell. A new right of action arose of the same character in favor of the heirs or devisees of the deceased complainant.

Equity rules 56, 57, and 58 are as follows:

Rule 56: "Whenever a suit in equity shall become abated by the death of either party, or by any other event, the same may be revived by a bill of revivor, or a bill in the nature of a bill of revivor, as the circumstances of the case may require, filed by the proper parties entitled to revive the same, which bill may be filed in the clerk's office at any time; and, upon suggestion of the facts, the proper process of subpoena shall, as of course, be issued by the clerk, requiring the proper representatives of the other party to appear and show cause, if any they have, why the cause should not be revived. And if no cause shall be shown at the next rule day, which shall occur after fourteen days from the time of the service of the same process, the suit shall stand revived, as of course."

Rule 57: "Whenever any suit in equity shall become defective from any event happening after the filing of the bill (as, for example, by change of interest in the parties), or for any other reason a supplemental bill, or a bill in the nature of a supplemental bill, may be necessary to be filed in the cause, leave to file the same may be granted by any judge of the court, on any rule day, upon proper cause shown, and due notice to the other party. And if leave is granted to file such supplemental bill, the defendant shall demur, plead, or answer thereto, on the next succeeding rule day after the supplemental bill is filed in the clerk's office, unless some other time shall be assigned by a judge of the court."

Rule 58: "It shall not be necessary, in any bill of revivor or supplemental bill, to set forth any of the statements in the original suit, unless the special circumstances of the case may require it."

It is clear that the proper course for the heirs and devisees of Currell is to file a supplemental bill, or a bill in the nature of a supplemental bill, under equity rule 57, instead of a bill of revivor under rule 56. The suit has become defective by a change of interest in the parties.

Assuming that this will be done, I proceed to consider the question as to what is necessary, in Tennessee, to pass title by a will executed in a foreign country.

Section 3003 of the Code of Tennessee provides that:

"No will or testament shall be good or sufficient to convey or give an estate in lands, unless written in the testator's lifetime, and signed by him, or by some other person in his presence and by his direction, and subscribed in his presence by two witnesses at least, neither of whom is interested in the devise of said lands."

Section 3010 provides:

"Wills shall be proved and recorded, and letters testamentary granted, in the court of the county where the testator had his usual residence at the time of his death, or in case he had fixed places of residence in more than one county, in either or any of said counties."

**Section 3012 provides:**

"Written wills, with witnesses thereto, when not contested, shall be proved by at least one of the subscribing witnesses, if living. And every last will and testament, written or nuncupative, when contested, shall be proved by all the living witnesses, if to be found, and by such other persons as may be produced to support it."

**Section 3022 provides that:**

"Wills executed in other states, or in any of the territories, or in the District of Columbia, shall be proved according to the laws of this state, and certified in the manner prescribed by the act of congress."

**Section 3023 provides that:**

"A copy of a will so certified shall be registered in the county where the land lies, and a copy from the books of the register duly certified shall be evidence."

**Section 3024 provides that:**

"And where the last will and testament of any person deceased is proved in a court of any state or territory of the United States, or before the mayor of any city, any person interested may present a copy thereof, duly authenticated, to the county court of any county in the state where the land or estate devised or disposed of by the will is situated; and thereupon such court may order the same to be filed and recorded, and said copy, when so recorded, shall have the same force and effect as if the original had been executed in this state, and proved and allowed in the courts of this state."

**Section 3025 provides that:**

"And said will, if proved according to the laws of this state as to wills, and executed within the limits of this state, shall be sufficient to pass lands and other estate."

**Section 3026 provides that:**

"In those cases where the will is proved before a court of any other state or territory, the copy shall be authenticated in the manner prescribed by the act of congress of 1790, section 2, chapter 11, for authenticating the records and judicial acts of any one state in order to give them validity in any other state."

It appears that, previous to 1875, an alien was not permitted to hold or transmit real estate in Tennessee, but by chapter 2, § 2, of the Laws of that year, now incorporated as section 2804 of Milliken & Vertrees' Revised Code, it was provided that:

"An alien, resident or nonresident, may take and hold property, real or personal, in this state, either by purchase, descent or devise, and dispose of and transmit same by sale, descent or devise, as a native citizen; and in all cases where aliens, resident or nonresident, have heretofore acquired title to property, real or personal, in this state, in a lawful manner, said aliens, their assigns, heirs, devisees or representatives shall hold and dispose of the same, in the same manner as native citizens."

There is no specific provision in the statutes of Tennessee prescribing how a will executed and probated in a foreign country shall be authenticated for use as evidence and as a muniment of title; in Tennessee, and in the absence of such a provision, section 4550 of the Code of the state must have application to this case. That section provides that copies of the records and proceedings in the courts of a foreign country may be admitted in evidence upon being authenticated as follows:



"(1) By official attestation of the clerk or officer in whose custody such records are usually kept. (2) By the certificate of one of the judges or magistrates of such court, that the person so attesting is the clerk or officer legally intrusted with the custody of such records, and that the signature to his attestation is genuine. (3) By the official certificate of the officer who has the custody of the great seal of the government under whose authority the court is held, attested by said seal, stating such court is duly constituted, and has jurisdiction of the subject of the record, and that the seal of the court is genuine."

When a will is executed in a foreign country, and is proven as required by section 3012 of the Tennessee Code before a foreign court having the requisite probate jurisdiction, the record of the probate affirmatively showing the probate by such proof, and authenticated as provided in section 4550, it will pass title to real estate in Tennessee as a common-law conveyance without registration. In the case of *Smith v. Neilson*, 13 Lea, 461, Judge Cooper laid down the Tennessee law on this subject as follows:

"It was the settled rule of English law, recognized by our courts as in force in this state, that a devise of land was in the nature of a conveyance and special appointment, passing only the title to the testator at the date of publishing the will. *Brydges v. Duchess of Chandos*, 2 Ves. Jr. 427; *Wynne v. Wynne*, 2 Swan, 407. There was no provision in England, until recently, for the probate of wills of realty by the probate courts, so as to conclude all parties in interest; and it was necessary to establish such a will by proof whenever any question occurred in court involving its validity. *Habergham v. Vincent*, 2 Ves. Jr. 230. At common law, therefore, a devise of land was good without probate of the will containing it. *Weatherhead v. Sewell*, 9 Humph. 272. A foreign will, duly authenticated, might be introduced in evidence as a muniment of title. *Donegan v. Taylor*, 6 Humph. 501."

The court then proceeds to hold that the will, duly authenticated in accordance with the statute, may still be used as a muniment of title. In *Bleidorn v. Mining Co.*, 89 Tenn. 166, 15 S. W. 737, the supreme court of Tennessee again considered this question, and, in the reported opinion by Judge Lurton, held that a will conveying lands in Tennessee operated as a conveyance without registration in Tennessee, and affirmed the case of *Smith v. Neilson*, already referred to.

It remains to consider whether the record here presented fulfills the requirements above stated, so as to operate as a conveyance. It will save time to have this question decided now, on a bill for revivor, instead of waiting until the question arises on the hearing of the merits.

The certificate is entitled: "In the High Court of Justice in Ireland, Probate and Matrimonial Division. The District Registry at Belfast." It begins as follows:

"Be it known that, upon search being made in the district registry of her majesty's high court of justice at Belfast, it appears that, on the twentieth day of March, in the year of our Lord one thousand eight hundred and ninety-five, the last will of Andrew Currell, late of Ballygarvey, Ballymena, in the county of Antrim, merchant, deceased, who died at Ballygarvey, on or about the 9th day of January, one thousand eight hundred and ninety-five, was proved by William Gibbon, of Liffafillan, Ballymena, aforesaid, Esquire, justice of the peace, one of the executors therein named,—John Workman, the other executor, having duly renounced,—which probate now remains of record in the said registry. The true tenor of the said probate is in the words following, to wit: [Then follows the will.]

"In witness whereof, I have signed my name at the end of this my will, which is contained on this and twenty preceding pages of paper, this seventh day of May, one thousand eight hundred and ninety-four."

"Andw. Curell.

"Signed by the said testator, Andrew Curell, as and for his last will and testament, in the presence of us both, being present at the same time, who, in his sight and presence, at his request, and in the presence of each other, have hereunto subscribed our names as witnesses.

"George L. MacLaine, Clerk of Peace, Co. Down.

"William Anderson."

"In faith and testimony whereof these letters testimonial are issued.

"Given at Belfast, this twentieth day of May, in the year of our Lord one thousand eight hundred and ninety-five.

"Henry H. Corley, District Registrar.

"I, the Right Honorable R. R. Warren, president of the probate and matrimonial division of the high court of justice in Ireland, hereby certify that the foregoing exemplification of the probate of the will of Andrew Currell, deceased, was duly issued, and that the foregoing attestation has been duly made, with the seal of office annexed, by Henry H. Corley, district registrar, who is the person having power to grant such exemplification.

"Richard R. Warren.

"[And the seal of her majesty's high court of justice, probate division.]"

It is objected that this is not a certificate showing that the proof of the will is in accordance with the laws of Tennessee. This objection must be sustained. A presumption, from an Irish statute, or the common-law rule of evidence in the proving of a will, that the oaths of the subscribing witnesses were used to prove the will is not sufficient; for it is laid down in *Harris v. Anderson*, 9 Humph. 779, 780 (and I do not find that this rule has since been in any degree changed), that:

"The clerk ought to certify a literal copy of the probate from the record, to the end that it may appear whether or not the will has been proved in the mode prescribed by law. A recital by him of what may be deemed its import is unauthorized and inadmissible."

*Marr v. Gilliam*, 1 Cold. 488, 512; *Carr v. Lowe*, 7 Heisk. 88.

It has been held, in a number of cases, that, if it appears that the proof was by the oaths of the subscribing witnesses, under a certificate of the clerk, that will be sufficient. *Wright v. Mongle*, 10 Lea, 38-42. But here the certificate is that the will was proved by the executor. I should have no difficulty in holding that this meant that the will was propounded by the executor, and not that it was proved by his evidence; but the record lacks the statement that the will was proved by the oaths of the subscribing witnesses. The certificate or exemplification of the record is also defective because the third requisite mentioned in section 4550 quoted above is wholly wanting. For the two reasons stated, therefore, the order of revivor is refused.

I might add that, under the provisions of the will, the persons who should properly be admitted as parties by supplemental bill, under equity rule 57, are the executor and trustee and the children of Andrew Currell living at the time of his death, because each of the latter has a possible estate in expectancy under the will. It may be doubted whether the title passes to the trustee and executor at all. He would seem only to have the power to lease, and

not the power to sell. Therefore, a vesting of the fee in him is not required for the purposes of the trust. However this may be, his interest will cease upon the coming of the children to their majority, when the estate in fee will vest either in the eldest of the sons or in all of the living daughters. The application, therefore, should be made in the names of these devisees; and, out of abundant caution, the trustee may be joined.

The clerk will enter an order denying the application for a revivor, and leave will be granted to the devisees and trustee of the deceased complainant within three months to file a supplemental bill to substitute themselves as parties complainant, instead of the deceased complainant, Andrew Currell, and, upon duly exemplified and authenticated record evidence of the proper proof and probate of the will in Ireland, according to the laws of Tennessee, the prayer of the supplemental bill will be granted.

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BARBER ASPHALT PAVING CO. v. CITY OF DENVER.

(Circuit Court of Appeals, Eighth Circuit. January 6, 1896.)

No. 655.

1. CONTRACT—LIABILITY FOR PROMISED PAYMENT BY A THIRD PERSON.

One who induces a contractor to perform labor or furnish materials by the promise that a third person who, he claims, owes him a debt or duty, shall pay to the contractor the agreed price of the labor and materials he furnishes, becomes primarily liable to pay the contract price himself if he receives the fruits of the contract and his debtor does not pay, or the debt or duty did not in fact exist.

2. MUNICIPAL CORPORATION—CONTRACT TO PAY FOR STREET IMPROVEMENTS BY ASSESSMENTS.

A municipal corporation which contracts to pay for street improvements by assessments upon abutting property is primarily liable to pay the contract price itself, if it has no power to make such assessments, or if it fails to make them, or if the assessments it attempts to make are void.

3. SAME—CONTRACTS THAT RAILWAY COMPANIES SHALL PAY FOR STREET IMPROVEMENTS.

A municipal corporation which contracts that street improvements made for it shall be paid for by railway companies which occupy the street under an ordinance which requires them to make such improvements as the city directs, is primarily liable to pay for the improvements if the railway companies do not, and the corporation takes no action to compel them to do so.

Caldwell, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the District of Colorado.

The Barber Asphalt Paving Company (a corporation, and the plaintiff in error) brought an action in the court below against the defendant in error, the city of Denver, a municipal corporation, to recover a balance which it alleged that the city owed it for the performance of four contracts that it had made with the city to grade and pave with sheet asphalt portions of four of its streets. The complaint set forth four separate causes of action,—one upon each of the contracts. The statement of each cause of action presents the same questions for consideration here, and for that reason but one of them

will be considered. The facts alleged in the complaint as a basis for the cause of action were these: The charter of the city of Denver gave it the general power to grade, curb, and pave its streets. The railway companies using the streets had made a contract with the city, in consideration of a license granted to them by it to use these streets, to bring the streets to the official grade, and to pave them between their tracks, and for two feet upon each side of them, in a manner directed by the city. The charter also gave the city the power to assess two-thirds of the total expense of grading and paving any street, excluding the intersection of streets and alleys, upon the property abutting upon the improvement, whenever the owners of a majority of the lots fronting on the same petitioned for it. On March 13, 1892, the city determined to grade and pave a portion of Arapahoe street, and passed an ordinance for that purpose, which provided that the street-railway companies occupying the street at the time of making the improvement should pay such parts of the cost of paving as were provided by the ordinances granting them rights of way on the street; that, after making allowance for the sums so to be paid by the railway companies, the city's proportion of the cost of the improvement should be one-third of the cost of grading, curbing, and paving in front of the lots abutting upon the improvement, and the entire cost of grading, curbing, and paving the intersection of the streets and alleys; and that the remainder of the cost should be borne by the owners of lots abutting upon the improvement. Certain railway companies took possession of and occupied this street with double tracks while the improvement was being made, under an ordinance of the city which gave them license so to do, and provided that the companies "shall pave or plank the same between its rails and two feet on the outside of each rail even with the track whenever the city orders such streets to be paved, and in such manner as the city council may require." The ordinance which provided that the improvement should be made also provided for levying the assessment upon the abutting lots, and appropriated out of the fund to be raised by that assessment \$30,911.67, to pay the warrants of the city, which the ordinance provided should be issued against this amount; and it appropriated \$15,448.34, not out of the general funds raised by taxation to pay the current expenses of the city, but out of a special fund, realized, or to be realized, by the sale of bonds of the city, which the board of public works of the city had authority to issue, and to apply the proceeds of, for the purpose of paving, grading, and curbing streets, and making other like improvements, in the city of Denver. The ordinance specified that this \$15,448.34 was appropriated to pay the city's proportion of the expense of the improvement. After the passage of this ordinance the board of public works advertised for bids for grading and paving this street. The plaintiff in error made a bid that was accepted, and the city made a contract with it in accordance with the bid. The contract was that the plaintiff in error should furnish all the labor and materials required to make the improvement, at prices specified in the contract, and that upon the completion of the work there should be paid to it, in the manner provided by the ordinance, the sum which the labor and materials amounted to, at the prices specified in the contract. The plaintiff in error performed the contract to the satisfaction of the city. The cost of the improvement, at the prices fixed by the contract, was \$38,094.05; and the city has paid \$33,924.89, but refuses to pay the remaining \$4,169.16. The amount unpaid is the cost of grading, paving, and improving that part of the street between the railroad tracks and within two feet outside of the rails. The paving company requested the city to collect this amount of the railway companies that occupied the street, and pay it over to the paving company; but the city refused to do so, and, after demand, refused to pay the amount itself. To this statement of a cause of action, the city demurred on the ground that it disclosed "upon its face that the city of Denver was not, under any conditions to be liable for paving between the rails, and for two feet on the outside of the rails, of the street railway, \* \* \* but that said street railway was to be liable therefor to the plaintiff, and plaintiff was, under the contract sued on, to look to said street railway for payment for such paving." The court below sustained the demurrer, and dismissed the action. The writ of error was sued out to reverse this judgment.

Charles W. Waterman (Edward O. Wolcott and Joel F. Vaile were with him on the brief), for plaintiff in error.

George Q. Richmond (F. A. Williams was with him on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

One who induces a contractor to perform labor or furnish materials by the promise that a third person, who, he claims, owes him a debt or duty, shall pay to the contractor the agreed price of the labor and materials he furnishes, cannot enjoy the fruits of the contract, and leave the contractor remediless, either because his debtor does not pay, or because the debt or duty did not exist. In either event he becomes primarily liable to pay the contract price himself. *White v. Snell*, 5 Pick. 425; *City of Chicago v. People*, 56 Ill. 327, 333; *Bucroft v. City of Council Bluffs*, 63 Iowa, 646, 650, 19 N. W. 807; *Cronan v. Municipality No. One*, 5 La. Ann. 537.

Stripped of its verbiage, this is the first cause of action disclosed in this complaint: The city of Denver agreed with the Barber Asphalt Paving Company that, if the latter would lay this pavement, it should be paid \$38,094.05 therefor, in this way: A certain portion of this sum should be paid in cash, obtained or to be obtained from the sale of the bonds of the city of Denver; \$4,169.16 of it should be paid by the street-railway companies which had contracted to pave part of this street at the time and in the manner in which the city directed; and the balance should be paid from moneys to be realized from an assessment to be levied upon the property abutting upon the improvement. The plaintiff in error has paved the street, and the city has received all the benefits of a full performance of the contract. The city has discharged the obligation imposed upon it by the contract, with this exception: that it has not caused, or attempted to cause, the street-railway companies to pay the paving company the \$4,169.16 which it contracted that they should pay to it; and it refuses to pay this amount itself, or to take any steps to cause the railway companies to pay it. Why is this not a good cause of action? If the city had failed to issue its bonds, or to pay that part of the price of this improvement which it promised to pay from their proceeds, an action could have been immediately maintained to recover it. If it had failed to levy the assessment upon the lots abutting upon the improvement, or if it had been without the power to make that levy, and it had thus failed to cause that part of the price to be paid by the owners of those lots, the paving company could have recovered it by a direct action against the city. It is not perceived why its liability for that part of the price which it contracted that the railway companies should pay is less direct, primary, or absolute. It is no answer to this proposition to say that, while the city contracted that the railway

companies should pay this \$4,169.16, it did not, before the contract was let, provide, by ordinance or otherwise, any method by which the railway companies could be compelled to pay it. It is no defense to an action for the breach of a contract that the party in fault did not make adequate provision for its performance. In *Bucroft v. City of Council Bluffs*, 63 Iowa, 646, 650, 19 N. W. 807,—a case in which the city had agreed to pay for certain improvements out of a fund to be raised by the levy of assessments upon abutting property, and in which the property owners refused to pay, and the city was without power to enforce payment,—the supreme court of Iowa said:

"It may be said that the defendant did not, in terms, agree to pay, but it contracted, and the work was done for a compensation fixed by the city, and to its satisfaction, under an assumed power that the expense could be assessed as a charge on the abutting owner; and, in substance, both parties contemplated that payment should be made in a certain manner, or out of a designated fund. The plaintiff cannot be so paid. The defendant had no claim nor demand against the abutting owner, nor the power to create the fund, and yet it contracted that it had. \* \* \* Now, when it turns out that there was no such fund, and that the power to create it did not exist, it seems to us that the city should not and cannot escape all liability under the contract; and it has been so held."

In *Reilly v. City of Albany*, 112 N. Y. 30, 42, 19 N. E. 508, in which the plaintiff's assignor made a contract with the city of Albany to make certain improvements, to be paid for by assessments, and the proceedings leading up to the assessments were declared to be invalid, and the city refused to proceed to make other assessments, when a suit had been brought to recover the contract price of the work directly from the city, the court of appeals said:

"When the contractor had performed his work according to his contract, he had no duty remaining to discharge, and then had a right to rely upon the implied obligation of the city to use with due diligence its own agencies in procuring the means to satisfy his claims. It could not have been supposed that he was not only to earn his compensation, but also to set in motion, and keep in operation, the several agencies of the city government, over whom he had no control, to place in the hands of the city the funds necessary to enable it to pay its obligations. That was a power lodged in the hands of the city, and the clear intent of the contract was that it should exercise it diligently for the purpose of raising the funds necessary to pay for the improvement. For an omission to do so it would become liable to pay such damages as the contractor might suffer by reason of its neglect of duty."

If a municipal corporation which has the power to make a contract for street improvements contracts for them, and stipulates in the contract that the agreed price of the improvements shall be paid to the contractor out of funds realized or to be realized by assessments upon abutting property, the city is primarily and absolutely liable to pay the contract price itself, if it has no power to make such assessments, or if the assessments it attempts to make are void. *City of Memphis v. Brown*, 20 Wall. 289, 311, 312; *Hitchcock v. Galveston*, 96 U. S. 341, 350; *Barber Asphalt Paving Co. v. City of Harrisburg*, 12 C. C. A. 100, 64 Fed. 283; *Bucroft v. City of Council Bluffs*, 63 Iowa, 646, 650, 19 N. W. 807; *Scotfield v. City of Council Bluffs*, 68 Iowa, 695, 28 N. W. 20; *City*

of *Chicago v. People*, 56 Ill. 327, 333; *Maher v. City of Chicago*, 38 Ill. 266, 273; *Miller v. City of Milwaukee*, 14 Wis. 699; *Fisher v. City of St. Louis*, 44 Mo. 482; *Commercial Nat. Bank v. City of Portland*, 24 Or. 188, 33 Pac. 532.

If a municipal corporation which has the power to make a contract for street improvements contracts for them, and stipulates in the contract that the agreed price of the improvements shall be paid to the contractor out of funds to be realized by assessments upon abutting property, and the city has power to make the assessments, but fails to do so, or fails to make valid assessments, and thereby to provide the fund out of which the contractor may receive the price of his labor and materials, the city is primarily and absolutely liable to pay the contract price itself. *Bill v. City of Denver*, 29 Fed. 344; *Argenti v. City of San Francisco*, 16 Cal. 256, 281, 283; *Beard v. City of Brooklyn*, 31 Barb. 142, 150, 151; *Commercial Nat. Bank v. City of Portland*, 24 Or. 188, 33 Pac. 532; *City of Louisville v. Hyatt*, 5 B. Mon. 199, 201; *City of Leavenworth v. Mills*, 6 Kan. 288, 297; *Reilly v. City of Albany*, 112 N. Y. 30, 42, 19 N. E. 508; *Michel v. Police Jury*, 9 La. Ann. 67. In cases of this character the city becomes primarily liable, even when the contract expressly provides that the contractor shall accept the assessments in payment of the contract price, and that the city shall not be otherwise liable, whether the assessments are collectible or not. *Barber Asphalt Paving Co. v. City of Harrisburg*, 12 C. C. A. 100, 64 Fed. 283; *City of Chicago v. People*, 56 Ill. 327, 334; *Commercial Nat. Bank v. City of Portland*, 24 Or. 188, 33 Pac. 532. There is no substantial conflict of authority upon these propositions, and the principle they establish is decisive of the question under consideration. This contract was between the city and the paving company. The latter agreed with the city, and not with the railway companies, to grade and pave the street; and the city agreed, and the railway companies did not agree, to pay for these improvements. The paving company has fully performed its contract, and the city has received the benefit of it. It had no contract with the railway companies, it did not pave the street at their request, and its right to recover the contract price is against the party which induced it to make the improvement, and promised that it should be paid for it. If the city had agreed to pay this portion of the contract price in the bonds or the promissory notes or the lands or the services or the material of the railway companies, or any third parties, and had failed to do so, an action against it for the contract price would immediately have arisen. The fact that it agreed to pay this part of the price in the money of these railway companies, and failed to do so, cannot abrogate or modify the principle. By this contract the city became primarily liable to pay that part of the contract price of these improvements which it agreed that the railway companies should pay, when it failed, for an unreasonable length of time after the completion of the contract, to cause the companies to make the payment.

It is, however, insisted that the judgment below ought not to

be reversed, because the charter of the city prohibited its officers from making any contract for, or imposing any liability upon, the city until a definite amount of money had been appropriated to discharge the liability so incurred, and no money was appropriated to discharge the liability incurred by the contract that the railway companies should pay the amount now in question. There are several reasons why this proposition cannot be maintained:

First. The question it attempts to present was not raised by the demurrer, because it does not appear from the complaint that no appropriation was made. Counsel for defendant in error effectually concede this in their brief, for they say:

"We are not contending that the city had no right to make this contract, as it is set out in the complaint, but insist that, in the absence of an appropriation, the city cannot be bound by ordinance, contract, or judicial legislation."

If the contract, as it is set out in the complaint, was within the scope of the powers of the city, and was made by it, as the complaint alleges, then that contract cannot be avoided by the existence or nonexistence of some prerequisite concerning which the complaint is silent. The plaintiff has averred that a contract was made which the city had the power to make. It has pleaded a valid contract. If a previous appropriation was requisite to its validity, the presumption arises, from the execution of the contract, that this appropriation was made. If it was not made, that fact is new matter, which can be brought to the attention of the court by plea or answer only. *Chicago, B. & Q. R. Co. v. Otoe Co.*, 1 Dill. 338, Fed. Cas. No. 2,667, and cases cited; *Nash v. City of St. Paul*, 11 Minn. 174 (Gil. 110); *Boone*, Code Pl. § 66. It was undoubtedly within the scope of the general powers of the city to make this contract for paving one of its streets. If the contract was void because the city failed to make the necessary appropriation for it, it was so because the city itself failed to exercise the power which it possessed in a lawful manner, and this was an affirmative defense. The ordinance directing the improvement, the contract let by the board of public works and executed by the city, and the fact that the paving company was permitted to proceed and completely perform it, without objection to its validity, are at least presumptive evidence that the contract was made in a lawful manner, and that the powers of the city were properly exercised. All these facts are disclosed by the complaint, and no fact to avoid their effect is there disclosed. A contract of a corporation, fully executed by its proper officers, by authority of its governing board, and not in itself necessarily beyond the scope of its powers, will, in the absence of pleading and proof to the contrary, be presumed to have been made by lawful authority. Acts done by the corporation which presuppose the existence of other acts to make them legally operative are presumptive proof of the latter. *City of Lincoln v. Sun Vapor Street-Light Co.*, 19 U. S. App. 431, 8 C. C. A. 253, 59 Fed. 756, 760; *Lincoln v. Iron Co.*, 103 U. S. 412, 416; *Bank v. Dandridge*, 12 Wheat. 64, 70; *Omaha Bridge Cases*, 10 U. S.



App. 98, 189, 2 C. C. A. 174, 240, 51 Fed. 309, and cases cited; *Union Water Co. v. Murphy's Flat Fluming Co.*, 22 Cal. 620, 629.

Second. The charter of the city of Denver did not prohibit its officers from making the contract here in question until after a definite amount of money had been appropriated to discharge the liability so incurred. The law incorporating the city of Denver, and its amendments, was reduced into one act by the legislature of Colorado in 1885; and it appears in the Session Laws of that year, between pages 74 and 124. It was amended in 1889, and those amendments appear in the Session Laws of that year, between pages 124 and 149. It was again amended in 1891, and those amendments appear in the Session Laws of that year, between page 75 and page 81. In 1892, when the contract here in question was made, the provisions of this charter that are material to the questions now under consideration were these:

Section 20 of article 2 vested in the city council the general management and control of all the property of the corporation, real, personal, and mixed, and gave it authority to open, alter, abolish, widen, extend, establish, grade, pave, and otherwise improve the streets of the city. Sess. Laws Colo. 1885, p. 81.

Section 6 of article 6 of this charter, which is entitled "Finance and Taxation," provided that during the last quarter of each calendar year the officers at the head of the different departments of the city government should make detailed statements of the probable expenses of their respective departments for the ensuing year, that the mayor should thereupon present to the city council a statement of the money necessary to defray the expenses of the city government for the next year, and that as soon thereafter as possible the city council should pass an annual appropriation ordinance for the next calendar year, appropriating certain definite sums of money to defray the expenses incident to each department of the city government, based upon the estimate of the mayor. Sess. Laws Colo. 1889, p. 135.

Section 7 of that article provided that the board of public works and the city council might contract an indebtedness to the amount of \$400,000, to pay for certain new improvements, including the construction of public buildings, public sewers, viaducts, reservoirs, and to pay the city's proportion of grading, paving, and curbing streets. Sess. Laws Colo. 1889, p. 136.

Section 8 of article 6, which is the section on which the contention of counsel for defendant in error is based, provided:

"The city council shall not order the payment of any money, for any purpose whatever, in excess of the amount appropriated for the current year, and, at the time of said order, remaining unexpended in the appropriation of the particular class or department to which such expenditures belong. Neither the city council nor any officer of the city shall have the authority to make any contract, or do anything binding the city, or imposing upon the city any liability to pay money, until a definite amount of money shall have been appropriated for the liquidation of all pecuniary liability under said contract, or in consequence thereof, and the amount of said appropriation shall be the maximum limit of the liability of the city under any such contract, or in consequence thereof; said contract to be ab initio, null and void, as to

the city, for any other or further liability; \* \* \* provided, that the provisions of this section shall not apply to or limit the authority conferred by the preceding section 7." Sess. Laws Colo. 1885, pp. 106, 107.

Section 3 of article 10, which is entitled "Streets and Sidewalks," provided that whenever the owners of the majority of the lots abutting on a street or alley should petition the city council for the paving or grading thereof, or whenever the board of public works should order the same, and should notify the city council, such paving or grading should be ordered by ordinance, and two-thirds of the total expense thereof, excluding the intersection of streets and alleys, should be assessed upon the property abutting upon the same, and one-third of such expense on such frontage, and all the expense at street and alley intersections, should be borne by the city. It also provided that:

"Warrants in payment of two-thirds of the total cost, including the incidentals and interest of the grading or paving, or both, along any property frontage, which may include curbing, storm sewers as above indicated, so ordered, shall be issued in the manner provided by ordinance, and shall be payable out of the moneys collected from the assessments upon the lots abutting upon such improvement. \* \* \* The amount in payment of the one-third of the total cost of such improvement to be borne by the city shall be in cash, and shall be payable as provided by ordinance." Sess. Laws Colo. 1889, pp. 141, 142.

Section 6 of an act to amend the city charter of Denver, approved April 11, 1891, provided:

"All contracts for the construction, reconstruction or aiding in the construction of district sewers, public sewers, storm sewers, bridges, viaducts, sidewalks, curbing, street grading and paving, with all their appurtenances shall be hereafter let by the mayor with the approval of the board of public works, without any action on the part of the city council, anything in this act or the acts to which this act is amendatory to the contrary notwithstanding." Sess. Laws Colo. 1891, p. 78.

In the month of April, 1891, the city council of Denver passed an ordinance, pursuant to the authority vested in it by section 7, art. 6, *supra*, which provided that 400 bonds of the city of Denver, of \$1,000 each, should be issued, upon the approval of a majority of the members of the board of public works of the city, for the purpose of paying the city's proportion of grading, paving, curbing, and construction of storm sewers, with their manholes, inlets, and appurtenances, and for paying for the other improvements mentioned in section 7; that "the said board of public works shall have full and absolute authority to negotiate the sale of said bonds when issued, and shall have full, complete and exclusive authority to expend for and in behalf of said city such sums of money as shall from time to time be realized from the sale of the bonds aforesaid for any or all of the said purposes, viz." for constructing public buildings, viaducts, reservoirs, etc., and "for paying the city's proportion of grading, paving, curbing and construction of storm sewers with their manholes, inlets and appurtenances."

A careful examination of this legislation discloses the fact that the method of conducting the general administration of the affairs

of the city, of making the contracts for its current wants, and the appropriations for its current expenses, which were to be paid for by the general tax levy of the coming year, was prescribed by sections 6 and 8 of article 6 of this charter. By section 6 the officers at the head of the different departments of the city government were required, during the last quarter of the year, to make detailed statements of the probable expenses to be incurred in their respective departments, and thereupon the city council was required to pass an annual appropriation ordinance "providing for the appropriation of certain definite sums of money to defray the expenses incident to each department of the city government" for the next calendar year. By section 8 the city council was prohibited from ordering the payment of any money in excess of the amount appropriated by this annual appropriation ordinance, and remaining unexpended in the appropriation of the particular class or department to which such expenditure belonged, at the time the order was made, and it was further provided that neither the city council nor any officer should have authority to make any contract binding the city until a definite amount of money had been appropriated to liquidate the liability incurred thereby. The last clause of that section, however, expressly provides that the provisions of the section shall "not apply to or limit the authority conferred by the preceding section 7." Now, section 7 prescribed the method, and gave to the board of public works and to the city council the power, to raise and expend \$400,000 to grade, pave, and curb streets, to construct sewers, to erect public buildings, to purchase and improve parks, to build viaducts, and to make other original improvements, which were not to be paid for by the general tax levy for the coming year. The contract now in question was for grading, paving, and curbing a street; it was an original improvement, and not a current expense of the city; it was to be paid for from local assessments and the proceeds of the bonds authorized to be issued by section 7, and not by general taxation; and it was made pursuant to the general authority to grade and improve streets, and the authority granted by section 7, *supra*, and section 6 of the amendment of 1891. The conclusion is irresistibly forced upon our minds, by this review of the provisions of this charter, that this and like contracts for the construction of buildings, sewers, viaducts, and sidewalks, and for grading and paving streets, that were not a part of the current expenses of the city, and were not to be paid for by the general tax levy, but through the expenditure of the funds authorized to be raised by section 7, are expressly excepted from the restrictions and prohibitions of section 8 by the last clause of that section. We are unable to bring ourselves to the view that the legislature intended that the city council should include in its annual appropriation ordinance an appropriation for every original improvement of this nature that might be made, under section 7 and the subsequent legislation, during the year following the passage of the appropriation, and that it was forbidden to order the payment for any such im-

provement not included in such appropriation. Such a construction of this charter would require of a board of public works and a city council in a growing city a degree of foreknowledge in excess of that possessed by the legislature itself. How could they foresee what streets the owners of abutting property would petition to have paved or graded six months or a year before the petitions were drawn? The express exception at the close of section 8, however, seems to us too plain and unambiguous to receive much aid from argument or construction. When the language of a statute is plain, it should be held to mean what it clearly expresses, and no room is left for construction. *Railway Co. v. Sage* (decided by this court at the present term) 17 C. C. A. 558, 71 Fed. 40; *Knox Co. v. Morton*, 15 C. C. A. 671, 68 Fed. 787, 789; *U. S. v. Fisher*, 2 Cranch, 358, 399; *Railway Co. v. Phelps*, 137 U. S. 528, 536, 11 Sup. Ct. 168.

If any doubt had arisen as to the intention of the legislature in enacting the exception at the close of section 8, the subsequent action of the legislature and the city council would remove it from our minds. Section 7, as it now stands, was enacted in 1889. In 1891 the legislature of Colorado provided that all contracts of the city of Denver for the construction of sewers, bridges, viaducts, and sidewalks, and for curbing, grading, and paving streets, should be thereafter "let by the mayor with the approval of the board of public works, without any action on the part of the city council, anything in this act or the acts to which this act is amendatory to the contrary notwithstanding." Sess. Laws Colo. 1891, p. 78, § 6. If the mayor and board of public works were authorized to let this contract without any action of the council, they were certainly authorized to let it without an appropriation by the council. The city council so construed this charter, and recognized and ratified this power in the board of public works, by the ordinance which it passed in April, 1891. It provided by that ordinance that the \$400,000 of bonds authorized by section 7 should be issued "upon the approval of a majority of the members of the board of public works of said city, at a session thereof"; that that board should have full authority to negotiate their sale, and "full, complete and exclusive authority to expend for and in behalf of said city such sums of money as shall from time to time be realized from the sale of the bonds aforesaid," for the purposes specified in section 7,—one of which was, as we have seen, to pay the city's proportion of grading, paving, and curbing the streets.

The result is that a contract for grading, paving, and curbing a street of the city of Denver is not subject to the restrictions and prohibitions of section 8, art. 6, of the charter of the city, but is expressly excepted therefrom by the last clause of that section, and by the provisions of section 6 of the act of 1891, amending the charter, and the previous appropriation of a specific amount to pay the liability incurred by such a contract is not essential to its validity. The case of *Smith Canal or Ditch Co. v. City of Denver* (Colo. Sup.) 36 Pac. 844, which was cited and relied upon by counsel for defendant in error, is not in conflict with this view. That was an action to recover upon

an implied contract for the value of water furnished to the city of Denver. It was an action upon a supposed liability incurred in the usual course of the administration of the city, under sections 6 and 8 of article 6 of the charter, and to be paid for, if at all, from the funds derived from the general tax levy of the year in which the cause of action arose; and the supreme court of Colorado held that the contract was void, because no previous appropriation had been made for it. The difference between the contract in question in that case and that here in issue is that the former was clearly within the restrictions and prohibitions of section 8, and the latter was as clearly excepted from them by the last clause of that section, and by section 6 of the act of 1891. The supreme court of Colorado, in its opinion in that case, carefully recognized this distinction. It declared that the complaint in that case did not "allege such facts as bring the case within any of the provisos mentioned or referred to in said section 8." The complaint in the case at bar does allege such facts as bring it within the exception contained in the last proviso of section 8, and such facts as take it out from under the rule announced in *Smith Canal or Ditch Co. v. City of Denver*, supra. The judgment below must be reversed, with costs, and the case must be remanded, with instructions to overrule the demurrer and permit the defendant to answer, and it is so ordered.

CALDWELL, Circuit Judge (dissenting). In the opinion of the majority it is said:

"It is, however, insisted that the judgment below ought not to be reversed, because the charter of the city prohibited its officers from making any contract for or imposing any liability upon the city until a definite amount of money had been appropriated to discharge the liability so incurred, and no money was appropriated to discharge the liability incurred by the contract that the railway companies should pay the amount now in question. There are several reasons why this proposition cannot be maintained: First. The question it attempts to present was not raised by the demurrer, because it does not appear from the complaint that no appropriation was made. Counsel for defendant in error effectually concede this in their brief, for they say: 'We are not contending that the city had no right to make this contract, as it is set out in the complaint, but insist that, in the absence of an appropriation, the city cannot be bound by ordinance, contract, or judicial legislation.' If the contract, as it is set out in the complaint, was within the scope of the powers of the city, and was made by it, as the complaint alleges, then that contract cannot be avoided by the existence or nonexistence of some prerequisite concerning which the complaint is silent. The plaintiff has averred that a contract was made which the city had the power to make. It has pleaded a valid contract. If a previous appropriation was requisite to its validity, the presumption arises from the execution of the contract that this appropriation was made. If it was not made, that fact is new matter, which can be brought to the attention of the court by plea or answer only. *Chicago, B. & Q. R. Co. v. Otoe Co.*, 1 Dill. 338, Fed. Cas. No. 2,667, and cases cited; *Nash v. City of St. Paul*, 11 Minn. 174 (Gil. 110); *Boone*, Code Pl. § 66."

The court here decides two things: First, that the question whether the charter of the city prohibited its officers from incurring the liabilities sought to be imposed upon it by this suit until a definite amount of money had been appropriated to discharge the liability so incurred, was not raised by the demurrer; and, second, that "that fact is new matter, which can be brought to the attention of the court

by plea or answer only." It is obvious, therefore, that all that is said upon this question—which, it is distinctly decided, is not raised by the demurrer, and "is new matter, which can be raised by plea or answer only"—is obiter dictum, and is not binding on this or any other court. It is the ruling of the lower court on the demurrer, and nothing else, that is before this court for review; and a question not raised by that demurrer is not before us, and cannot be considered judicially. Whatever may be said on the subject cannot be regarded as a judicial utterance. Counsel for the plaintiff in error, in their brief, say:

"This technical defense, this new matter which the city contends goes to the validity of the contracts themselves, ought not to be injected into this record by the instrumentality of a demurrer; but the defendant in error, if it relies upon such a defense, should be relegated to the proper legal methods of raising such defense. It should be sent back to the court below, with instructions that, if it has a defense of that character, it can be interposed by answer, and by no other method; giving the plaintiff in error, when such defense is properly raised, the opportunity of replying thereto, and setting up the facts which may go to defeat such a defense."

This is undoubtedly a correct statement of the proper practice to be pursued in this case. It is obvious that the learned counsel for the plaintiff in error did not conceive it possible that this court could or would pass upon the validity of the contract after it was decided that the demurrer did not raise that question. Not until all the facts having relation to the validity of the contract are brought upon the record can its validity be passed upon. But the majority of the court, while adopting the view of the counsel for the plaintiff in error, viz. that the demurrer does not raise the question of the validity of the contract, nevertheless proceed to decide that very question. This question, which the defendant in error mistakenly supposed it had raised by its demurrer, is indeed the only question in the case, and is the only one discussed in the brief of the counsel for the defendant in error. That portion of the opinion of the majority which precedes the paragraph quoted discusses questions which are not controverted, but which do not touch the real point intended to be raised by the demurrer, namely, the proper construction of the city's charter and of ordinances, and the validity of the contract thereunder. Moreover, all that is said on this subject is not only obiter, but very much of it is based on matters entirely outside of the record. Ordinances and other facts are referred to which are not made part of or referred to in the complaint, and are not found in the record, but appear only in the brief of the plaintiff in error. It will be time enough to discuss the law upon this subject when the court has a record before it which raises the question, and presents the facts necessary to its correct decision. If the opinions of appellate courts are to be respected and have any weight, they must conform their utterances to the questions properly brought before them, and to the facts appearing in the record. Proper respect for this rule, and a due regard for the rights of the parties in this case, require that the court should say no more than that this question is not raised by the demurrer, and cannot, therefore, be considered.

## WAITE et al. v. O'NEIL et al.

(Circuit Court, W. D. Tennessee. January 4, 1896.)

**1. EQUITY JURISDICTION—WAIVER OF OBJECTION.**

Failure to make, before final hearing, the objection of want of equitable jurisdiction because of an adequate remedy at law, is a waiver thereof, and authorizes the court to retain the cause, if the case be one of such a nature that equity might give the relief asked, or any part of it, or if the question of equitable jurisdiction be even a doubtful one.

**2. SAME—ALTERNATIVE LEGAL RELIEF.**

A decree embodying purely legal relief will more readily be granted by a court of equity, as alternative to the specific equitable relief prayed, when the objection of want of equitable jurisdiction is not taken until final hearing.

**3. SAME.**

Complainant filed a bill for specific performance of certain covenants in a lease, whereby, it was alleged, respondents became bound to repair and restore to its original condition the leased land, which had been undermined and partially washed away by a flood in the Mississippi river. In lieu of specific performance, the bill prayed for damages for breach of the covenant, and also for a decree for installments of rent due. *Held* that, while the court would deny specific performance, on the ground that the disaster to the premises was not in the contemplation of the parties, and the enforcement of the covenant would be unconscionable, yet there was such a show of equitable cognizance in the bill that the cause would be retained for the purpose of affording such other relief, even purely legal in character, as the proofs might justify.

**4. LANDLORD AND TENANT—COVENANTS TO REPAIR—WASHING AWAY OF PREMISES ON RIVER BANK.**

Where premises were leased for use as a river landing, with a covenant by the lessee to deliver up the premises at the end of the term in good order and condition, and to make good all damages thereto, except the usual wear and tear, *held* that, being construed in the light of the uses contemplated, the covenant merely bound the lessee to keep the premises in their usual condition of usefulness, as against ordinarily destructive influences operating to abrade the banks or displace the appliances used in the business, and that it did not bind him to restore the premises, after they had been undermined and partially washed away by an unusual flood, so powerful in its effects that vast expenditures, beyond the entire value of the premises, would have been necessary in order to stay the damage or restore the property to its original condition; but that, the lessee having abandoned the premises because they had been thus rendered unfit for the purposes of the lease, the owner was entitled to recover rent to the end of the term.

This was a bill by Charlotte H. Waite and others against J. N. O'Neil and others for a specific performance of the covenants of a lease, and for other relief.

The plaintiff, for herself, and as guardian for her children, executed to the defendants O'Neil & Co. a lease in the following words:

**"LEASE.**

"Charlotte H. Waite, for herself, and as guardian of her two minor children, of the first party, and O'Neil & Co.,—firm composed of J. N. O'Neil, W. W. O'Neil, S. P. Large, and I. N. Large,—of the second party, hereby enter into the following contract, viz.: The said first party, by these presents, leases to the said second party, from the first day of November, 1882, until the first day of October, 1889, the river front and landing in front of lots numbers (1, 2, 3, and 4) one, two, three, and four, in block No. one (1) South Memphis, with ample space for a roadway along the landing at all stages of the water, and no more; the said landing to be used by said

lessees for the moving, storing, and unloading of coal, wood, and ice barges or boats, but not to be used as a dump for scavenger or night-soil wagons or carts. Said parties of the second part are to have the privilege of renewing this lease until the majority of the youngest of said minors, provided suitable arrangements can be made with the oldest child, who will then be of age. And the said first party covenants that she will keep and secure said second party in the peaceful use and possession of said premises during the term of this lease, unless default of payment of rent or other condition of this contract be made. The said second party, for and in consideration of the use of said premises, agree to pay to said first party, or her assigns, the sum of six thousand two hundred and twenty-five dollars, payable in eighty-three monthly installments, for which eighty-three promissory notes for twenty-five dollars each, of date hereof, have been executed; and the second party agree to deliver up, to said first party or her assigns, the said premises, at the expiration of this lease, in good order and condition, and to make good all damages to said premises, except the usual wear and proper use of the same, and to keep the roadway thereon in repair, and also to remain liable for rent until all the premises, with the keys of the same, clear of all persons, goods, or things not belonging to the same, be tendered or delivered to said first party, her heirs or assigns, in like good order; and no demand or notice of such delivery shall be necessary. The second party agree that they will not underlet the whole or any part of said premises without the written consent of said first party or her assigns. It is further agreed that, in default of either one or more of said payments, or any part thereof, at maturity, or in case of underletting without authority, this lease may be declared forfeited by said first party, at her option, in which case the second party shall be liable for all rents until the possession be delivered, and for all damages done to the premises; and the first party shall have the right to re-enter, take, and retain possession of said premises without being required to make demand of the same, or demand the payment of rent due, or to give notice of the nonpayment of the rent; and the first party shall not become a trespasser by taking possession as aforesaid. No set-off in payment of said rent shall be allowed, unless signed by the first party, her agent, or assigns, and the said notes shall be full and complete evidence of the rent due and owing, and when no notes are given, the proof of the payment of rent shall be on the second party in all controversies. It is agreed that said premises are in good order and condition at the date of these presents. In case of default of the second party, so as to forfeit this lease in their absence from this state, service of process upon any adult occupying or in possession of the premises shall be good and valid service upon the second party. It is further agreed by the party of the second part that they will, if necessary, construct, at their own expense, a roadway, with boats, piling, or plank, along the river front of said lots, and to construct the same without unnecessary digging of the ground on said lots, and to maintain the same during the continuance of this lease. This lease to take effect upon the expiration of the lease held by Brown & Jones. Said second party stipulates not to commit, but to prevent, waste. It is further agreed that no alterations or repairs shall be done to any part of said premises by said second party, without the first party's consent, in writing, under the penalty of double the cost necessary to put the premises in the condition they were when leased to said second party; and the second party shall not, at any time, remove any permanent repairs, improvements, additions, or fixtures put on said premises. But the first party shall have and hold all of the same at the end of said lease. Said first party reserves the right to make such repairs at any time as are necessary to the security or preservation of said premises.

"In testimony whereof, the said parties have hereunto set their hands and affixed their seals, this 30th day of May, one thousand eight hundred and eighty-one.

O'Neil & Co. [Seal.]  
"Charlotte H. Waite. [Seal.]

"Witnesses:

"Otto Seyppel.

"C. A. Le Clerc."



About the 1st of May, 1886, the lessees abandoned the use of the premises, and refused to pay the rent, which is still due upon the 41 notes exhibited with the bill. The reason for this abandonment is found in the fact that, some time prior thereto, the banks of the river, through the operation of the currents, began to cave away, and in April, 1886, the extraordinary flood then prevailing swept out of existence a large part of these lots and their river front, as it did much of the adjacent property. This caving was so serious that it amounted almost to a public calamity, and demanded and received at the hands of the property owners and the government of the United States costly efforts to restrain the ravages, that resulted to some extent favorably. The government engineer, in charge of the work by which the caving was arrested, testifies that the cost of putting in the dikes, mattresses, and other work was about \$64,000, the most of which was subscribed by the property owners. The lots of plaintiff lie on the upper portion of the banks that were injured, and the most of this expenditure was probably upon that portion of the banks lying below her lots; but, taking it as an entirety, there can be no doubt, on the proof, but that the work done under the supervision of the government arrested the destruction by the river, and, together with the operation of natural causes, has saved what is left. There is a dispute in the record as to the subsequent character of this landing, in respect of its adaptability to the uses of the lessees; but I think it may be taken, as established by the proof, substantially, that the landing has never been fit for any further use by the lessees since the destruction began. It is not impossible that they might have still used it during the term of the lease, by the expenditure of considerable sums of money; but, in the view that the court has taken of the case, it may be taken as a fact that the property conveyed by the lease was no longer available for the uses of the lessees. There is also a dispute in the proof as to whether or not the plaintiff agreed to contribute anything to a fund that was raised by the property holders to pay for the work which was done to arrest the ravages of the river, and counsel are disagreed as to the legal effect of such subscription, if any was made; but, again, it may be said that, in view of the rulings of the court upon the main issues of the case, this dispute of either fact or law is immaterial. The proof establishes, beyond controversy, that the destructive influences were beyond the control of a single property holder, and that the lessees could not, by the expenditure of any reasonable sum of money, have done anything to arrest the erosion caused by the currents of the river, which destroyed their property and that of the plaintiff in these premises. Work done alone in front of these lots that were leased would have been idle and useless. Any scheme to save them must have comprehended the whole front of the river, which was affected by the destructive influences which were at work to cause the caving of the banks. It must also be taken as proved that, all along, during the progress of the work, and up to the time when the proof was taken, the ultimate result was extremely doubtful as to the efficacy of the work to stop the destruction. It has turned out that the caving ceased, whether through the usefulness of the engineering work that was done, or from natural causes, or both, jointly, is not certain on the proof; but the important fact is shown that neither the owners of the property nor these lessees had anything more than a reasonable hope that the work would stop the caving of the banks, and it was under these circumstances that the lessees abandoned their holding, and refused to pay the rent. It is also proved that the lessor herself did nothing to arrest the progress of destruction, unless the disputed subscription to the fund by her can be taken as an effort in that direction.

The document constituting the lease between the parties shows that it was written upon the ordinary form of a lease of real estate, found, printed, at the stationers'; that some of the covenants therein are written into the blank form, and others are found in the printed portion which contains also some interlineation. After the date line, found in the opening clause of the lease, that which follows is written in down to the words, "And the said first party covenants that she will keep and secure the said second party in peaceful use and possession," etc. In the printed covenant for redelivery to the lessor in good condition, and to make good all damages to

said premises, except the usual wear and proper use of the same, and to keep the roadway thereon in repair, these last words about the roadway are written in. After the printed covenant for the service of process in the absence of the lessees, the covenant for the construction of the roadway at the expense of the lessees, and against unnecessary digging in the ground, is written in the blank form, down to the printed words of the covenant against alterations or repairs by the lessees without the consent of the lessor.

The bill was filed to enforce a specific performance of these covenants, or, in lieu thereof, damages for their nonperformance, for the collection of the rent not paid, and for general relief. The defendants make their answer a cross bill, as they may in the state court from which the case was removed, and pray a rescission of the lease and an injunction against the collection of the notes given for the rent. The case was not transferred after removal to the law side of the docket, nor was there any motion to replead for that purpose, nor any objection by defendants to the jurisdiction until the argument at the final hearing, nor did they offer to dismiss so much of their answer as was made a cross bill.

W. M. Randolph & Sons, for complainants.  
Turley & Wright, for defendants.

HAMMOND, J. (after stating the facts as above). The troublesome question of the jurisdiction must be resolved in favor of the plaintiff. Notwithstanding the seemingly imperative command of the statute that a court shall, of its own motion, always dismiss a case where the want of jurisdiction appears, and notwithstanding the almost universal practice of the federal courts to so dispose of a case in its last stages, even after appeal in the supreme court, when the jurisdiction is lacking, it is quite well settled that this rule pertains more particularly to that class of cases where the jurisdiction is absolutely wanting, and the court could not, under any circumstances, have cognizance of that case; as, where there is not a diversity of citizenship, or there is not a subject-matter within our federal cognizance, or where statutes have been neglected which it was necessary strictly to follow in order to give the court that special jurisdiction conferred by them. In its relation to an objection taken under the Revised Statutes (section 723), prohibiting the jurisdiction of a court of equity where there is a plain, adequate, and complete remedy at law, the court will sometimes disregard the objection, if it be not taken in time, and does not always lend a ready ear when it is delayed until the final hearing. In this, as in any class of cases, the court will, even after appeal, dismiss, if it appear that a court of equity could not by any possibility acquire jurisdiction; but, if the question of jurisdiction be even doubtful, and the facts be of that nature that a court of equity might give the relief asked, or any part of it, the objection will be disregarded, unless it be made in limine. I do not know that I have found this better stated anywhere than in the case of *Reynolds v. Watkins*, 9 C. C. A. 273, 60 Fed. 824, by our own circuit court of appeals:

"An objection that the remedy at law was plain and adequate should be taken at the earliest opportunity. Yet neither consent nor negligence will confer jurisdiction in equity where none really exists, and the court may, at any stage of the cause, entertain such objection, or dismiss the bill *mero motu*. Yet there are cases where, if the objection of want of jurisdiction,

because of an adequate remedy at law, be not taken in the circuit court, and be for the first time presented upon appeal, the court will not feel itself obliged to entertain an objection coming so late, especially if the subject-matter of the suit is of a class over which a court of chancery has jurisdiction, and it is competent for the court to grant the relief sought."

The court cites for this position, *Reynes v. Dumont*, 130 U. S. 355, 9 Sup. Ct. 486; *Kilbourn v. Sunderland*, 130 U. S. 505, 9 Sup. Ct. 594. I have examined these and other cases, and, while I have found one only (*Dederick v. Fox*, 56 Fed. 714) where this rule was applied in the court of original jurisdiction, and they generally relate to an objection for the first time taken in the appellate court, there is, in principle and in practice, no difference in that regard. Indeed, the rule has been imported into the appellate courts from the high court of chancery and other courts of original cognizance, and the very authorities cited by the courts from the English practice refer to an objection which has been taken too late in the court of inferior jurisdiction; and I see no sound reason why a court of original jurisdiction should entertain the objection, when it has not been taken until the final hearing, any more than an appellate court should entertain it when it is made for the first time in that tribunal. At most, it is only a question of degree, and relates solely to the efflux of time; for the record is in precisely the same condition in the one court as in the other, the process of appeal having only transferred it from the one to the other; and, as it affects the rights of the parties, namely, the inconvenience and injustice to the plaintiff in having it made at so late a time, the rule of exclusion is just as forceful in the one case as in the other. The case of *Preteca v. Land Grant Co.*, 1 C. C. A. 607, 50 Fed. 674, gathers the cases upon this point from both the state and federal courts somewhat extensively, and will save me the labor of citing them here. It quotes from *Tyler v. Savage*, 143 U. S. 79, 12 Sup. Ct. 340, and *Reynes v. Dumont*, 130 U. S. 354, 9 Sup. Ct. 486, what is there said upon the subject of taking the objection to the jurisdiction at too late a stage of the proceedings. In *Reynes v. Dumont*, supra, the chief justice quotes from *Daniell's Chancery Practice* the rule that the objection must be taken at the earliest opportunity, and before the defendant answers and submits to the jurisdiction, and it will not be then heard, except in that class of cases where it is not open to any doubt that the bill brings into a court of equity matters absolutely cognizable only in a court of law. In *Tyler v. Savage*, 143 U. S. 79, 12 Sup. Ct. 340, Mr. Justice Blatchford reaffirms *Reynes v. Dumont*, on this point, and cites a number of later cases, which is done also in *Foltz v. Railway Co.*, 8 C. C. A. 635, 60 Fed. 316.

A careful examination of these cases, and of the other authorities for the practice, establishes the principle that, while a failure to make the objection that there is a want of equitable jurisdiction and an adequate remedy at law cannot impose upon the court of equity jurisdiction of matters that are purely of legal cognizance, the objection is waived by a failure to take it at the earliest opportunity in all that class of cases where it is possible for a court of equity to act in the premises. And in our federal practice we must

not confound the inflexible and inexorable rule, both statutory and judicial, that the federal courts will always decline jurisdiction at all stages of the case where it is absolutely wanting, and without the federal power, with the untenable position that a court of equity must always decline, at any stage of the proceedings, to take jurisdiction of a bill which it might have dismissed upon demurrer or plea, because the plaintiff might have had relief at law. There are some cases, even in the federal courts, where the objection to the jurisdiction may be waived by not taking it in time, and this seems one of them. *Brown v. Iron Co.*, 134 U. S. 530, 10 Sup. Ct. 604; *Hollins v. Coal & Iron Co.*, 150 U. S. 371, 380, 14 Sup. Ct. 127. However, it is not necessary for the plaintiff to rely on this waiver to save the jurisdiction here; and, somewhat oddly, it does not relieve us of the necessity of considering the merits of the objection to the jurisdiction. The rule is not absolute that the court will disregard the objection, either in the appellate court or here, simply for the reason that it is made for the first time at the final hearing or on appeal. Mr. Daniell calls attention to the danger of overlooking the qualification of the rule of waiver because the objection had not been taken in limine,—that it must nevertheless be always competent for a court of equity to grant relief, and it must have jurisdiction of the subject-matter. 1 Daniell, Ch. Prac. 555.

We must, therefore, see whether or not the case falls within that class which may be at all entertained by a court of equity. In determining this question, the court will be more complacent and indulgent of doubtful cases of equitable jurisdiction, when the objection is taken for the first time at the final hearing, than it would be if taken at the threshold; but, at last, the court must find some sensible ground for equitable procedure, or it will not proceed at all, no matter when the objection be taken. *Allen v. Car Co.*, 139 U. S. 658, 11 Sup. Ct. 682. Also, the court will, when the objection to the jurisdiction has not been taken in due time, more readily grant a purely legal judgment as alternative to the relief in equity which it may deny. Yet, always, as before, there must be a fair and reasonable ground—or what I may, by a borrowed analogy, call “probable cause”—for his appeal to a court of equity. He must have had, in the nature of his case, a reasonable expectation of equitable relief, which has been disappointed only because that relief has been, in the legal discretion of the court, denied to him. This is very closely allied to the question, which has been so much argued in this case, whether or not this bill for specific performance is one which a court of equity should, within its discretion upon that subject, entertain. It is not a matter of course that a court of equity will always specifically perform a contract, or entertain a bill for that purpose, even where the plaintiff does not have an adequate remedy at law. Adequate or inadequate, courts of equity often compel the plaintiff to resort to his remedy at law, and, in the exercise of a legal discretion in that behalf, refuse the prayer for specific performance of the contract; and that is what we have been asked to do in this case. It will be observed that the two considerations just mentioned are not precisely the same,

and yet are so closely allied that we may treat them together; for, if this case be one in which the court would exercise its judicial discretion in favor of a specific performance, there would be no doubt of the jurisdiction. But, even though the court should deny a specific performance of the contract, in the exercise of that judicial discretion which it has in all cases asking that particular relief, yet, if the facts be such that the plaintiff might fairly and reasonably have expected the court to grant the equitable relief of specific performance, there would be such a show of equitable cognizance and doubtful remedy and probable cause as would save the plaintiff from the penalty of a dismissal of the bill for want of jurisdiction because of a plain, adequate, and complete remedy at law, under Rev. St. § 723. It might be that the court would refuse the prayer for specific performance, but, under the prayer for general relief, or some more specific prayer, give a decree which would be identical with a judgment that might have been obtained at law, no matter at what time the objection to the jurisdiction has been made, whether by demurrer or at the final hearing. But, certainly, if the case be of a doubtful kind, it should not be dismissed for want of jurisdiction, under section 723, *supra*, when the objection to the jurisdiction is taken only at the final hearing. In other words, if this bill be of that class often appearing, whether for specific performance or what not, in which a court of equity might maintain and grant relief as at law, although denying the equitable relief which has been prayed, the rule that the case would be dismissed because there was an adequate and complete remedy at law would not apply, unless it were taken at the earliest opportunity.

We shall, therefore, necessarily have to consider the objection which has been made that this case is not one falling within the class of cases in which a court of equity, while refusing the specific relief demanded by the bill, may grant some other relief which might have been obtained at law. In the case of *Thompson v. Railroad Co.*, 6 Wall. 136, the court held that the case was bare of every pretense of equitable cognizance, and dismissed the bill, saying that it did not present a single element for equitable jurisdiction and relief, and that it was nothing but an ordinary action at law; and so it was in *U. S. v. Wilson*, 118 U. S. 86, 6 Sup. Ct. 991, where it was called an "ejectment brought in equity." But, in our Tennessee practice, it is well established that almost pure ejectment suits may be maintained in equity, upon the consideration that, "when parties have, at great expense, prepared a case for trial, they shall not be turned out of court upon a doubtful question of jurisdiction," and the case is held often upon a very slender thread of semblance of the jurisdiction. *Buck v. Williams*, 10 Heisk. 277; *Almony v. Hicks*, 3 Head, 39; *Manufacturing Co. v. Ross*, 12 Lea, 8. These cases go further, possibly, than the federal adjudications would warrant; but, still, these latter hold firmly to the jurisdiction, if no objection has been raised in early time, whenever there is a possibility of doing it without a violent invasion of the exclusive jurisdiction of a court of law. The case of *Hayward v. Andrews*, 106 U. S. 672, 1 Sup.

Ct. 544, where the jurisdiction was declined, is instructive; but there was not, there, even a fair pretense of equitable cognizance, as in *Thompson v. Railroad Co.*, *supra*,—the assignee of a chose in action being not at all embarrassed at law, merely because he could not sue in his own name, when he might sue in the name of his assignor. And in *Van Norden v. Morton*, 99 U. S. 378, like *Hurt v. Hollingsworth*, 100 U. S. 100, the blending of legal and equitable remedies in federal courts, after the manner of the state courts, under the influence of state statutes, was condemned, as in this leading case of *Thompson v. Railroad Co.*, so much urged by counsel for defendants here. I have traced that case, by the citations of it, quite carefully; and I think it may be said, of all of the type to which it belongs, that the jurisdiction was never declined unless there was a stripping to the bone of pure legal cognizance and of every delusive pretense of equitable cognizance relied on in the particular facts of each case. And wherever this process did not expose, in the bone, a case of pure and untinged legal jurisdiction, the equitable power to deal with it was maintained, even when the objection was properly made in limine; and it is not at all tolerated when made later, if there be no such nakedness of equitable jurisdiction. Mr. Circuit Judge Baxter, in *Burdell v. Comstock*, 15 Fed. 395, ousted the bill because it was a fraudulent pretext only; and in *Re Sawyer*, 124 U. S. 210, 8 Sup. Ct. 482, the supreme court, in a peculiar case, arising out of an attempt to stay by injunction what the majority of the judges thought to be criminal proceedings, enforced the fundamental idea that the court must always have at least a semblance of equitable cognizance, but the dissenting judges protested that even in such cases as presented an entire absence of this, the decree granting equitable relief was not void, under the rule that the judgment of a court without jurisdiction is void,—which shows that, under the statute excluding cases where there is a plain and adequate remedy at law, the court still may entertain those where the remedy is doubtful, and if the doubt is resolved against the equitable relief, the court may, nevertheless, having acquired the jurisdiction to resolve the doubt, give a legal relief rather than dismiss the bill, but, always, there must be a reasonable expectation of equitable relief in the first instance. In *Hipp v. Babin*, 19 How. 271, so much cited everywhere, as in the other cases, there was an entire absence of any reasonable pretense of equitable jurisdiction.

The cases sustaining the jurisdiction have been somewhat cited already, and it is quite certain that this case comes within the class they establish, if they are carefully considered in this connection; and these require that the court shall grant any relief, either equitable or legal, to which the plaintiff may be entitled, whenever the facts bring it within the rule we have stated. One of the earliest cases considering this statute is *Boyce v. Grundy*, 3 Pet. 210, where it is said not to bar a bill unless the remedy at law is "as practical and as efficient to the ends of justice and its prompt administration as the remedy in equity." The leading case of *Watson v. Sutherland*, 5 Wall. 74, is called in *Van Norden v. Morton*, *supra*, "a close

case"; but, like *Boyce v. Grundy*, it well illustrates the extent to which a court of equity will go in maintaining a bill to avoid a multiplicity of suits, and the accumulation of damages recoverable at law, where the injury being done is cumulative and consequential, and therefore not adequately compensated by legal judgment. A pertinent illustration is found in *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.*, 118 U. S. 290, 298, 6 Sup. Ct. 1094, which was a bill for the specific performance of the covenants of a long lease; and the very multiplicity of suits for rent installments is noted as a ground of equitable retention of a bill, when the issue of the obligation involves other complex issues, arising out of the claim for a compliance with the covenants of the lease and damages for their breach. And in *Mobile Co. v. Kimball*, 102 U. S. 691, the obstacle to a specific performance arising out of a repeal of the law authorizing a certain board to act, it was held that a court of equity would, after that, give pecuniary compensation in damages, and that it is the general rule that, if specific performance cannot be decreed because of such changes in conditions as produce obstacles to carrying out the contract, a court of equity, having jurisdiction to hear the plaintiff's demand for a specific performance, which must be refused, or which cannot be had, will grant any legal relief to which he may be entitled. And in a more notable case, that of *Gormley v. Clark*, 134 U. S. 338, 10 Sup. Ct. 554, even state legislation creating new equitable remedies was allowed to furnish a foundation for invoking the aid of a federal court of equity, and administering therein purely legal and somewhat anomalous relief; and this, notwithstanding the rulings subsequently made in *Whitehead v. Shattuck*, 138 U. S. 146, 11 Sup. Ct. 276, and *Scott v. Neely*, 140 U. S. 106, 11 Sup. Ct. 712. The chief justice truly says it is only cases which are "a mere pretext for bringing into chancery causes proper for a court of law" that are rejected, because the remedy at law is adequate. And in *Root v. Woolworth*, 150 U. S. 401, 14 Sup. Ct. 136, the objection of adequacy of remedy at law was held untenable, where the sole right to be in equity was to enforce a previous decree of an equity court settling the title. And so it is, wherever we find the cases, that the court retains the jurisdiction wherever there is a plausible ground of equitable cognizance, as against the objection arising too late, and even, in most cases, coming at any time.

Having, then, jurisdiction of this case, the question is, what relief, if any, can the plaintiff have here? Certainly she is entitled to a judgment on the rent notes in any event, and that is decreed; and somewhat reluctantly I conclude that she is entitled to nothing more. I say this because it does not seem to me the defendants acted towards the plaintiff with the highest regard for the contract when, abandoning it as they did, and refusing even to pay the rent, they did nothing whatever to save the property from the elements attacking it,—not even trying to mitigate the destruction, as in some degree they were bound to do. But, after all, they could not have saved it, and all they could have done, within the limits of their liability, was to keep it tenable for their uses somewhat longer than

they did. But this injury finds full compensation in the payment of the rent during that time. For the rent subsequently accruing they are liable on another ground, as we shall presently see. It seems to me that this lease has been considered with too much disregard of its surrounding circumstances, and the character of the property about which the parties were dealing. Mr. Justice Story said, in *Van Ness v. Washington*, 4 Pet. 232, that a court should not defeat the legal meaning, and resort to conjectural intents, but construe a solemn instrument according to the legal import of its terms. But the same learned judge said, also, in *U. S. v. Appleton*, 1 Sumn. 500, Fed. Cas. No. 14,463, that, in the construction of grants, the court ought to take into consideration the circumstances attendant upon the transaction, the particular situation of the parties, and the state of the thing granted, and that every grant of a thing necessarily imports a grant of it as it actually exists, unless the contrary is provided for; and this is the obvious rule of construction for all the purposes of justice between the parties. So looking at this contract of lease, and it is not a grant of an estate in this land "from the zenith to the nadir," as the books put it, with all the formidable results of such an estate, and its uses, although the contract appropriates the forms of covenant usual in such leases. It is a contract for the limited use of a part of a lot having the riparian right of wharfage or landing for vessels engaged in navigation and commerce; and it is in the light of this use we must scrutinize these covenants. I do not doubt that the technical effect was to convey a leasehold estate in the land, and such was the intention of the parties; but it had reference to this particular use, and was more a contract for an occupation, sometimes termed a "franchise," than a seisin of the land. *East Haven v. Hemingway*, 7 Conn. 202; *Potomac Steam-Boat Co. v. Upper P. Steam-Boat Co.*, 109 U. S. 685, 3 Sup. Ct. 445, and 4 Sup. Ct. 15; *Linthicum v. Ray*, 9 Wall. 241. And it is in regard to this contemplated use of the thing granted that we are to find the intention of the parties in making these covenants. Now, then, placing ourselves where the parties were, making this contract, and looking at it in relation to its surroundings, it seems monstrous to hold that these lessees intended to incur, or the lessor intended to bind them to an obligation which, if enforced according to the strict construction of the words which this demand upon them implies, would require an expenditure of moneys far in excess, not only of the value of the thing granted, but of the whole land to which that thing was appurtenant; for the proof shows that the ravages of the river could not have been stopped, if at all, without enormous sums of money used for the purpose, and we would have to hold that such a bargain was made when the parties knew—what we all know, and see every day—that this gigantic river, in its destructive influences, is uncontrollable, even when the vast resources of the government are yearly employed in the attempt to mitigate them. Either the parties did not intend to impose this burden on the lessees, or it is so hard and unconscionable a bargain that a court of equity, exercising its ever present discre-



tion in applications for specific performance, will not enforce it. I do not think the parties intended anything more than that the lessees should keep the landing in such repair and condition of usefulness as was required for the uses to which they were to put it, and as it was then held, as against ordinarily destructive influences operating to abrade the banks or displace the appliances serving that use. A similar demand which was refused, was made upon a landlord upon supposed implied covenants to protect the tenant against the catastrophe of a snow slide which injured her, destroyed the property, and killed six of her children. *Doyle v. Railroad Co.*, 147 U. S. 413, 422, 13 Sup. Ct. 333. It does not seem to me that the landlord has any better claim than that against a tenant for compensation for destruction that comes, without his fault, from external forces, such as storms, floods, earthquakes, and the like, in the absence of an express warranty, in the sense that the very words are used in the contract to make it express and clear, and not in the sense of being implied from other expressed words in the covenants, however broad, which may be made to stretch over such an injury by expansion of construction. Chancellor Walworth tells us that it was a law of Sesostriis, an Egyptian king, that, if the violence of the river should wash away a part of the land, the tenant should be proportionately abated in his rent; but I do not find it anywhere adjudged, as the result of the ordinary covenants on either side, that either party to a lease shall be liable in damages to the other for the results, direct or consequential, of such destruction. Where it can be done reasonably within the power of ordinary business operations, either party may under such covenants be, and often they are, required to repair and restore and rebuild, or pay the cost of doing these things, and often very hard bargains are so enforced; but these demands fall within the ordinary description of injury that is in a sense reparable, and not to the re-creation of things that have been utterly destroyed, as land that is swept away by flood, as this was. In the absence of an express covenant to the contrary, such losses fall on the owners, each according to his holding; to the lessor or landlord that which he has owned, and to the lessee or tenant that which he has used. *Tayl. Landl. & Ten.* §§ 329, 347, 360, 373, 386.

On the other hand, the tenant must always pay the rent under such circumstances. *Viterbo v. Friedlander*, 120 U. S. 707, 712, 7 Sup. Ct. 962. There was, for a long time, a great struggle to break away from this seemingly harsh rule, and introduce, as an equity, a reduction or abatement of the rent when the property was destroyed. No less a personage than Mr. Justice Story urged it as counsel in one of the cases cited below, and was told by the bench that the contention had been finally overthrown. Chancellor Kent states the same thing in his text, and it is now well understood to be as Mr. Justice Gray states it in the case last cited. Mr. Taylor, in his work on *Landlord and Tenant*, so often quoted and commended in the highest places, seems to approve the discarded suggestion of an equitable abatement "where a part of the land is lost

to the tenant by the act of God," and states that he is not liable for the whole rent, "as where the sea break in and overflow a part of the land." He cites for this the ancient Case of Richards le Taverner, Dyer, 56a, and Rolle, Abr. p. 236, pl. 1; but, on subsequent consideration, the courts became thoroughly hostile to this view, at least so far as it relates to that kind of loss for which the tenant is in no sense himself responsible. 3 Kent, Comm. 465; Belfour v. Weston, 1 Term R. 310; Ellis v. Sandham, Id. 710; Hallett v. Wylie, 3 Johns. 44; Fowler v. Bott, 6 Mass. 63; Viterbo v. Friedlander, supra. What is said in the case of The Tornado, 108 U. S. 342, 351, 2 Sup. Ct. 746, does not apply where a lease has become executed, and has created an estate in the land for a term of years, as the foregoing authorities all show. The case of the music hall (Taylor v. Caldwell, 3 Best & S. 826), cited by Mr. Justice Blatchford, as it is by counsel here, was not a lease of the music hall, but only an agreement to let it, which makes a vast difference in the matter of a defense against the covenant to pay rent. In such an agreement it is open to a court of equity, as in other contracts, to apply the rule that the impossibility of performance, where it depends on the continued existence of a thing, is excused if the thing perish. Id. But a leasehold estate in land is an exception to this rule, as the cases cited establish. Tayl. Landl. & Ten. § 37.

But, moreover, as before stated, a court of equity will not specifically enforce such hard bargains, even where there is an express covenant. Tayl. Landl. & Ten. § 268. Therefore, if the defendants here had covenanted in the use of this landing to indemnify the plaintiff against all loss by flood or currents, and it came about that the loss was so enormous as to destroy the whole ground, river landing and all, so that a restoration was impossible, and the money it would have taken to stop the destruction was so out of proportion to the value of the thing leased as to make it unconscionable, a court of equity would, in its discretion, refuse specific performance. Hardness of bargain alone will not suffice to stay the hand of a court of equity, and it was so decreed in the case of a lease of telegraph wires where the rent money was inadequate. Telegraph Co. v. Harrison, 145 U. S. 459, 471, 12 Sup. Ct. 900. But it was refused where the circumstances showed that it was unconscionable to compel a man to comply with a contract that was oppressive. Manufacturing Co. v. Gormully, 144 U. S. 224, 237, 12 Sup. Ct. 632. And in another case, where it was refused because the proof was doubtful, the rule is stated that, while the discretion to withhold relief is not to be exercised capriciously or arbitrarily, but according to settled principles, it must always be done with reference to the facts of the particular case. Hennessey v. Woolworth, 128 U. S. 439, 9 Sup. Ct. 109; Nickerson v. Nickerson, 127 U. S. 668, 8 Sup. Ct. 1355; Cheney v. Libby, 134 U. S. 68, 78, 10 Sup. Ct. 498. In Dalzell v. Manufacturing Co., 149 U. S. 325, 13 Sup. Ct. 886, the court quotes approvingly Lord Hardwicke's rule that the contract must be "certain, fair, and just in all its parts." In the case of Railroad Co. v. Cromwell, 91 U. S. 643, Mr. Justice

Bradley said the court would not shut its eyes to the evident character of the transaction. In *Marr v. Shaw*, 51 Fed. 860, it is said that "where, upon a review of all the circumstances of the case, it is patent that it will produce hardship or injustice to either of the parties," specific performance will be refused. And in *Pullman Palace Car Co. v. Texas & P. R. Co.*, 11 Fed. 625, specific performance was refused because the contract was unconscionable as against the public. All these cases cite the leading case of *Willard v. Tayloe*, 8 Wall. 557, so much relied on here, where the contract was decreed to be performed upon conditions which provided against its inequitable features, which is impossible in this case. Mr. Story sums up the result by saying that "courts of equity will not decree specific performance, except in cases where it would be strictly equitable to make such a decree"; and Mr. Pomeroy, by saying that, "if the contract is unfair, one-sided, unjust, unconscionable, or affected by any other inequitable feature, or its enforcement would be oppressive or hard on the defendant, \* \* \* or would work any injustice, \* \* \* its specific performance will be refused." 1 Story, Eq. Jur. § 750; 3 Pom. Eq. Jur. § 1405. It must be conceded that any court charged with such a wide discretion must look carefully to the legal principles that control it, and relieve it of all arbitrariness and capriciousness, lest we descend into a mere substitution of irregular and desultory judgment for that which is guided by "the established doctrine and settled principles of equity," as mentioned by Mr. Justice Bradley in *Willard v. Tayloe*, 8 Wall. 567. But, on the preceding page, he cites approvingly Lord Hardwicke's judgment, which refused to compel a tenant, under a covenant to repair, to pull down and rebuild houses which did not comply with the covenant. *London v. Nash*, 1 Ves. Sr. 12.

It was not, in my judgment, within the contemplation of the parties, or either of them, to provide by the covenants of this lease against the calamity that came upon this lessor and lessee by the extraordinary and unprecedented destruction of the banks of the river in front of this city,—a violence of nature which at one time threatened to carry away a considerable portion of the city itself, by undermining its foundations and establishing the channels of the river where streets and houses had been, which thing has been done before under our eyes in front of this very city, where the ground for the houses and streets is now again restored after years of submersion. The unconscionable character of the demand does not arise out of the covenants themselves, but out of the construction that is now put upon them, and the demand for damages for the not doing of things which it is not certain would have stopped the ravages if they had been done; and this, in lieu of a specific performance which might not have been decreed if the covenants for it had existed. If the very demand now made had been expressed in the words of the covenant, under the principles and cases cited, it would be inequitable to grant it and it would be refused. We have seen how the courts have struggled against

the attempt to introduce hardship as an equitable relief in favor of the lessee, as against the lessor's demand for rent, when the property has been partially or wholly destroyed without his fault. Surely, a court of equity will not superadd to the burden of the rent that of damages and compensation for the value of the property, upon either improvident covenants so binding him, or by implication upon words not expressing that especial and particular obligation; certainly not, if it have any discretion in the matter.

Decree for the rent and interest, with reference to fix amount, if necessary.

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CENTRAL TRUST CO. OF NEW YORK v. ASHVILLE LAND CO. et al.

(Circuit Court of Appeals, Sixth Circuit. March 3, 1896.)

No. 342.

1. CORPORATIONS—AGENT'S AGREEMENT FOR ARBITRATION—RATIFICATION.

If an English corporation, controlled by a board of directors in England, objects to an agreement made by its general manager in this country to submit to arbitration a claim against the company for a trespass in cutting timber from the lands of another, it is its duty, within a reasonable time of receiving notice of the agreement, to notify the other party of its disapproval; and, in the absence thereof, a ratification may be presumed. The assertion of counterclaims by it is not a disaffirmance, but rather justifies a presumption of an affirmation.

2. TAXATION BY COUNTIES—LEVY BY COURT—SUFFICIENCY OF RECORD.

Under the Tennessee statute authorizing counties to lay the same or a less tax upon privileges as that levied by the state, it is sufficient if the record of the court levying the county tax shows that the rate on privileges is made the same as that of the state, for the subjects of the tax and the rate on each are definitely specified in the revenue law of the state, and by reference thereto the county tax is definitely shown.

3. SAME.

The Tennessee statute requires that three-fifths of the justices entitled to attend are necessary for the levying of a county tax. Mill. & V. Code, § 4974. By requirement of the state laws there is an official record of the division of the counties into districts, and of the election and commission of every justice of the peace entitled to sit at the sessions of the county court. *Held*, therefore, that where the record of a session at which a tax was levied shows that a specified number of the justices were acting, who, by reference to the official records above referred to, of which the court takes judicial notice, are ascertained to constitute three-fifths of the number entitled to attend, this is sufficient evidence that the requisite proportion acted in levying the tax.

Appeal from the Circuit Court of the United States for the Northern Division of the Eastern District of Tennessee.

John K. Shields, for appellants.

Jesse L. Rodgers, for appellee.

Before TAFT and LURTON, Circuit Judges, and HAMMOND, J.

LURTON, Circuit Judge. The Central Trust Company of New York, trustee under a mortgage made by the American Association, Limited, an English corporation owning lands in Tennessee,

filed its foreclosure bill in the circuit court of the United States for the Eastern district of Tennessee. Subsequently Henry Holbrook Curtis filed an independent bill in the same court for the purpose of winding up the affairs of the American Association, Limited, as an insolvent corporation. Receivers were appointed, the property of the corporation placed in their possession, and the two causes consolidated. The Ashville Land Company, a corporation of the state of Tennessee, and the county of Claiborne, one of the counties of the state of Tennessee, became parties by intervention, for the purpose of asserting claims against the American Association, Limited. Each of these interveners obtained decrees, from which appeals were allowed to this court. The claim of the Ashville Land Company, as presented by its intervening petition, was that it was the owner of lands in Tennessee upon which the American Association, Limited, had trespassed by cutting and removing timber to the value of about \$2,000, and that its claim for damages had, by agreement between the two corporations, been submitted for arbitration to one John M. Brooks, who assessed the damages at the sum of \$1,933.71, which sum the American Association, Limited (hereafter called the "English Company"), had not paid, although it had accepted the award, and promised to pay the sum thus awarded. The English Company denied the trespass, denied the authority of its agent to submit the matter to arbitration, and denied any agreement to pay the award of the arbitrator. It also set up a claim for money paid for and on account of the Ashville Land Company, amounting to \$600, and pleaded this by way of offset. The issues thus presented were referred to D. A. Gaut as special master, to take proof, and report his conclusions of law and fact. The special master reported that the claim of the Ashville Land Company had been submitted to the arbitration of John M. Brooks, through the action of A. A. Arthur, general manager and representative in Tennessee of the English Company, and that the arbitrator had found that the English Company was liable, by reason of the trespass mentioned, to pay the sum of \$1,933.71. He further reported that this award had been ratified by the directors of said English Company. He found in favor of the set-off claimed by the latter company, and that, after crediting same, there was due \$1,462.86, with interest from May 28, 1892, and that this sum was entitled to priority over the mortgage to the Central Trust Company by virtue of priority in date and the statute of Tennessee giving preference to domestic creditors out of the assets of foreign corporations doing business within the state. The exceptions filed to this report were overruled, and a decree rendered accordingly.

The errors assigned involve two questions. First. The authority of A. A. Arthur, as an officer of the English corporation, to submit the claim of the Ashville Land Company against the English Company to arbitration. Second. If his authority was insufficient, then has his act in excess of his agency been ratified by the corporation?

Arthur's position is designated as that of "general manager." Whether his duties and powers were defined by any by-law of the company does not appear, though no such office or officer is mentioned in its charter. The company whose agent he was, in respect of such matters as were properly within the scope of a "general manager," was, as before stated, an English corporation managed by a board of directors from its principal office in London. Its charter powers were very wide, and contemplated the conduct of a varied business in America. It had authority to buy, own, and sell lands, lay off and build up towns, engage in iron and steel making, railroad building, and generally to do all that pertains to a town-building, mining, manufacturing, and land-speculating company. Arthur was its chief representative in America, where these varied enterprises were to be chiefly conducted. A power of attorney was given him of limited character, and evidently intended as only partially defining his powers, for it relates alone to his power to make sales of town lots or parcels of land, lay off roads, streets, etc. It is, however, difficult, on this record, to say that he had authority, by reason of either the recorded power of attorney or the general and undefined powers of a general manager, to submit a claim against his corporation to arbitration, without express authority from the directors. This it is unnecessary, however, to decide, for we are clearly of opinion that if he exceeded his powers in signing the articles of submission his act was subsequently affirmed by his directors. He did, while its representative in America, and while exercising the authority of a general manager, enter into an agreement with the appellee for an arbitration of a matter in dispute between the two corporations, and that the award should be final. After the award was made, it, together with the submission, and a statement of the circumstances made out by his assistant, was forwarded to the company at its London office, which thus became apprised of the action of its general manager, and of the result. That the company had the power to submit such a claim to arbitration, or to authorize Arthur, in his discretion, to do so, is not questioned. The most that can be said is that he, as general manager, exceeded his power in doing so under the constitution and by-laws of the corporation. If the company so regarded this agreement, it was its undoubted duty, upon being apprised that he had made this submission, to in a reasonable time disaffirm his act, and notify the Ashville Land Company of its disapproval. Failing to do this within reasonable time, a ratification may be presumed. *Indianapolis Rolling-Mill v. St. Louis, Ft. S. & W. R.*, 120 U. S. 256, 7 Sup. Ct. 542; *Pittsburgh, C. & St. L. Ry. Co. v. Keokuk & H. Bridge Co.*, 131 U. S. 371, 9 Sup. Ct. 770. The evidence submitted not only fails to show such disaffirmance within a reasonable time, but tends strongly to establish that his action was affirmed. The correspondence between the London office and the American office, and between the latter and the Ashville Company, seems to establish that the directors sought to offset the award by the assertion of

counterclaims, or to pay the award, provided they could recoup from certain persons to whom it had sold timber from its own lands, and who were supposed to be the real trespassers or beneficiaries of the trespass. Under the circumstances, the company was called upon, when apprised of the agreement to submit to arbitration, to distinctly repudiate the agreement, and give notice accordingly. This it did not do, and the assertion of counterclaims was by no means a disaffirmance, but was such conduct as justifies a presumption that it affirmed the submission. The decree in favor of the appellee must be affirmed.

The petition of the county of Claiborne asserted that the English Company was liable for the privilege tax assessed in 1890, 1891, 1892, and 1893 for county purposes, for exercising the privileges of a land-stock company within that county. The special master reported a liability for the three years first named, and exceptions to this report were overruled, and the report confirmed.

The first objection now urged goes to the vagueness of the record from the county court assessing or imposing a tax on privileges for county purposes during the several years involved. The law of Tennessee permits counties to lay the same or a less tax upon privileges as that levied by the state for state purposes. The objection seems to be that the county court order does not specifically mention the privileges subjected to the tax. That is not essential. The only discretion vested in the county court was as to the amount to be levied on privileges for county purposes, which may be less, but not greater, than that levied by the state, and without discrimination between privileges. The court in each instance appointed a committee to recommend to the court a proper tax levy on both property and privileges, which report was received and adopted. This report included a recommendation as to the necessary rate of the direct property tax for state, county, school, and special purposes, and concludes by reporting that the rate "on privileges should be the same as the state." This, in our judgment, was sufficient, as the subjects of the tax and the rate on each were definitely specified in the revenue law of the state. That is certain in law which by record can be made certain.

It is next urged that the levy in each instance was void, because it does not affirmatively appear that three-fifths of the justices composing the county court were present when the report of the committee on rates was adopted. By section 4974 of Milliken & Vertrees' Compilation of the Laws of Tennessee it is provided that "three-fifths of the justices entitled to attend shall be required to levy a tax, or to appropriate public money." The proceedings of the county court levying the tax now in question were filed as part of the record, and recite by name the justices present, but do not affirmatively state that these constituted three-fifths of those entitled to attend; and for this reason it is urged that there was no valid tax levy during the years 1890, 1891, and 1892. The provision in the Tennessee Code requiring a specified number or proportion of the justices composing the court to be present for any

given purpose has been uniformly construed by the supreme court of the state as rendering void an action of the court which did not on the record appear to have been transacted or ordered by a court composed of the requisite number. *Coleman v. Smith*, Mart. & Y. 36; *Mankin v. State*, 2 Swan, 206; *McCullough v. Moore*, 9 Yerg. 305. The question thus presented requires us to determine whether the record of the proceedings of the county court at which the privilege tax levy was ordered for 1890, 1891, and 1892, shows that there were present three-fifths of the whole number of justices entitled to attend. The record does show that when the levy was ordered for 1890 there were "present and acting" 30 justices; in 1891, 32; and in 1892, 29. The evidence does not show how many justices constituted a full bench of the county court of Claiborne county, and the contention is that the county court record must affirmatively show that those present when each levy was ordered constituted the requisite number essential to lay a tax. The Code of Tennessee provides that counties shall be laid off by the county courts into civil districts of convenient size, the number of districts being proportioned to the voting population, so that the whole number shall not exceed 25 nor be less than 4. Rev. St. Tenn. (Mill. & V. Code) §§ 81-84. By section 85 the county court is required to cause a map of the county to be made, exhibiting the districts, and giving the boundaries of each, and to record the same in the office of the county clerk, and to file a copy with the secretary of state. Sections 389 and 392 of the same revision provide that for each district of every county there shall be elected two justices of the peace, and for the district including the county town one additional, and for every county or incorporated town one additional justice. By law, all of the justices of a county are required to attend at every quarterly session of the county court. Acts Tenn. 1887, c. 236. Every justice holds his office for a term of six years, is elected by the lawful voters of the district, and is commissioned by the governor. Thus there is an official record of the division of Claiborne county into districts, and an official record of the election and commission of every justice who was entitled to sit at the sessions of the county court of Claiborne county when the tax in question was assessed on privileges. Of these records we may take judicial notice, and from them are apprised that the number of justices shown by the record of the county court to have been present and acting were more than three-fifths of the whole number entitled to sit. A court will take judicial notice of the local divisions of the country, its division into states, and of the latter into counties, districts, or townships and the like. Greenl. Ev. § 6. So it may judicially know the political constitution of the government, and who constitute those charged with the administration of the government, as the sheriffs, clerks, judges, etc. "Courts will generally take notice of whatever ought to be generally known within the limits of their jurisdiction. In all these, and the like cases, where the memory of the judge is at fault, he resorts to such documents of reference as may be at hand,



and he may deem worthy of confidence." Greenl. Ev. § 6; Jones v. U. S., 137 U. S. 202-216, 11 Sup. Ct. 80; U. S. v. Jackson, 104 U. S. 41; Fancher v. De Montegre, 1 Head, 40; Moody v. State, 6 Cold. 299. The presumption that justices present and acting when the court met continued present, and participated in the assessment of this tax, can only be rebutted by some other part of the record. McCullough v. Moore, *supra*. This has not been done. It was not essential for the journal of the court to show that those present constituted the requisite number to lay a tax, if the number of those recited as present is judicially known to the court to be more than the requisite number. The decree in favor of the county must be affirmed.

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CRIMP v. McCORMICK CONST. CO. et al.

(Circuit Court of Appeals, Seventh Circuit. March 5, 1896.)

No. 251.

1. CONTRACTS—INTERPRETATION.

The reasonable intention of the parties to a contract is to be sought in the words of such contract, not assumed; and it is not the duty of a court to bend the meaning of some of the words of a contract into harmony with a supposed reasonable intention of the parties.

2. SAME—18 C. C. A. 70, 71 Fed. 356, REAFFIRMED.

The terms of the contract involved in Crimp v. Construction Co., 18 C. C. A. 70, 71 Fed. 356, reconsidered, and the decision therein affirmed.

This was a suit by Eugenia Crimp, as executrix of the will of W. G. Crimp, against the McCormick Construction Company and others, to determine the rights of the parties in the assets of the corporation. The decree made by the circuit court was affirmed on appeal. 18 C. C. A. 70, 71 Fed. 356. Complainant petitioned for a rehearing.

John N. Jewett and R. W. Baylies, for appellant Eugenia Crimp.  
Wm. J. English, for appellant Ingersoll-Sergeant Drill Co.

W. E. Church, Tenney, McConnell & Coffeen, Collins, Goodrich, Darrow & Vincent, A. Burton Stratton, and McGlasson & Beitler, for appellees.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge. This petition in large part covers ground already considered, and to that extent requires no response. In so far as it goes beyond the original briefs and the argument at the hearing, it is characterized by inaccuracy of statement, and by an uncalled-for exhibition of temper. After quoting from our opinion the proposition that Crimp's purchase of stock was conditional, or upon an agreement to resell at the same price, the petition says:

"Now, let us see in what sort of a hole this conclusion puts the court. We take the court at its word. It is no use to say that there is not a sentence, a line, a word, or a syllable of this contract that points to a conditional sale of the stock, or of a sale with an agreement to repurchase at the same price

or any other price. No matter for this. The court wipes out the old contract and constructs a new one. The proposition is that McCormick sold his stock (126 shares) to Crimp for \$25,200, paid to the construction company upon the condition that Crimp should sell it back to McCormick at the same price, McCormick (not the construction company, that received the money) agreeing to repurchase at that price, provided the other parts of the agreement were duly performed; that is, McCormick agreed to repurchase, if he and the construction company, who were together the first party to the contract, did as they agreed to do, and if they did not perform the contract on their part, and, by their failure to perform, destroyed the value of the stock, then McCormick would not be bound to repurchase. McCormick and the construction company did in everything fail to perform, and utterly abandoned the execution of the drainage contract, and therefore no obligation to repurchase the worthless stock or to refund the money to Mr. Crimp rests upon anybody. \* \* \* There are some things which the members of the profession can bear patiently, treat respectfully, and discuss with good temper, even though they may consider them errors. Other things in the same line seem so unnatural, so lacking in perceptions of justice and reason, that they stir up all the bitterness of feeling which can find lodgment in the human breast. Prudence would then dictate a suspension of comment. We yield to the dictates of prudence. If the court adheres to the conclusion announced in the last quotation from the opinion, this petition must be denied. If it does not so adhere (and we fail to see how it can), the petition must be granted, for the conclusion is the result of wrong methods and wrong reasoning, and the whole case must be reconsidered by different methods and upon different theories."

This is Nestor playing the part of Thersites, though hampered somewhat, it seems, by a prudent regard for the scepter of Ulysses.

But from the manner we turn to the matter of the petition. "A sale with an agreement to repurchase is usually termed a conditional sale." 1 Hil. Mortg. 96. And that this agreement was of that character is demonstrated by the first, fourth, eleventh, and twelfth articles of the contract. The proviso that is supposed to have made the proposition worthy only of ridicule, if it relates at all to the undertaking of McCormick to repurchase, applies especially to the agreement of Crimp to resell. Only upon the condition of that proviso did he agree to reassign the stock purchased, together with that pledged, and it is not difficult to perceive his motive for having the contract so framed. His belief, manifestly, was that the company would realize large profits, and, if he had lived to give the business his personal attention, it is possible that his expectation would not have been disappointed; and in that event it was his purpose, upon failure of the other parties to fulfill to the letter their promises and covenants, to have it in his power, if he should deem it to be to his interest, to refuse to reassign, and, by forfeiting the 99 shares which had been pledged, to become the owner of the entire capital stock, and thereby the effectual owner of the entire property of the company. On the other hand, he could hardly have failed to understand, that, if McCormick and the construction company, by their failure to perform the contract, should destroy the value of the stock, or that, if for any reason the contemplated enterprise should prove disastrous, the company and McCormick would thereby be made insolvent, and their promise, or the promise of either of them, to repurchase or to redeem the stock, would be worthless. The sup-

posed incongruity between the agreement for a resale and repurchase and the condition upon which its performance was made dependent is therefore more imaginary than real.

The court's view of the twelfth article of the contract is criticised. "In this part of the opinion," it is said, "the court forgets that it was one of the early stipulations of the contract that the profits to be made by the performance of the drainage contract should be divided equally between the parties. \* \* \* If not otherwise provided (and there is no other provision in the contract), the cost of all improvements and additions to the plant or assets of the company must necessarily be taken from that fund which would otherwise go to increase the profits of the enterprise. All such improvements and additions would therefore be invested profits, and, as Crimp's interest in and connection with the construction company was to cease with the completion of the drainage contract, his share in the profits thus invested would be lost to him, unless an interest in those improvements and additions was preserved to him." This only emphasizes the significance given by the court to the twelfth article, which, unlike the fourth, is not limited to improvements and additions to the assets of the company derived from the proceeds of the drainage contract, but embraces all increment, betterment, and additions, from whatever source, accruing or made after the date of the contract. The business of the company was not limited to the performance of the drainage contract, and, if other profitable business had been done, there is no possible construction of the contract in suit by which Crimp could reasonably have been denied the joint interest so unequivocally stipulated for in the last article of it.

The case was understood to be submitted to us as one which depended in the main on the construction of the contract, unaided by extrinsic evidence, and so we decided it, overlooking nothing, though not specifically mentioning everything, within the four corners of the writing; but now it is suggested that "both competent and necessary to be considered along with the papers signed by the parties are the facts and circumstances attending their execution, and the situation of the parties themselves." If, however, the case is of a character to require or permit of such presentation, and if there is evidence in the record competent to be considered, outside of the contract, that evidence was not referred to at the hearing and has not now been called to our attention. But it is said, also, that "the opinion does not utilize the definite facts appearing upon the face of the contract for the purpose of arriving at the probable and reasonable intention of the parties. We wish again, as briefly as possible, to call attention to those facts." And here follow eight propositions, some of which accord with express terms of the contract, some are mere inferences, more or less probable, some are wholly unwarranted, and intermingled with them are subordinate suggestions and assumptions of which the contract contains no hint. For instances of the definite facts, it is stated that the construction company

was seriously embarrassed for the want of ready money; that in this situation McCormick applied to Crimp, a stranger, so far as the record shows, for assistance to enable the company to go on with the drainage contract, "and nothing more"; that the contract relates solely to the work to be done under the drainage contract; that the mere fact of Crimp's \$25,200 having been advanced to the construction company imported an obligation on the part of the company to refund it; that the stock belonged to McCormick, and, however intimate his relations with the company, the two are distinct, "and cannot be, and must not be, confounded"; that the drainage contract was the property of the construction company and not of McCormick; and that, by the fourth and eleventh articles, the \$25,200 advanced are to be "repaid" or "returned." The contract, however, does not show that the company was not able readily to obtain from other sources needed money, nor that McCormick applied to Crimp, nor, even by suggestion, that they were strangers, but, to the contrary, expressly recites that Crimp was "desirous of becoming interested in the construction company" upon the terms and conditions mentioned. That the contract does not relate solely to the work to be done under the drainage contract is shown by the last article, as already explained, and though it is provided, in terms, in the eleventh article, that, upon the performance of the things there mentioned, "this contract shall be ended," it is evident that, for the purposes of the twelfth article, it would continue in force. And, if presumptions are to be indulged, it is probable that the money paid by McCormick for stock went to the company because McCormick had not paid therefor, or was otherwise indebted to the company, and that thereby the shares became, as recited in the contract, "full-paid and nonassessable," and the requirement of the seventh article, that the money be applied in the particular way specified, was made reasonable, when it otherwise would not have been. It is not true, in law, that the mere fact of Crimp's money having been advanced to the construction company, under the circumstances, imported an obligation on the part of the company to refund it. But, as bearing upon the question of construction, the more important fact, evident upon the face of the contract, as it seems to us, is that all the parties, and certainly Crimp, entered into the agreement anticipating large profits from the performance of the contract with the drainage district; and, if that had been the outcome, it may be assumed that Crimp would have insisted upon the construction which the court placed upon the contract, because it would have been more beneficial to him than any other. On the theory of a loan, he could have claimed rightfully only the return of his money with lawful interest, and perhaps reasonable compensation for his services. All besides would have been usurious. If the transaction was in fact a loan, the contract was, on Crimp's part, most unconscionably exacting; and there is no rule of construction or interpretation which requires the court, in order to fasten such a character upon a writing, to

ignore any of its provisions, or to force upon them strained and unnatural definitions. As a shareholder in a speculative enterprise, it was legitimate that Mr. Crimp should make large profits, and take security for their realization. As a lender of money he was entitled only to lawful interest, for the payment of which and the repayment of the principal sum he was entitled to exact such security as he was willing to accept, but, as a good citizen, nothing more.

It is insisted in behalf of the appellant that, somehow or other, a construction shall be invented or forced which will relieve from the disaster of a condition of affairs which was not apprehended, and against which no stipulation or security was provided, or, indeed, could well have been provided, in so far as it was the result of the alleged fraudulent conduct of McCormick, made possible, and perhaps suggested, by Crimp's physical inability to interfere. It is said, further, that the contract "needs and must have construction, and not simply interpretation, in order that it may, if possible, be brought into line with the reasonable and probable intention of the parties to it. If this cannot be done, then it would be the duty of the court to pronounce the contract void for uncertainty, or fraudulent for its gross injustice, and to determine the rights of the parties, independently of the jargon of words to which their signatures were appended." And yet it is by virtue, and upon the assumed validity, of the contract, that the appellant sought relief and has whatever standing she has in court. Without it she has no pretense of a lien upon the drainage contract, or the fund realized from its sale, and she has asserted no right not dependent upon it. Besides, there is no issue in the case, nor proof, upon which the court could have considered whether the contract was for any reason invalid or fraudulent; and, if it be true, as asserted, that McCormick misappropriated or converted to his own use the money advanced by Crimp, and even if that was his intention from the beginning, it does not affect the question of the right interpretation or construction of the contract.

Finally, it is said:

"The trouble with the opinion of the court is that it is all the time sticking to the literal and technical meaning of the words employed in some of the articles of the contract. It does not try to bend that [meaning] into harmony with a reasonable intention of the parties. The effort is all the time to interpret and not to construe, to find inconsistencies and not to harmonize them, and in doing this it gives the widest and most sweeping effect to words and clauses which seem to open wide the door for successful rascality, and visits the consequences of the iniquities of the construction company and McCormick upon the victim of those iniquities in every possible way. The 126 shares of stock would be as much involved and as completely liberated from the claims of Crimp and his representative, by the forfeiture of the 99 shares under article 10, as would the drainage contract. The theory of the opinion makes Crimp agree that if the construction company and McCormick fail to perform their part of the contract, and thereby ruin the entire enterprise, he will accept 99 shares of the stock, made worthless by their defaults, in full satisfaction of his money advances and expected profits. As already said, nothing short of inexorable necessity should compel such a conclusion, and the hesitancy and want of positiveness of the opinion, if nothing else, indicate that

no such necessity exists. As the 99 shares were transferred as a security for profits mainly, it would be easy, other parts of the contract considered, to limit the effect of their forfeiture to the loss of the profits, and no rule of construction would be violated by so doing. If the court will force upon the appellant the ownership of these 99 shares by virtue of the provisions of article 10, and against her will, for the villainous conduct of McCormick and his company (which ought not to be done), we insist that the consequences should extend no further than the most rigid and limited construction of their rights absolutely requires."

To all this the opinion itself, and what we have already said here, would be sufficient answer. The theory of the opinion, neither by construction nor interpretation, can be made to bear the implication suggested. On the contrary, the opinion says that, "if that remedy"—that is, the forfeiture of the 99 shares—"were asserted, the absolute ownership of the 225 shares of stock would become vested in the appellant as the representative of the second party." Upon the construction given by the court to the contract, that is clearly so, because, on that theory, Crimp was already the owner of the 126 shares, and by reason of the default of the other parties was released from the obligation to resell. And while "the right of the company to retake possession of the drainage contract, which could not be included in the forfeiture, would immediately revive," the beneficial ownership of that contract would follow the ownership of the stock, subject, of course, as on that theory it ought to be, to the payment of the debts of the company. The suggestion, in the first lines of this last quotation, that the court ought "to bend" the meaning of the words employed in some of the articles of the contract "into harmony with a reasonable intention of the parties" is a begging of the question. The "reasonable intention" is to be sought, not assumed; and the intention contended for cannot be found in "the literal and technical meaning of the words employed" in any of the articles of the contract. It might, perhaps, by construction, be deduced from some of the articles, but not from the entire contract, without ignoring or forcing from their true significance the plain and unequivocal words and expressions of other articles. The court's construction puts upon no word, phrase, sentence, or article a strained or unfamiliar sense. Upon that construction, every provision of the contract was upon its face favorable to the appellant's testator, and if, in the outcome, there has been misfortune or injustice, it is attributable to causes outside of the contract, against which no safeguard was devised, or, perhaps, thought to be necessary.

The petition is overruled.

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WOODBURY et al. v. ALLEGHENY & K. R. CO. et al.

(Circuit Court, W. D. Pennsylvania. August 26, 1895.)

No. 33.

1. STATE AND FEDERAL COURTS—JURISDICTION—PENDENCY OF FORMER SUIT.

The A. Ry. Co., a corporation of the states of New York and Pennsylvania, most of whose property lay in the latter state, made a mortgage to the C. Trust Co. to secure an issue of bonds. Pursuant to a provision of

the mortgage, a majority of the bondholders requested the trustee to foreclose the mortgage, and it accordingly commenced suit in a court of the state of New York. The railway company thereupon commenced a suit in the same court, in which it obtained an injunction restraining the trustee from proceeding with the foreclosure. The bondholders then requested the trustee to bring suit for the foreclosure of the mortgage in Pennsylvania, and, upon its refusal to do so, themselves filed a bill in a federal court in Pennsylvania for the foreclosure of the mortgage. *Held*, that the mere pendency of the suit in the New York court in which the trustee had been enjoined from proceeding did not oust the jurisdiction of the federal court to proceed to decree foreclosure of the mortgage on the property in both states.

**2. DEEDS—ALTERATION—RATIFICATION BY GRANTOR.**

The mortgage was made jointly by the railway company and one B., its president, who pledged certain lands owned by him as additional security for the bonds of the railway company. After the directors of the railway company had authorized the execution of the mortgage in such form as should be approved by counsel, to secure the bonds, the mortgage was drawn, executed, and acknowledged by the railway company and B., and submitted to complainants, brokers, who were to purchase a part of the bonds. They objected to the provisions relating to the pledge of B.'s property, requiring that certain reserved interests should be included in the mortgage. After negotiation and correspondence between complainants, B. and his counsel, who was also counsel of the railway company, and W., the secretary of the railway company, a new clause was drawn up by B. and his counsel, including the interests in question, approved by complainants, and then inserted by W., under B.'s direction, in the mortgage, to which W. then obtained the acceptance of the trustee. B. then had the completed mortgage recorded, and, as president of the railway company, executed the bonds reciting the mortgage. Part of the bonds were then delivered to the complainants, who paid cash for them, which was used in paying the indebtedness of the railway company. *Held*, that the bonds were not void or voidable, either by B. or the railway company, on the ground of unauthorized alteration, the change in the mortgage having been fully ratified both by B., whose interest was alone affected, and by the officers of the railway company, who had authority to execute the mortgage in any form approved by counsel.

**8. RAILROAD BONDS—BONA FIDE HOLDER—PENNSYLVANIA CONSTITUTION.**

The mortgage was given in pursuance of a series of contracts between B. and B., the principal stockholders of certain railway companies which were consolidated to form the A. Ry. Co., a firm of brokers, who were to assist in extending the railroad and negotiating the securities of the company, for which they were to receive a part of such securities as commission, and to turn over the proceeds of others to B. and B., and a construction company, which was to build the extensions of the road. Under such contracts, the stock of one of the constituent companies, a New York corporation, was largely increased, and the bonds were to be used in part in retiring the securities of the constituent companies. A large proportion of the bonds issued under the mortgage were sold to the complainants, who paid for them in cash, which was applied to the payment of the debts of the constituent companies, and who had no knowledge of the contracts leading up to the making of the mortgage and the issue of the bonds. *Held* that, without regard to such previous contracts, the bonds bought and paid for by the complainants were not within the prohibition of the constitution of Pennsylvania that no corporation shall issue stocks or bonds except for money, labor done, or money or property actually received; the validity of the bonds could not be questioned, and the complainants were entitled to a foreclosure of the mortgage.

**4. MORTGAGES—PENNSYLVANIA STAY LAWS.**

The stay clause in the Pennsylvania statute of 1705 (1 Smith's Laws, p. 60) applies only to scire facias sur mortgage, and not to a bill in equity to foreclose.

C. Walter Artz, for complainants.

Jack & Roberts and A. Moot, for defendants.

Before ACHESON, Circuit Judge, and BUFFINGTON, District Judge.

BUFFINGTON, District Judge. This bill in equity was filed August 23, 1892, by Woodbury & Moulton, a firm whose members are citizens and residents of the state of Maine, against the Allegheny & Kinzua Railroad Company, a consolidated corporation of the states of Pennsylvania and New York, Spencer S. Bullis and Sarah E., his wife, the Central Trust Company, a corporation of the state of New York, and others, to foreclose a joint mortgage given by the said railroad and Bullis to the said trust company. The mortgage is dated February 1, 1890, is recorded March 10, 1890, in McKean county, Pa., and in Cattaraugus county, N. Y., and is to secure payment of \$500,000 of the bonds of said railroad. Of the bonds, \$200,000 are in the trustee's hands, unissued. Of the \$300,000 issued, \$15,000 were paid under a sinking-fund provision, leaving \$285,000 outstanding. Default was made of the semiannual interest due February 1, 1892, and on the principal of \$15,000 of bonds then payable under the sinking-fund clause. Pending such default, the trustee (upon the written request of more than 50 per cent. of the bondholders to so declare and to foreclose), in pursuance of the provisions of the mortgage, declared the entire outstanding issue of bonds due. In pursuance of the above request of the bondholders the Central Trust Company, the trustee, in April, 1892, began an action to foreclose in the supreme court of the state of New York, Cattaraugus county. Thereupon the railroad company filed a bill in said court against the trustee and others, in which, on July 26, 1892, that court, by an order which is still in force, enjoined the trustee from proceeding in said action. On August 17, 1892, the present complainants, the owners of \$50,000 of said outstanding bonds, and who had joined in the previous noted request to the trustee, requested the trustee, among other things, to bring an action to foreclose in Pennsylvania, where most of the mortgaged property was situate. This the trustee declined to do, on account of the pending order above recited; whereupon the complainants filed the present bill to foreclose on behalf of themselves and other bondholders. To it the trustee has made no defense or objection. On October 5, 1892, the railroad company and Bullis filed separate demurrers, alleging the bill contained no averment that "a written request of the holders of a majority in amount at par value of the outstanding and unpaid bonds issued under the mortgage sought to be foreclosed by said bill, accompanied by proper bonds of indemnification, was made to the trustee under said mortgage, requesting the commencement of this suit by it." They also filed special pleas to the effect that the trustee had, before the bringing of this suit, brought a bill to foreclose the same mortgage in the supreme court of New York, Cattaraugus county, which suit was pending



and undetermined. These pleas and demurrers were, on February 6, 1893, overruled. The same questions being raised on final hearing, we have re-examined them, and find no reason to change the views then held. Article 6 of the mortgage provides that the trustee "shall, upon the written request of the holders of a majority in amount at par value of the outstanding and unpaid bonds which may have been issued hereunder, and upon being properly indemnified, and whenever entitled to do so by the terms hereof, institute proceedings to foreclose this mortgage, whenever the holders of a majority in value of said outstanding and unpaid bonds may direct; and, in absence of any such direction, then as the trustee may deem expedient." This the bill (paragraph 11) expressly alleges was done, viz.: "Said trust company was duly requested in writing by the holders of more than 50 per centum of the said bonds outstanding to exercise its option, and to declare that the principal of all the bonds secured by said mortgage or deed of trust should become immediately due and payable, anything contained in the said bonds to the contrary notwithstanding, and to foreclose said mortgage or deed of trust;" and we find such demand was made before the New York suit was begun. The bill also avers, and the proofs show, an additional notice and request by the complainants to the trustee before this bill was filed. By this precedent request the trustee was called upon to execute the trusts imposed by the mortgage upon it for the bondholders. *Ashhurst v. Iron Co.*, 35 Pa. St. 30; *Bradley v. Railroad Co.*, 36 Pa. St. 152; *Com. v. Susquehanna & D. R. R. Co.*, 122 Pa. St. 306, 15 Atl. 448. Indemnification was a right personal to the trustee, which it could, and presumably did, waive, for it has not raised any such question, or, indeed, any objection to the present bill. The property and line of the respondent railroad being situate in two states, and the road a consolidated one under the laws of both, the courts of each state had jurisdiction to foreclose and sell the entire line. *Muller v. Dows*, 94 U. S. 444; *McElrath v. Railroad Co.*, 55 Pa. St. 208. See, also, *Massie v. Watts*, 6 Cranch, 148, and *Burnley v. Stevenson*, 24 Ohio St. 474. That the mere filing of a bill to foreclose in the New York state court did not oust the jurisdiction of the circuit court for the Western district of Pennsylvania is clear. *Stanton v. Embrey*, 93 U. S. 548; *Gordon v. Gilfoil*, 99 U. S. 168. While the New York court enjoined the trustee from bringing all suits upon the matters involved in the suit before it, and the trustee prudently obeyed the order, yet the mere pendency of that suit, or the subsequent restraining order upon the trustee, did not, in the absence of a final decree by that court, oust the jurisdiction of the United States circuit court of the Western district of Pennsylvania, or prevent it from entertaining a suit and determining all questions properly brought before it, although the same questions might be involved in the suit pending and undetermined in the first-named court. The right and duty to foreclose having been settled by the proper number of bondholders, and the hands of the

trustee having been tied in an attempt to foreclose, are the cestuis que trustent thereby deprived of their right to prosecute their foreclosure in the circuit court of the United States in another state, and one where the bulk of the property mortgaged lies? Assuredly not, and the wisdom of the rule is apparent from this case. The railroad company, having obtained the restraining order in July, 1892, in the court first appealed to, has not taken a single step towards obtaining a final decree in that case, and yet, in the absence of such a decree, or of any attempt to secure one, now suggests that the federal court, in which a vast amount of proofs have been taken, and a huge record presented for final decree, is powerless to afford complainants relief because of the mere pendency of the other bill. We are of opinion the circuit court originally had jurisdiction of the subject-matter of their present bill; that its jurisdiction was not ousted by the filing of a bill in the New York state court; and that under the facts peculiar to this case the complainants had the right to file this bill, and, having filed it, and all parties in interest having appeared and taken part in the case, including the railroad company, Mr. Bullis, and the trustee, our jurisdiction to foreclose the mortgage upon all the property included therein, as well that within the state of New York as that within the state of Pennsylvania, seems to us to be clear. *Muller v. Dows*, 94 U. S. 444; *Massie v. Watts*, 6 Cranch, 148; *Bradley v. Railroad Co.*, 36 Pa. St. 141; *Burnley v. Stevenson*, 24 Ohio St. 474; *McElrath v. Railroad Co.*, 55 Pa. St. 208.

The validity of the mortgage, however, is assailed on the ground of an unauthorized alteration. The bonds were given by the railroad company alone. The mortgage was a joint one, in which the company mortgaged its property and franchises; and Spencer S. Bullis, who was its president, one of its large stockholders, and the owner of large bodies of timber land along its line in Pennsylvania and New York, mortgaged these lands as additional security for the company's bonds. At a meeting of the directors of the railroad held February 1, 1890, a resolution was passed, which, after reciting that Bullis was to join in the mortgage, provided that "the officers of this company are hereby authorized and directed to make, execute, and deliver said mortgage or deed of trust in such form as they may be advised by counsel, and to make, execute, and deliver under the terms thereof the bonds of said company to the number and in the amount hereinafter specified, substantially in the following form; that is to say" (then follows a copy of the bond). It would seem from the recitals in the resolution that both bonds and mortgage had been previously drawn, and it would appear the board adopted the specific form of bond, but made the form of mortgage subject to advice of counsel. While this term is general, yet, under the proofs, Frank Sullivan Smith, Esq., who was counsel for Bullis, the company, and for Newcombe & Co., the negotiating brokers, was evidently the person contemplated. The mortgage, as originally prepared, was duly signed for the company by Mr. Bullis, its president, attested

by Lewis F. Wilson, its secretary, and its execution acknowledged and proved by them, February 27, 1890. On the same day it was executed by Bullis as an individual, his wife joining, and duly acknowledged by them. As thus executed, the mortgage provided for the reservation in Bullis of the timber, wood, lumber, and bark; also for the petroleum, gas, coal, and other minerals of the lands mortgaged. It was submitted to complainants, a firm of brokers at Portland, Me., who had been in communication for some time with the parties with a view of purchasing \$125,000 of the bonds. They objected to it by telegram to Mr. Smith, and claimed there should be a forfeiture of Bullis' reserved rights to the timber in case of default. This message was forwarded to Bullis, with a note calling attention to the fact that complainants asked "that a provision be inserted in the mortgage that, in case of a default in the payment of the interest on the bonds, upon a foreclosure of the mortgage the timber land can be sold free of the reservation to you." To this Bullis replied by letter, in which he said: "I could not, perhaps, make a change in that mortgage that would meet the point they make, inasmuch as in some cases I do not own the reservations. Whatever the mortgage covers, I, of course, expect will be subject to sale upon any default, the same as any other part of the property." On March 4th, Mr. York, a member of complainants' firm, met Mr. Bullis in New York. He says he told the latter that the absence of the default clause was an insurmountable objection. After a conference a clause meeting York's objection was drawn by Wilson, Smith's clerk, and the secretary of the railroad, but he would not take the responsibility of inserting it in the mortgage without the consent of Smith. The latter was at Olean, N. Y., and it was arranged Bullis should take the proposed clause to him there, and submit it to him. He did so, and Smith prepared another form of it, which was afterwards inserted, and in which not only was the reserved timber which Bullis owned made subject to sale on default, but his contracts for timber also. He then sent a copy of this in a letter to Woodbury & Moulton, in which he said, "In this I have conceded everything that you ask." The testimony is that York did not know the mortgage had already been acknowledged, and Mr. Bullis further added in his letter: "Will you please examine it, and, if satisfactory, wire him [Smith] to New York, and the mortgage will then be executed in this form." He also sent a copy in a letter to Wilson, telling him he had sent a copy to Portland, and saying, "It will, of course, be satisfactory, as it is all they ask." The following day he wrote Wilson, as secretary of the road, signing himself as president, and saying, "Let me know if we must execute it here again, or whether the pages are so arranged that no further execution will be necessary." Woodbury & Moulton having reported the clause satisfactory, Wilson, in pursuance of an arrangement made with Bullis, had the new clause printed, and inserted in the mortgage. He then had the trust company accept the trust, which it had not before done, and forwarded the com-

pleted mortgage to Bullis for record. This Bullis did, then came to New York, and, as president of the railroad, executed the bonds, which recited they were "secured by a first mortgage or deed of trust bearing even date herewith, duly executed by said railroad company to the Central Trust Company of New York." Thereafter \$125,000 of them were delivered to complainants, for which they paid par in cash. Of the sum received from them by the trust company \$110,000 was applied, as provided in the sixth provision of the mortgage, to the payment of prior bonded indebtedness of the Bradford & Corydon Railroad, a Pennsylvania corporation, one of the constituent companies of the respondent railroad, and whose debts it had assumed. The balance was applied to other indebtedness of the constituent companies.

In view of these facts we fail to see how either Bullis or the railroad can, on the ground of an unauthorized alteration, successfully attack this mortgage. The subject-matter of the reservation concerned Bullis alone. He was a surety for the debt of the company, and the extent of the pledge he gave the mortgagee was a question solely between him and it. The inserted clause neither diminished, increased, nor affected the debt in bonds which the railroad incurred. There can be no doubt that, so far as Bullis personally was concerned, the clause was fully understood by him, was inserted with his consent, and was ratified by his placing it of record. Under these facts he is not in position to take advantage of the absence of a reacknowledgment, and this especially in view of the fact that in his letter to complainants he promised, if the clause were satisfactory, "the mortgage will then be executed in this form." Nor, if it be granted the clause affected the railroad, can it defeat the mortgage on this ground. As finally put on record, the instrument was one which the executive officers could, under the resolution, have made and executed. If they had the right to execute in that form, manifestly they had a right to waive a re-execution of it when changed to that form. The change was approved by Smith, its counsel, ratified, and accepted by its president and secretary, the only officers required to execute it, and was by them placed of record. Subsequently the bonds were executed, negotiated, and their full value applied by the trustee, the agent of the railroad, to the payment of uncontested debts. Under any view, the mortgage cannot be declared void or voidable on the ground of alteration.

But its validity is attacked for the reason that it is alleged to be part of a scheme to issue bonds and stocks in contravention to that provision of the constitution of Pennsylvania which provides: "No corporation shall issue stocks or bonds, except for money, labor done or money or property actually received; and all fictitious increase of stock or indebtedness shall be void." This question renders necessary a summary of the somewhat complicated proceedings and agreements out of which these bonds arose. The Allegheny & Kinzua Railroad Company, the respondent mortgagor, is a consolidated corporation of New York and Pennsylvania, and was formed by merger

of the Allegheny & Kinzua Railroad Company of New York, the Allegheny & Kinzua Railroad Company of Pennsylvania, and the Bradford & Corydon Railroad Company of Pennsylvania. On October 8, 1889, Messrs. Bullis and Barse, of Olean, N. Y., who were the principal stockholders of the two constituent Pennsylvania companies, entered into an agreement with the broker firm of I. B. Newcombe & Co., of New York City, with a view to their consolidation and extension. The contract recites the two companies have a mileage of 16 miles, which it is proposed to extend to 30; that Bullis and Barse are the owners of or control 30,000 acres of valuable timber lands tributary to the roads, the product of which they desire to carry over the completed roads, and that they have applied for financial aid to Newcombe & Co. On their part, Bullis and Barse agreed to cause the roads and the 30,000 acres of land to be owned or controlled by a corporation of Pennsylvania with a capital of \$250,000, and to cause a mortgage to be given to secure \$250,000 bonds to be issued by said to be formed company. Newcombe & Co. agreed to negotiate \$210,000 of the bonds at par, and turn over the proceeds to Bullis and Barse. One hundred and twenty-five thousand of these they were not required to negotiate, except as the contemplated 14 miles of the road were completed in 5-mile sections under the directions of John Byrne, a civil engineer, connected with their house. On completion of such 5-mile sections Bullis and Barse were to receive the proceeds of five-fourteenths of the \$135,000. Seventy-five thousand were to be negotiated presently; and concurrently with their sale Newcombe & Co. were to receive the remaining \$40,000 of the issue for their commissions, labor, and services, of which bonds Byrne, the engineer, was to have \$15,000 for services performed or to be performed. It was agreed that 1,000 acres of timber land per mile or completed road—in all 16,000 acres for 16 miles—were to be under the lien of the mortgage originally; and that for every 5-mile section of the road subsequently completed for which Newcombe & Co. were required to sell bonds, 5,000 additional acres should be placed under the lien of said mortgage. Of the \$250,000 stock Bullis and Barse were to give Newcombe & Co. \$100,000, of which Byrne was to have \$15,000; and they were to guaranty for two years a 6 per cent. dividend on \$40,000. This agreement was subsequently modified by one of December 9th following, which recites that Bullis and Barse were owners of this stock of the Allegheny & Kinzua Railroad Company of New York, a line of which 10 miles were completed out of a contemplated 16; that it was desired to consolidate it with the two Pennsylvania corporations, and form a new consolidated one. By it Bullis and Barse agreed to procure such merger into a corporation with \$500,000 capital, and to issue \$500,000 bonds, secured by a first mortgage upon the property of the merged roads, "including 30,000 acres of timber land for the first 46 miles of railroad constructed and completed, and 16,000 acres for the additional 24 miles to be constructed and completed as aforesaid." Newcombe & Co. agreed on their part to negotiate \$260,000 of the bonds at par, and turn over the proceeds to Bullis and Barse. One hundred and thirty-five thousand of them they were not

required to negotiate, except as the contemplated 16 miles of the road were completed in 5-mile sections, as in the original contract; and on completion of such sections Bullis and Barse were to receive the proceeds of five-sixteenths of the bonds. Of the remaining bonds \$125,000 were to be negotiated at once (provided 26,000 acres of timber land was placed under the mortgage), and concurrently with their negotiation Newcombe & Co. were to receive the commissions before mentioned, viz. \$40,000 in bonds and \$100,000 in stock. The remaining \$200,000 in bonds and the like amount of stock were reserved to provide for the building of the 24 miles of additional road. It was agreed Bullis and Barse might contract with the Interior Construction & Improvement Company of New Jersey to perform their covenants under these contracts. On the same day the construction company mentioned, of which John Byrne was president and principal stockholder, entered into an agreement with the Allegheny & Kinzua Railroad Company of New York to construct its road to the Pennsylvania state line, to acquire the two Pennsylvania companies by merger or consolidation, and construct and complete the consolidated road under directions of the railroad company's engineer up to 46 miles, and, if required, to construct the remaining 24 miles, so that the consolidated company should have 70 miles of completed road at a cost not to exceed \$7,000 per mile. It further agreed to pay all liens, etc., of the constituent roads, and furnish certain rolling stock. The railroad agreed to increase its capital stock from \$80,000 to \$390,000, to issue \$500,000 bonds secured by mortgage on its property, and that it would pay all of said bonds and stocks to the construction company for its work as above, performed or to be performed, as soon as they could be legally issued. It was further provided the consolidated company to be formed should have a capital stock of \$500,000 (made up of the stock of the New York company, \$390,000, and the Pennsylvania companies, \$110,000), and that it should issue \$500,000 in bonds, secured by mortgage on its property, and certain lands in addition, for the purpose of retiring the New York company's bonds, specified above, which bonds, as well as the stock of said company, the construction company had a right to exchange for corresponding bonds and stocks of the consolidated company. On the same day the construction company entered into an agreement with Bullis and Barse in which the foregoing contract was recited and made part thereof. By it the construction company agreed to make the following disposition of the stock and bonds of the consolidated company received by it under the preceding contract: To Newcombe & Co., \$260,000 bonds, to be sold under agreements of October 8, 1889, and December 9, 1889. To Newcombe & Co., \$40,000 bonds, commissions under said agreements. To Central Trust Company, \$200,000 bonds, to provide for construction of 24 additional miles of road. To Bullis and Barse, \$265,000 stock. To Newcombe & Co., \$100,000 stock, for commissions under first agreements. To construction company, \$135,000 stock, for its compensation. Bullis and Barse, on their part, agreed to apply the proceeds of bonds sold by Newcombe & Co. to payment of liens upon property covered by mortgage, to carry out the consolida-

tion, to provide for construction of the additional road to be built under the preceding agreement, to cause the proper amount of timber land to be placed under the mortgage, and save the construction company harmless. The same day the Allegheny & Kinzua Railroad of New York executed the mortgage to secure the \$500,000 bonds provided for in the preceding agreement. In pursuance of the agreements the stockholders of the latter corporation voted to increase its capital stock to \$390,000, and applied to the board of railroad commissioners of New York state to sanction their action. On February 24, 1890, that board approved the proposed increase, and an examination of its order shows the contract of the railroad with the construction company, the proposed issue of bonds, the payment of bonds and stocks to the construction company, and the terms of merger with the Pennsylvania companies were all fully set forth and understood by that body. Thereafter the constituent roads were merged and consolidated, the subsisting debts and contracts thereof assumed by the consolidated company, and the mortgage in suit given. Of the \$300,000 of bonds issued thereunder, \$125,000, as we have seen, went to Woodbury & Moulton, the complainants; \$40,000 to Newcombe & Co. for commissions, of which sum Byrne was to get \$15,000; and \$135,000 are alleged to have been sold, and their proceeds spent in construction. Of the fact that this latter sum was properly expended in behalf of the railroad there is a dispute. Of the Woodbury & Moulton bonds \$15,000 were retired under the sinking-fund clause of the mortgage.

Whatever contention may be made in reference to the preceding agreements, and to the increase of stocks and issues of bonds in pursuance thereof, it is certain that of the validity of the bonds bought and paid for by the complainants there can be no question. Mr. York, one of the firm, testifies he knew nothing of the previous contracts. It is true, Mr. Woodbury, the other member, was named as a director of the consolidated company, but there is no evidence that he took part in or knew of any of the contracts or proceedings leading to said issues. That complainants received at the time of the purchase of the bonds, as a bonus or inducement to do so, a portion of stock of the consolidated company from Newcombe & Co., the negotiating brokers, does not affect them in any way. They paid full value for their bonds to the trustee, and the money was applied to the payment of the debts of the constituent companies, the validity and legality of which debts are in no wise questioned. These bonds are, therefore, not within the constitutional prohibition that "no corporation shall issue stocks or bonds except for money, labor done, or money or property actually received." Having issued them for a lawful purpose, having negotiated them for full value, and having used their proceeds for the payment of its legal obligations, they were not such bonds as the constitution inhibited, and the consolidated company must pay them. The bonds of complainants being valid, and being secured by the mortgage in suit, why should it not be foreclosed? That disputes may exist between

the railroad company, the construction company, and Messrs. Bullis & Barse as to the extent, expense, and details of construction; that questions exist as to the proper application of the proceeds of some of the other bonds; or that their holders are not purchasers for value; or that there is stock outstanding whose legality is questioned,—are questions which do not affect the right of the complainants, who are bona fide holders for value, to have their security enforced by foreclosure.

The view we take of this case renders it needless to discuss the many other questions suggested. It is, however, alleged that, even if a right to foreclose exists, the bill is prematurely filed, by reason of the year and a day stay clause of the Pennsylvania state statute of 1705 (1 Smith's Laws, p. 60). We cannot accede to this view. That act applies to a *scire facias sur mortgage*, and has no application to a bill in equity to foreclose such as the present.

It is also contended the lien of the mortgage was not to cover Mr. Bullis' timber land until 46 miles of road were constructed. Assuming, for present purposes, the 46 miles were not built, the position contended for cannot be yielded. While there is some ambiguity in the description of the lien of the mortgage as given in the bonds, viz.: "This bond \* \* \* is \* \* \* secured by \* \* \* mortgage \* \* \* upon the property and franchises of said railroad company, including thirty thousand acres of timber land, upon the construction and completion of the first forty-six miles of the railroad of said railroad company,"—yet all uncertainty disappears when we turn to the mortgage itself. It contains words of present conveyance, describes lands by metes and bounds, in its seventh clause provides for the further conveyance of the 16,000 acres mentioned in the bond, "in addition to the thirty thousand acres of timber land conveyed to said trustee by this mortgage." If further reason were needed in support of this view it would be found in the third clause of the agreement of Bullis & Barse with Newcombe & Co., of December 9, 1889, that the latter were not required to negotiate the \$125,000 lot of bonds until the contemplated mortgage "shall constitute a security upon twenty-six thousand acres of land" and in article 10 of the mortgage, where careful provision was made to enable the trustee to release portions of the timber land from its lien,—a provision subsequently acted upon by Mr. Bullis, and money actually paid for such release. We see no reason to depart from the express words of present conveyance of the land in the mortgage, and the presumption of law is that all previous verbal negotiations and understandings were merged in the final writing. On the whole, we are of opinion a right to foreclose has been shown.



## RHINO v. EMERY et al.

(Circuit Court of Appeals, Sixth Circuit. December 11, 1895.)

No. 345.

## 1. PLEADING—HEIRSHIP.

An averment that the blood of both the ancestors on the paternal side, in the second generation from one from whom the pleader claims to inherit, as next of kin on the mother's side, is extinct, is a sufficient averment that there is no one of the blood of such ancestors to inherit.

## 2. EQUITY PLEADING—FRAUD.

An averment that one B. was from infancy and during all his life of unsound mind, and incapable of transacting business, and that B.'s mother and her legal adviser fraudulently procured from B. a deed of property, for a grossly inadequate consideration, which was never paid to him nor to any one for his use, is a sufficient averment of fraud in procuring such conveyance.

## 3. SAME.

Complainant's bill alleged that one E. had obtained by fraud a conveyance from her son of certain land devised to him by his father, E.'s husband; that subsequently she had instituted proceedings in a probate court, as executrix of her husband, to procure the sale of the same land to pay the testator's debts, and had obtained an order to that effect, directing the surplus to be paid to herself, under which she had received a large sum of money, such proceedings in the probate court being alleged to be fraudulent. Complainant, claiming to be B.'s heir, sought to set all these acts aside, and hold the representatives of E. as trustees for him. *Held*, on demurrer to the bill, that it was not necessary that the proceedings in the probate court should be set aside before B. would be entitled to such relief.

## 4. LIMITATIONS—ACTION TO CONTEST VALIDITY OF WILL.

A limitation of time for bringing a suit to contest the validity of a will does not apply to a suit to establish a trust in property which is alleged to have been diverted from its true owners by fraud, and to have passed into the hands of others under sundry conveyances, including a will.

Appeal from the Circuit Court of the United States for the Western Division of the Southern District of Ohio.

David Stewart Hounshell, for appellant.

Herbert Jenney, for appellees.

Before TAFT and LURTON, Circuit Judges, and HAMMOND, J.

TAFT, Circuit Judge. This is an appeal from a decree dismissing an amended bill on demurrer. 65 Fed. 826. The bill in general charges the defendants, or some of them, with having obtained title to and possession of the proceeds of a large amount of real property belonging to one James Berry, 2d, by fraud; avers that James Berry, 2d, died May 13, 1891; that the complainant is entitled to a moiety of his estate; and that he is therefore entitled to hold the defendants as trustees for his share of the property described in the bill.

The first ground upon which the action of the court is sought to be upheld is one not taken by the court below. It is that the complainant does not show by the averments of his bill that he is the heir and next of kin of James Berry, 2d, according to the laws of Ohio. The property in controversy was real estate be-

longing to and descended from James Berry, Jr., the father of James Berry, 2d. James Berry, Jr.'s, father was James Berry. His mother was named Rolston. The bill avers that the blood both of James Berry and of the Rolstons is extinct, and that complainant is a first cousin of James Berry, 2d, being the nephew of his mother, Eliza Berry, and is his next of kin. Section 4158, Rev. St. Ohio (the statute of descents), provides that, when there are none of certain relations living, the estate shall pass to the next of kin to the intestate of the blood of the ancestors from whom the estate came, or their legal representatives. Section 4160 provides that, when there is no person to inherit under this clause, the estate shall pass to the husband or wife relict of the intestate as heir; and, if there is no such relict, then it shall pass to and vest in the next of kin of the intestate, though not of the blood of the ancestor from whom the estate came. Now, it is said that the complainant, claiming under this latter section, must show that there is no one of the blood of the ancestor from whom the real estate came who can inherit. He has done so by the averments of his bill, for, after averring that the ancestor from whom the property descended was a son of Berry and a Rolston, he avers that the blood of the Berrys and Rolstons, the ancestors of James Berry, 2d, on his paternal line, became extinct. This certainly excludes the possibility of any next of kin to James Berry, 2d, of the blood of James Berry, Jr., and makes section 4160 applicable.

The defendants in the bill against whom relief is asked are William G. Roberts, Sarah A. Weller, Thomas J. Emery, and John J. Emery, and M. E. Sperry. M. E. Sperry is alleged to be a coheir with the complainant, and is made party defendant that his interest may be preserved to him. The bill alleges that James Berry, Jr., died possessed of three valuable pieces of real estate; that he devised this estate to his wife, Eliza A. Berry, for life, with remainder to his two children, James Berry, 2d, and Kate E. Berry, providing that, in case of the death of either of the children before the death of his wife, the entire remainder should pass to the surviving child; that all the debts of the testator were paid shortly after his death; that Kate Berry married, and died without issue; that James Berry, 2d, was from his early infancy and during the whole period of his life a person of unsound mind and of weak understanding, and wholly incapable at any period of his life of transacting any business by reason of his mental incapacity and imbecility; that upon the death of his sister, in 1882, the defendant William G. Roberts and the mother of James Berry, 2d, Eliza A. Berry, conspired together for the fraudulent purpose of securing the title to the real estate devised to James Berry, 2d, by the will of his father, James Berry, Jr., so that they might appropriate the property to themselves; that at that time Eliza A. Berry was more than 70 years of age, and that her son, James Berry, 2d, was verging to the age of 40 years; that William G. Roberts, the defendant, was the legal adviser of Eliza A. Berry,

and had great influence over her, and that, through his inducement, they together, on the 21st of August, 1882, fraudulently procured a deed from said James Berry, 2d, an imbecile person and of unsound mind, by which he conveyed all his real estate to the said Eliza A. Berry, for the "grossly inadequate consideration of \$3,000, no portion of which said sum was ever paid to said James Berry, 2d, or to any other person for his use"; that the real estate so conveyed was soon thereafter sold for more than eight times the amount of the said \$3,000; that in 1885 the said Roberts and Eliza A. Berry procured an order from the probate court of Hamilton county, Ohio, appointing Roberts statutory guardian of James Berry, 2d; that, in furtherance of their fraudulent scheme, Eliza A. Berry, as executrix of the estate of her husband, more than 22 years after his death, under the fraudulent pretense of paying the debts of the testator, instituted suit in the probate court of Hamilton county, Ohio, against herself and against her son, James Berry, 2d, and Roberts, as guardian of said son, for the purpose of selling said real estate, and that on April 18, 1885, she obtained a judgment for the sale of said lands, long after her power to sell had become inoperative, and soon thereafter obtained an order confirming the sale, and ordering deeds conveying to the purchasers of the said lands so sold under the irregular and void proceedings in said suit; that Roberts acted as one of the attorneys of record in said suit for Eliza A. Berry, and conducted the same as the leading counsel for her; that the petition in said suit for the sale of said real estate recited a debt which was a mere pretended and fictitious one, and had no foundation in fact; that the sale resulted in bringing to Eliza A. Berry some \$12,000, \$8,000 of which was held until her death; that on August 23, 1886, Eliza A. Berry made her will, which was drafted by Roberts; that on the 9th of September, 1886, she died, and in the will appointed Roberts trustee under the will for her son, gave him complete power of controlling her estate by sale and reinvestment, directed him to provide for the support of her son, and, upon his death, made Roberts and the defendant Sarah A. Weller joint legatees and devisees of whatever should remain of her estate; that the executor of this will turned over the \$8,000, the proceeds of the sale of the land in the probate court, to Roberts, as trustee for James Berry, 2d; that Roberts thereafter procured an order committing James Berry, his ward and cestui que trust, to the insane asylum, where he remained until his death, on the 13th of May, 1891. The bill further avers that at the time of the death of James Berry, 2d, there remained of the estate of James Berry, Jr., undisposed of, a valuable piece of land on Longworth street, in Cincinnati, which, on December 8, 1891, Roberts and Sarah A. Weller, by deed, in consideration of the sum of \$16,700, sold and conveyed to the defendants Thomas J. Emery and John J. Emery; that the defendants the Emerys did not pay the purchase money to Roberts, but have some secret understanding by which the payment is deferred, of which the complainant is ignorant.

The bill avers that the Emerys had full notice and knowledge of all the facts and circumstances under which Roberts and Mrs. Weller obtained title and power to sell the real estate in question, and that they therefore cannot claim as bona fide purchasers. The prayer of the bill is that William G. Roberts, as trustee under the will of Eliza A. Berry and in his own right, and the said Sarah A. Weller, may be compelled to render a full and perfect account of the estate of James Berry, 2d, which came into their hands, and that they may be charged with the amount of all money paid into the hands of William G. Roberts by the executor of Eliza A. Berry; that the deed from James Berry, 2d, to Eliza A. Berry, be rescinded, canceled, and annulled for fraud; and that Roberts and Mrs. Weller be held as trustees for whatever amount of money or other property belonging to the estate of James Berry, 2d, may have come into their hands through the acts and doings of Eliza A. Berry during her lifetime and under her said will; and that the deed from Roberts and wife and Sarah A. Weller to Thomas J. Emery and John J. Emery be canceled and held for naught; and that the Emerys be required to account for the rents and profits of the lands since the date of the conveyance to them.

The circuit court held that the averments of the bill were not sufficient to show that there was fraud in the mode by which the conveyance of James Berry, 2d, to his mother, was procured; that the inadequacy of the consideration did not clearly appear; nor was it averred that the consideration had not been applied for the benefit of James Berry, 2d. We cannot concur in this view. The bill shows the absolute incapacity of James Berry, 2d, to make a deed, the relationship of dependence between him and his mother, and expressly avers the gross inadequacy of \$3,000 as a consideration. It was not necessary that the bill should aver that the money was not paid to him to make a case, but the bill does so aver, and also that it was not paid to any one for his use. The court below said that this did not show that it had not been applied to his use. With deference, we think the two expressions are equivalent. Whether all the averments can be proven is a different question, but, if true, they certainly show such fraud in procuring the deed as to require its cancellation.

The court below held that, until the judgments in the probate court had been set aside, Roberts and Mrs. Weller could not be held accountable for the proceeds of the sale of the land of James Berry, 2d, made thereunder, because those judgments directed payment of the balance, after satisfaction of the debt, to Mrs. Berry. We cannot concur in this view. If the facts occurring prior to the suit in the probate court were such that in equity the proceeds of the sale belonged, not to Eliza A. Berry, but to her son, from whom the property was obtained by fraud, then the representatives and heirs of James Berry, 2d, have the right in equity to follow that money into hands of any one to whom it may have come with the knowledge of the fraud by which it was originally procured. Under the circumstances stated, Mrs. Berry is to be

treated merely as a trustee for her son in those probate court proceedings, and the proceeds of sale are as much part of his estate as the land was. More than this, the validity of the probate proceedings is attacked for fraud, and the jurisdiction of a federal court of equity to compel restoration of lands or proceeds fraudulently acquired by such proceedings is clear. *Arrowsmith v. Gleason*, 129 U. S. 87, 9 Sup. Ct. 237. A federal court of equity, where other necessary jurisdictional facts are present, has the right, without directly setting aside the proceeding in the state court in which the sale is made, to lay its hands upon the guilty parties committing the fraud, and to hold them as trustees, for the defrauded one, to account for the proceeds of the action conceived and carried on in fraud.

The circuit court also held that the cause of action stated in the bill was barred by limitation, resting its conclusion on the failure of the complainant to contest the will of Eliza A. Berry under section 5858 of the Revised Statutes of Ohio. That section provides that a person interested in a will may contest its validity in a civil action in the court of common pleas of the county in which such probate was had. And by section 5866 the action must be brought within two years. The will of Mrs. Berry was probated in 1886, and, as the two years had elapsed before this suit was brought, the circuit court held that the complainant was too late. The complainant does not by his bill seek to set aside the will of Eliza A. Berry. Her will is merely referred to as the conduit through which, as it is charged, William G. Roberts and Sarah A. Weller obtained possession of the proceeds of the real estate of James Berry, 2d, which, in pursuance of the fraudulent scheme of Roberts and Mrs. Berry, had been procured from James Berry, 2d, and conveyed to Eliza A. Berry, without adequate compensation. Neither James Berry, 2d, nor the complainant, had any ground to set aside the will of Eliza A. Berry. They could only follow the proceeds of the fraud against James Berry, 2d, through the various conveyances, whether by deed or will, to the persons in whose hands they found the money or property when the action was brought. By section 4978 of the Revised Statutes of Ohio, the time within which he could bring a suit to set aside his deed of 1882 to his mother did not begin to run against James Berry, 2d, during his life, because he is averred to have been an imbecile and an insane person from 1882, the date of the deed, until his death, in 1891, and to have been under the guardianship of William G. Roberts from 1885 until that time. The statute of limitations of Ohio provides that actions for relief on the ground of fraud shall be brought within four years, but the cause of action shall not be deemed to have accrued until the discovery of the fraud. As the statute did not run during the life of James Berry, 2d, and no right of action accrued to complainant until the death of James Berry, 2d, in 1891, the statute did not begin to run at all till then. This action was begun February 24, 1893, considerably less than four years thereafter.

The court below held that no ground for relief was stated against Mrs. Weller, because there was no averment in the bill charging her with participation in the fraud charged against Roberts or Mrs. Berry, or any knowledge of it. That is true, but she was a mere volunteer, and could not hold property devised to her without any consideration which the testatrix had obtained by fraud. The averments that the Emerys had full notice of the defects in title of Roberts and Mrs. Weller to the property for which they took a deed, are quite broad enough to require that they should also be required to answer the bill.

This case has been considered upon demurrer, and upon demurrer the averments of the bill must be taken as true. What the proof will disclose with respect to the serious charges in the bill is, of course, another matter. They are of a character not to be lightly made against reputable persons. We are clearly of opinion, however, that a sufficient case in equity is stated upon the face of the bill to entitle the complainant, if he proves it, to the relief he seeks, and that the defendants should be required to answer. The decree of the court dismissing the bill is therefore reversed, at the cost of the defendants, with instructions to overrule the demurrer and require the defendants to answer.

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MOLINE PLOW CO. OF KANSAS CITY, MO., et al. v. CARSON.

(Circuit Court of Appeals, Eighth Circuit. December 30, 1895.)

No. 671.

1. PRACTICE ON APPEAL—REVIEW OF REPORT OF SPECIAL MASTER.

The findings of fact and conclusions of law contained in the confirmed report of a special master appointed by consent of the parties to the suit to report the facts and the law, are conclusive, unless an obvious error has intervened in the application of the law, or some serious or important mistake has been made in the consideration of the evidence.

2. MISREPRESENTATIONS BY VENDOR—LIABILITIES.

A vendor who makes a false statement regarding a fact material to the sale, either with knowledge of its falsity or in ignorance of its falsity, when from his special means of information he ought to have known it, and thereby induces his vendee to purchase to his damage, is liable in an action at law for the damage the purchaser sustains through the misrepresentation, or to have the sale rescinded in a suit in equity, at the option of the purchaser.

3. CONTRACTS—MISREPRESENTATION.

Plaintiff brought suit against defendant for the specific performance of a contract to sell to plaintiff certain property for sundry bills receivable and one-third of the stock of a corporation. Defendant's answer alleged that the contract was obtained by plaintiff's misrepresentations. A special master, to whom the case was referred, found, among other things, upon sufficient evidence, that plaintiff had informed defendant, during the negotiations for the contract, that one K., who was known to defendant to be a shrewd and successful man of large means, had offered to buy the stock offered to defendant, and of the value of which defendant had no personal knowledge, at a premium of 15 per cent., but that plaintiff had refused the offer, whereas in truth K. had made such an offer, but, upon investigation of the affairs of the corporation, had withdrawn it, on the ground that he was dissatisfied with the corporation's condition. Held, that this misrepresentation alone was sufficient to avoid the contract between plaintiff and defendant.

**Appeal from the Circuit Court of the United States for the District of Nebraska.**

On June 2, 1892, the appellee, Amaziah L. Carson, made a contract with the appellant the Moline Plow Company of Kansas City, Mo., a corporation, by which he resigned his position as a director, manager, secretary, and treasurer of that corporation, and agreed to sell and transfer to it within 10 days 50 shares of the capital stock of the appellant the Moline Plow Company of Moline, Ill., another corporation; and the Moline Plow Company of Kansas City, Mo., agreed to sell and transfer to him \$17,500 in interest-bearing bills payable of the Moline, Milburn & Stoddard Company, a corporation, and one-third of the capital stock of that company, the par value of which was \$33,333.33, and to pay him \$125 in cash. Carson refused to carry out this contract, and on July 7, 1892, the appellants exhibited their bill in the court below for a specific performance of it. On September 3, 1892, Carson answered this bill, and, among other defenses, he pleaded that he was induced to make the contract by the fraudulent misrepresentations of the officers and directors of the Kansas City company relative to the value of the various assets of the Moline, Milburn & Stoddard Company, relative to the value of the one-third of its capital stock which he had agreed to buy, and relative to the refusal of the Illinois company to accept an offer of one Kingman to purchase the same at a premium of 15 per cent. above its par value a short time before the contract was made. On October 12, 1892, the appellee filed his cross bill in this case, and prayed for a rescission and cancellation of the contract on account of the fraudulent misrepresentations of the Moline Plow Company of Kansas City, referred to in his answer. The appellants answered this cross bill, and denied these charges of fraud, and the suit proceeded to final hearing and decree. On December 30, 1893, by consent of the parties, the case was by order of the court referred to W. W. Morsman, Esq., to report the law and the facts therein. He reported, among other things, that the contract was obtained by the practice of gross frauds upon Carson, by which he was circumvented and lured into giving an assent to it, which would not have been given if the dealing had been fair and honest on the part of the officers of the appellants; that on account of this fraud the appellants were not entitled to a specific performance of the contract, and that the appellee was entitled to a decree for its rescission. The court below confirmed this report, and rendered a decree in accordance therewith. This is the decree which the appeal brings before this court for review.

John L. Webster, for appellants.

James H. McIntosh, for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

The special master, upon whose report the decree in this suit is based, was appointed by consent of the parties, not to hear and report the evidence, but to report the facts and the law in this case. The parties to this suit selected him, and made him a special tribunal to hear and decide this suit. His report has been confirmed by the court below, and it carries with it similar presumptions to those which accompany the special verdict of a jury or the special findings of a court in an action at law or its decree in a suit in equity. The settled rule of the national courts is this: The findings of fact and conclusions of law contained in the confirmed report of a special master appointed by consent of the parties to the suit to report the facts and the law are conclusive, unless an obvious error has intervened in the application of the law, or some serious or important mistake has been made in the consideration of the evidence. It relieves the appellate court from the duty of weighing testimony or

considering the credibility of the witnesses where there is a substantial conflict in the evidence. *Kimberly v. Arms*, 129 U. S. 512, 525, 9 Sup. Ct. 355; *Crawford v. Neal*, 144 U. S. 585, 596, 12 Sup. Ct. 759; *Furrer v. Ferris*, 145 U. S. 132, 12 Sup. Ct. 821; *Davis v. Schwartz*, 155 U. S. 631, 637, 15 Sup. Ct. 237.

The report of the master covers 24 closely-printed pages of this record. It contains a concise and positive finding upon every issue of fact presented by the pleadings or the evidence, and a decision of every question of law which arose in the case. The findings of fact are set forth in natural and logical order, and are followed by the legal conclusions which he deduces therefrom. A more complete and finished report is not to be found among the records of this court. The evidence from which the master deduced his findings and conclusions covers more than 700 pages of the printed book before us, and, after a careful examination of the entire record of the case, we despair of stating the facts and the law applicable to them more concisely than he has done. In view of the rule to which we have adverted, any extended statement of them would be useless. Suffice it to say that many of the issues in the case which were strenuously contested at the hearing, and upon which the master was compelled to find the facts and the law, are immaterial in this court, and need no consideration, in view of the conclusion that has been forced upon us upon the main issue in the case. It goes without saying that if the appellee, Carson, was induced to make this contract by the actionable fraud of the appellant the Moline Plow Company of Kansas City, its performance ought not to be enforced, the decree which rescinded it was right, and it is immaterial who made the first default in its performance, or when, how, or why it was made. The master found that Carson was induced to assent to the contract by gross frauds which were practiced upon him by the officers of the Kansas City company. But he did not find that fact in these terms. He found and set forth in his report the existence of various facts and circumstances which were in issue at the hearing, and which, when considered together, led his mind to this ultimate conclusion. They are too numerous and complicated for repetition here. A few of the most salient of them were these:

Carson was, and had been for some time, the manager of the Kansas City Company under a contract with it for a term of years. His office was at Kansas City, in the state of Missouri, and he had no knowledge of the actual financial condition of the Moline, Milburn & Stoddard Company, the principal office of which was at Omaha, in the state of Nebraska. The capital stock and the management of the Kansas City company were controlled by the Moline Plow Company of Illinois, and the officers of the latter company either were, or controlled, the officers of the former. The Moline Plow Company of Illinois owned one-third of the capital stock of the Moline, Milburn & Stoddard Company, the par value of which was \$33,333.33. The officers of this Illinois company had been notified that \$60,000 of the bills receivable of the Moline, Milburn & Stoddard Company were worthless, and that its management had been bad



and unbusinesslike, and they had notified the owners of the other two-thirds of the stock of that company of these facts. None of these bad bills receivable had been charged off from the list of assets of the Moline, Milburn & Stoddard Company. Immediately after receipt of notice of these facts, the owners of the other two-thirds of the stock of this company sold it to one Kingman at 15 per cent. premium upon its par value. The Illinois company sent its treasurer to Omaha to investigate the financial condition of the Moline, Milburn & Stoddard Company, and after a careful investigation he made a report which purported to be a detailed statement of the assets and liabilities of that company as they existed on March 1, 1892, and which set forth the amount and value of its real estate, its bills receivable, and its other property. If this statement had been true, the stock of the Moline, Milburn & Stoddard Company would have been worth about its par value, but it was in fact worthless. In April, 1892, Kingman offered to purchase of the Illinois company its one-third of the stock of the Moline, Milburn & Stoddard Company, which was afterwards sold to Carson, and to pay it 15 per cent. premium on its par value; but no answer was made to this offer, and five days later Kingman withdrew it, and notified the Illinois company that on looking over the business of the Moline, Milburn & Stoddard Company at Omaha he had found a number of things which he did not fully understand when he made his offer; that the amount of the bills and accounts receivable past due there, and of the goods in the country, was much larger than he was aware of; and that he desired to make a careful investigation of all these matters before he made a further offer. Kingman was a man of large means, of extensive acquaintance, and of long and successful business experience, with whom Carson was well acquainted. The stock which Carson owned in the Moline Plow Company of Illinois was worth about \$50,000 when this contract was made, while the stock of the Moline, Milburn & Stoddard Company, for which, and \$17,500 of its bills receivable, he agreed to trade it, was in fact worth little or nothing. In this situation of affairs, five of the officers of the two Moline Plow Companies, including among them the president and the treasurer of the Illinois company and the president of the Kansas City company, went to Kansas City and made the contract in question with the appellee, Carson. To induce him to sign it, they told him that Kingman had bought two-thirds of the stock of the Moline, Milburn & Stoddard Company and had paid for it 15 per cent. premium upon its par value; that he had offered the Illinois company that price for the third of its stock which it held, and that the offer had been refused, when the fact was that it had not been refused, but had been withdrawn. They concealed from him the fact that as soon as Kingman had entered upon the investigation of the affairs of the Moline, Milburn & Stoddard Company at Omaha he had withdrawn this offer because the amount of its past-due accounts and bills receivable and of its goods in the country was so much larger than he supposed it was when he made it. They presented to him the detailed statement of the assets and liabilities of the company which the treasurer of the Illinois company had made in his report, from which the capital stock

appeared to be worth about its par value, and told him that \$15,000 should be added to the value of the assets there stated on account of the earnings of the company after March 1, 1892, and that the stock was worth 15 per cent. premium upon its par value. After listening to these and other statements, and in reliance upon them, Carson executed the contract.

After finding the existence of the facts to which we have referred, and many minor facts and circumstances which tend to support his conclusion, the master found as a conclusion of law that:

"The contract was obtained by the practice of gross frauds upon Carson, by which he was circumvented and lured into giving an assent that would not have been given if the dealing had been fair and honest on the part of the officers of the complainants."

A careful examination of the record discloses the fact that while upon many issues the testimony was conflicting, there was ample evidence to support the findings of the existence of the salient facts which we have recited. Some of them, indeed, rest upon uncontradicted evidence; notably the deceitful and misleading statement that the Illinois company had been offered 15 per cent. premium for its stock by Kingman, and that that company had refused to accept the offer. That misrepresentation alone was enough to avoid this contract. Here was the appellee, engaged in the discharge of his duties at Kansas City, ignorant of the financial condition of the Moline, Milburn & Stoddard Company, and ignorant of the value of its stock. He knew Kingman, and knew him to be a shrewd, careful, and successful business man. He knew that he had bought, and had paid 15 per cent. premium for two-thirds of the stock of this company. He was told that he had offered the same price for the third of the stock under consideration, and that the owner had rejected that offer. The fact was that, as soon as Kingman had obtained control of the company, and had commenced to investigate its affairs at Omaha, he found that he had been cheated in his purchase, and had notified the Moline company that he withdrew his offer, because the company had so large an amount of past-due paper and accounts, and so many goods in the country. Suppose that these officers had told Carson the whole truth about this offer and its withdrawal, would he have closed this trade? He reasoned that the shrewdness and sagacity of Kingman had convinced him that this stock was worth 15 per cent. premium, and that it must be safe for him to buy it at that price. Suppose that he had known that Kingman had instituted an investigation after his purchase, and had discovered that it was not worth that price, and had decided that he would give nothing and make no offer for the third of the stock held by the Illinois company until he had completed the examination upon which he had entered, which would end in developing the fact that the stock was worthless, would he have made the contract then? Yet this was the truth. Would he not have reasoned that Kingman had already discovered that it was not safe to buy the stock at any price until the affairs of the company were thoroughly investigated, and that he would not do so? These questions answer themselves. Nothing is more deceitful than half

the truth. This and many other like misrepresentations made by the officers of the appellants were not mere exaggerations of the value of the stock or of the assets of this corporation. They were fraudulent misrepresentations of material facts that were actually within their knowledge, or that the appellee had a right to presume, from their relation to the corporation, were within their knowledge. They constituted fraud, resulted in damage, and warranted the legal conclusion which the master reached.

A vendor who makes a false statement regarding a fact material to the sale, either with knowledge of its falsity or in ignorance of its falsity, when from his special means of information he ought to have known it, and thereby induces his vendee to purchase to his damage, is liable in an action at law for the damage the purchaser sustains through the misrepresentation, or to have the sale rescinded in a suit in equity, at the option of the purchaser. *Barnes v. Railway Co.*, 12 U. S. App. 1, 3, 6, 4 C. C. A. 199, 54 Fed. 87; *Cooper v. Schlesinger*, 111 U. S. 148, 155, 4 Sup. Ct. 360; *McFerran v. Taylor*, 3 Cranch, 270; *Doggett v. Emerson*, 3 Story, 700, 732, 733, Fed. Cas. No. 3,960; *Kiefer v. Rogers*, 19 Minn. 32, 36 (Gil. 14); *Litchfield v. Hutchinson*, 117 Mass. 195, 197; *Cole v. Cassidy*, 138 Mass. 437, 438.

Enough has been said to show that the master committed no error in the application of the law, and no mistake in the consideration of the evidence upon this issue of fraud, that could result in a reversal of his findings upon this issue. This concludes the discussion. The decree below must be affirmed, with costs, and it is so ordered.

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#### MORTON v. MORRIS (two cases).

(Circuit Court of Appeals, Eighth Circuit. February 17, 1896.)

Nos. 713 and 714.

#### CONTRACTS—DURESS—THREATS TO ENFORCE LEGAL RIGHTS.

On June 20, 1893, there was an unsettled account between complainant and defendant, growing out of previous business transactions extending over 10 years, and defendant, who had been complainant's agent, and for a part of the time his partner, was largely indebted to complainant. On that day a settlement was agreed upon between them, as a part of which defendant gave to complainant two mortgages. Upon suit being brought to foreclose such mortgages, defendant interposed an answer and filed a cross bill asking cancellation of the mortgages, in each of which he averred that at the time when the settlement was made a financial crisis existed, and it was very difficult to raise money; that defendant was engaged extensively in business, and both his assets and liabilities were large; that complainant took advantage of the business situation and of the danger to defendant's credit which would result from any such demand upon him, or from any litigation, to enforce an unfair settlement, and, by demanding an immediate settlement, and threatening, in bad faith and for the purpose of coercion, to institute a suit for an accounting, and to demand the appointment of a receiver, compelled defendant to agree to a settlement which was unfair, as a part of which the mortgages were given; that defendant only agreed to such settlement upon complainant's promise to say or do nothing to injure defendant's credit, but that complainant had attacked his credit in statements to third persons, whereby the sole

inducement for defendant's agreeing to the settlement had failed. It was also averred generally that the settlement was unjust and unfair, and that the property taken by the defendant was overvalued, but no facts and details were stated. *Held*, that the allegations of the answer and cross bill were insufficient, either as a defense to the foreclosure or as a ground for canceling the mortgages.

### Appeals from the Circuit Court of the United States for the District of North Dakota.

This suit was brought by Edwin Morris, the appellee, against Charles A. Morton, the appellant, to foreclose two mortgages on lands situated in the state of North Dakota that were given to secure the payment of three principal notes, amounting in the aggregate to \$32,000, and certain interest notes. The mortgages in question were executed by the appellant in favor of the appellee on June 20, 1893. One of the mortgages was in the ordinary form; the other was in the form of an absolute conveyance. The latter instrument conveyed to the appellee an undivided one-half interest in certain lands which the appellant and appellee owned as tenants in common; but the bill stated that it was in fact a mortgage, which had been given to secure a part of the aforesaid mortgage debt, and it prayed for a decree foreclosing the appellant's equity of redemption therein.

The defendant below filed an answer and a cross bill, whereby he resisted a decree of foreclosure, and sought to have the mortgage and the mortgage notes canceled on the ground that they had been executed under duress, or by means of undue influence. The material allegations in this respect which were contained in the answer and also in the cross bill as the ground for the affirmative relief therein prayed for were substantially as follows: The defendant below alleged that he had acted as agent for the plaintiff, Edwin Morris, from 1883 until June 20, 1893, in loaning and investing money for the plaintiff; that from January, 1888, until January 31, 1891, the plaintiff and the defendant had also been copartners in the banking business at Fargo, N. D.; that the banking business was discontinued on January 31, 1891, but that the firm was not dissolved until June 20, 1893; that the assets of the firm then consisted of money, notes, credits, book accounts, and other property, both real and personal, which was of great value; that the defendant had the sole control of the assets of the firm, after the discontinuance of the banking business, until June 20, 1893; that during the existence of the copartnership the defendant had continued to act, as before, as agent of the plaintiff in the matter of loaning and investing the latter's money; that from 1883 to June 20, 1893, the plaintiff and defendant had never had a final settlement, and that such settlement at the latter date involved an intricate and careful accounting.

Besides the foregoing averments, the answer and cross bill contained the following specific allegations, to wit: "That in said month of June, A. D. 1893, there was, and for some time prior thereto there had been, a financial crisis and money stringency existing throughout the United States, and that it was almost, if not quite, impossible for the defendant, or any other person, to realize immediately a large sum of money. That the defendant was then largely engaged in business of various kinds, and had a large amount of valuable property and assets, and had as well large liabilities; and that, in view of the matters and things aforesaid, the defendant, in said month of June, A. D. 1893, believed \* \* \* that it was vital to the defendant's interests, financially and otherwise, to maintain the financial credit which he then enjoyed, and to prevent, if possible, the happening of any event calculated or liable to injure, damage, or impair his financial standing or credit. That the complainant, in said month of June, A. D. 1893, well knew the financial condition then existing, and of the great business depression incident thereto, and that the defendant was then engaged largely in business, having a large amount of valuable property and assets and large liabilities, and that it was then vitally important to the defendant to maintain his financial credit; and that in view of the facts so known to complainant, and in the said month of June, A. D. 1893, the said complainant unjustly, wrongfully, and in bad faith sought to take advantage of the existing facts and circumstances, and did

wrongfully and in bad faith take advantage of the said existing facts and circumstances in the matter of coercing the defendant into the making of an inequitable and unjust settlement of the said matters, accounts, and things then in controversy between the defendant and the complainant, and into the making of a settlement by which the complainant should have and receive a larger share and proportion of property, or its equivalent in money, than he was justly entitled to upon a fair and equitable settlement. That during the negotiations between the defendant and the complainant for and as to a final settlement of the matters and things aforesaid the complainant evidenced toward the defendant in many ways a hostile and malicious state of mind, to such an extent that the defendant had good cause and reasonable ground to believe, and did then believe, that the complainant was in such an unfriendly and malicious condition of mind towards the defendant that he would in some way or manner injure and damage the defendant by statements and declarations calculated to affect and injure the defendant's financial standing and credit. That the defendant's financial standing and credit at said time was sound and good, but that the defendant then believed that any false or scandalous statements made against the defendant's financial standing and credit, or any attack whatever against the same, particularly by the complainant, who had for such a long time sustained business relations with the defendant, would at that particular time, and under the peculiar conditions and circumstances then existing, greatly damage the defendant, if not utterly ruin him, by rendering it impossible for him to raise money with which to meet his liabilities, except at a large and great sacrifice of property, both real and personal, and by rendering the defendant liable to be then called upon for payments of money that otherwise would not then be demanded. That in the said month of June, A. D. 1893, the complainant, with full knowledge of said financial condition and business depression of the country at large, did threaten to institute an action in equity against the defendant for the purpose of securing an accounting and settlement of the said matters, accounts, and things then unsettled, and to pray in said action the appointment of a receiver over and of the property and assets of said copartnership, and over and of all of the property in the possession or control of the defendant in which the complainant then had an interest. That the said threat was made by the said complainant for the sole purpose of enforcing and obtaining an unfair and unjust settlement of the accounts, matters, and things aforesaid. That the defendant then believed that unless he should at once make a settlement with the complainant of such accounts, matters, and things, that the complainant would carry out his said threats, and would institute such action in equity; and that the institution of the same at said time might, and probably would, irreparably injure and damage, and possibly financially ruin, the defendant. That in order to prevent the institution of such an action by the complainant, and in order to prevent the complainant from saying or doing anything at said time or while said financial depression continued that might or could by any possibility impair or injure the defendant's financial standing or credit, the defendant determined that he would make such final settlement of the accounts, matters, and things aforesaid as was then demanded and insisted upon by the complainant, although, in the opinion of the defendant, the same was unjust and unfair, provided the complainant would expressly promise and engage that he would not then and thereafter say or do anything that could by any possibility impair or injure the financial standing or credit of the defendant. That on the said 20th day of June, A. D. 1893, the defendant, for and in consideration of the promise made by the complainant to him that he, the complainant, would not in any way or manner say or do anything affecting or which might or could affect the financial standing, integrity, or credit of the defendant, or which would have a natural tendency so to do, or say or do anything reflecting upon, or which could by any possibility be deemed by any person or persons as reflecting upon, the sound financial standing, integrity, or condition of the defendant then or thereafter, or in any way or manner then or thereafter impugn the fairness or good faith of the defendant in making a final settlement with said complainant of and concerning all matters and things connected with said agency, copartnership, and ownership of lands, and of all matters and things then in dispute between the defendant and the complain-

ant, concluded and effected a full and complete settlement in writing with said complainant of all matters and things connected with and arising out of said agency, copartnership, and ownership of lands, the same being in fact a final settlement of all accounts, matters, and things then in dispute or otherwise between the defendant and the complainant, connected with or arising out of said agency, copartnership, and ownership of lands, and of all the interests, rights, claims, and demands of the defendant and complainant upon or with respect to each other, their several heirs, executors, administrators, and assigns."

The bill next averred, in substance, that the mortgages sought to be foreclosed in the present suit where executed as a part of said final settlement, and to carry out the terms and provisions thereof. The answer and cross bill also contained the following specific allegations, to wit: "That all of the property, both real and personal, which by the terms of said settlement was to become the property of the defendant, was so valued by the defendant, for the purpose of said final settlement, far above its actual value, and that a large part of said property, which by the terms of said settlement the defendant was to take and own for his own use and benefit, has since the execution and making of said final settlement greatly depreciated in value, and that none of said property so taken by the defendant has appreciated over and above such estimated values. That the complainant, in violation of his said promise and agreement, after making said settlement with the defendant, and subsequent to the delivery to him of the said promissory notes, mortgages, and conveyance, frequently, openly, and willfully attacked the financial credit, integrity, and standing of the defendant by statements and declarations made by him, the said complainant, to divers persons residing and being in the state of North Dakota, with respect to the financial standing, integrity, and condition of the defendant, in and by which said statements the said complainant alleged and declared that the defendant was financially irresponsible, that all of the property of the defendant was heavily incumbered, and that the defendant was financially bankrupt and insolvent; and that the complainant further, by declarations to third persons, frequently impugned the honesty and good faith of the defendant as to and in the making of said final settlement, and thereby violated and failed to keep and perform his said promise, to the great and irremediable damage of the defendant. That not only has the defendant suffered and sustained irremediable damages by reason of the violation of such promise and agreement by the complainant, but that the said violation by the complainant of his said agreement was in a large measure, if not solely, the reason for the defendant's inability to raise money and funds with which to pay those certain interest coupon notes which matured and became due, according to their terms, on the 20th day of June, A. D. 1894. That by reason of the defendant's failure and inability to pay said interest coupon notes when due, to wit, on the 20th day of June, A. D. 1894, the complainant did, on the 28th day of June, A. D. 1894, serve upon the defendant written notice of his election and intention to declare the whole sum secured by said mortgage and otherwise as aforesaid to be due and payable. That the violation of the complainant's said agreement, coupled with the financial depression existing at the time, and which the defendant and the complainant had in mind and in view at the time when the defendant stipulated for and exacted such promise from the complainant, to wit, at the time of the making of said settlement, rendered the defendant unable to pay the said coupon interest notes which matured on the said 20th day of June, A. D. 1894, and resulted in the demand made upon the defendant by the complainant for the payment forthwith of the whole sum of \$32,000, together with interest thereon during a continuance of said financial depression, and at a time when it was and is utterly impossible for the defendant to realize and pay such a sum of money, except, if at all, by the sale of real and personal property at great loss, sacrifice, and damage to the defendant. That by reason of said statements and declarations so made by the said complainant to divers persons, the sole consideration moving from the complainant to the defendant or received by the defendant for the execution and delivery of the said several instruments, and each of them, and for the making of said final settlement, has wholly and utterly failed. That the sole purpose and object of the defendant in making said final settle-

ment has been and was defeated by reason of said statements and declarations so made by complainant. That, but for the said promise of the complainant, the defendant would never have agreed to pay to the complainant the sum of \$32,000, or any other sum, until all the actual value of all the property involved in said settlement had been ascertained and determined either by agreement or judicial determination, and the true amount to which the said complainant was entitled, if any, had been thus, or in some other way, accurately and truly ascertained and determined."

The complainant below filed a replication to the aforesaid answer and a demurrer to the cross bill, which demurrer was sustained, and thereupon an order was entered dismissing the cross bill. Subsequently the case was referred to a master, with directions to report to the court separately his findings of fact and conclusions of law upon the issues raised by the bill, answer and replication. On the coming in of the master's report, the same was confirmed, and a decree was entered in accordance with the recommendation of the master, foreclosing both mortgages, and directing a sale of the property therein described for the satisfaction of the mortgage debt. The case comes to this court on an appeal taken by the defendant from the decree of foreclosure, and also on an appeal from the order sustaining the demurrer to the cross bill and dismissing the same.

W. P. Miller (Charles E. Flandrau, with him on brief), for appellant.

Charles F. Amidon (John D. Benton, with him on brief), for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The record shows that on the hearing before the master and in the circuit court no evidence was offered by the defendant, Charles A. Morton, tending to support any of the allegations of his answer, although a replication thereto was duly filed. The contention in behalf of the defendant seems to have been that, because the complainant had demurred to the cross bill, and the same had been sustained, the demurrer operated as a conclusive admission of all the facts pleaded in the answer as well as in the cross bill, and that it was, therefore, unnecessary to offer any proof for the purpose of establishing the averments of the answer. We do not find it necessary on the present occasion to decide whether this view regarding the effect of the demurrer is well founded or otherwise, for, even if the demurrer operated as an admission of the facts stated in the answer as well as in the cross bill, it was only an admission of such facts as were well pleaded, and the facts so pleaded, taken altogether, were insufficient, in our judgment, either to warrant a decree in favor of the defendant on his cross bill, or to justify the circuit court in refusing the relief prayed for by the plaintiff in his bill of complaint.

It was shown by the averments contained in the defendant's answer and cross bill that on June 20, 1893, there was an unsettled account between the parties to the suit, growing out of previous business transactions which had extended over a period of 10 years, and that the defendant, who had acted throughout the entire period as agent for the plaintiff in loaning money, and for a portion of the time as his copartner in the banking business, was largely in-

debted to the plaintiff by reason of such relations and transactions. Under these circumstances, the plaintiff had an undoubted right to call upon the defendant for a settlement and an accounting, and to enforce the demand by a suit in equity if a settlement was either deferred or refused. And, inasmuch as the affairs of the copartnership remained open and unadjusted, the plaintiff also had the right to ask for the appointment of a receiver of the property of the firm if he and his copartner failed to agree upon a division thereof, or as to the proper custody of the same, pending an adjustment of the partnership affairs. The only threat complained of in the answer and in the cross bill which appears to have been at any time made by the plaintiff was a threat to bring a suit to enforce a settlement and an accounting if an amicable adjustment was not reached, and, such being the case, we fail to see that the agreement of June 20, 1893, under and in pursuance of which the mortgage and mortgage notes were executed, was brought about by any such unlawful or unfair means as will serve to render the agreement voidable, either in a court of law or equity. In a legal sense, a person cannot be said to have taken an undue advantage of another, or to have done any wrong, when he merely threatens to enforce his rights by a civil action in the ordinary form. On the argument of the case some stress was laid on the averments contained in the answer to the effect that the defendant was called upon for a settlement when he was largely in debt, and when the times were unpropitious: also on the averment that the demand was made at that time by the plaintiff in bad faith, to coerce an inequitable settlement. These averments are not sufficient, in our opinion, to entitle the defendant to equitable relief. In the world of business it is usually the case that men are most urgently pressed to pay their debts when they are deeply involved, and the times are stringent, or when a financial panic is imminent. On such occasions the instinct of self-preservation often compels creditors to be more prompt and persistent, if not more exacting, in enforcing their demands, than they would be under other conditions. It is highly creditable to a man, no doubt, if he can so far overcome the dictates of self-interest as to be indulgent to his honest debtors in times of great business depression, but we are unable to say that it is a creditor's legal duty to be thus lenient when the times are hard, or to defer pressing for a settlement of his claims until a more convenient season. Nor are we able to say that in the forum of equity a creditor should be adjudged guilty of such unconscionable conduct as will vitiate securities taken from his debtor to secure a bona fide indebtedness, merely because he saw fit to insist upon a settlement when values were declining, and when it was most inconvenient for the debtor to meet his obligations.

With reference to the allegation contained in the answer and cross bill that the demand for an accounting was made in bad faith, to coerce an unjust settlement, it is only necessary to say that, inasmuch as the acts done and performed by the complainant were clearly lawful, we fail to perceive that the motives which may



have prompted him to demand a settlement and an accounting are at all material. The intent which actuates a creditor in seeking to enforce a legal claim or demand is ordinarily of no concern to the debtor, and is not a matter for judicial inquiry. The latter is only entitled to complain when some act is done or threatened by the creditor which is, in itself, unlawful, or is contrary to equity. In the present case the acts charged in the answer as the basis for relief consisted in a demand made by the plaintiff for an accounting and settlement when the defendant was in embarrassed circumstances, and in a threat to enforce such demand by a civil action. Neither of these acts was unlawful, or so far harsh, oppressive, or unconscionable as to vitiate the settlement subsequently made. *Silliman v. U. S.*, 101 U. S. 465; *Hackley v. Headley*, 45 Mich. 569, 8 N. W. 511; *Snyder v. Braden*, 58 Ind. 143; *Dunham v. Griswold*, 100 N. Y. 224, 3 N. E. 76; *Fuller v. Roberts* (Fla.) 17 South. 359; *McClair v. Wilson*, 18 Colo. 82, 31 Pac. 502; *Farmer v. Walter*, 2 Edw. Ch. 601; *Skeate v. Beale*, 11 Adol. & E. 983; *Wilcox v. Howland*, 23 Pick. 167.

It should be further noted that it does not appear from the allegations of the defendant's answer and cross bill, with the requisite certainty, that the settlement eventually agreed to was in any respect unjust and unfair. The answer contains the averment "that in the opinion of the defendant, the [settlement] was unjust and unfair," and the further averment "that all the property, both real and personal, which by the terms of said settlement was to become the property of the defendant, was \* \* \* valued by the defendant, for the purpose of said final settlement, far above its actual value, and that a large part of said property which by the terms of said settlement the defendant was to take and own for his own use and benefit has since the execution and making of said final settlement greatly depreciated in value, and that none of said property so taken by the defendant has appreciated over and above such estimated values"; but to what extent, in dollars and cents, the property in question was overvalued, is not stated; neither is it averred that the plaintiff was solely instrumental in causing such overvaluation. On the contrary, inasmuch as the plaintiff was a resident of the province of Ontario, Canada, while the defendant was a resident of the state of North Dakota, and had made all of the investments in that state, it is fair to presume, as the allegations of the answer and cross bill would seem to imply, that the defendant had more to do with placing values on the property that figured in the settlement than the complainant. At all events, the allegations of the answer in this respect are so general and indefinite that they fail to satisfy us that when the plaintiff called upon the defendant for a settlement, he first placed an exaggerated value on the property to be divided, and then took advantage of the defendant's necessities to compel him to take an undue proportion thereof at such exaggerated valuation.

Some other questions are discussed in the briefs of counsel, which have been duly considered, but, in our judgment, they are

not of sufficient importance to justify special mention. It results from the foregoing views that the decree of the circuit court was for the right party, and ought not to be disturbed.

We have been asked by counsel for the appellee to affirm the decree of the circuit court with 10 per cent. damages, in accordance with subdivision 2 of rule 30 of this court (11 C. C. A. cxii., 47 Fed. xiii.), on the ground that the appeal was taken merely for delay. We think, however, that the case is not one which would justify an allowance of damages. In lieu thereof an order will be entered affirming the decree, and directing the mandate to issue at the expiration of 10 days.

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GULF STATES LAND & IMPROVEMENT CO. v. PARKER et al.

(Circuit Court, E. D. Louisiana. February 8, 1896.)

No. 11,913.

1. TAXATION—SALES OF PROPERTY HELD BY STATE.

Under the Louisiana statute of 1888 (Act No. 80), where property acquired by the state for nonpayment of taxes is sold, not only the purchaser from the state, but also his vendee, is liable for the taxes due on such property.

2. SAME—ASSESSMENT OF LANDS HELD BY STATE.

Under the said act, lands acquired and held by the state because of nonpayment of taxes are subject to taxation, state and municipal, not only for one year immediately after their acquisition by the state, but for all the years they are held by it.

Complainant brought suit against defendant C. H. Parker, tax collector, to restrain the collection of taxes on certain lands acquired from the state by complainant's vendor at a sale under the laws of Louisiana of lands forfeited the state for nonpayment of taxes. The decree was rendered in favor of defendants, dismissing the bill (60 Fed. 974), and thereupon application was made for a rehearing.

E. B. Kruttschnitt, for complainant.

Horace L. Dufour, Asst. City Atty., for defendants.

The point raised by counsel for complainant in the argument on rehearing, that the property could not be assessed while in the hands of the state, was distinctly made and disposed of adversely to this view in the Powers Case, 45 La. Ann. 566, 12 South. 880, on which he relies. In that case the state acquired the property in 1884. On page 567 (paragraph 5 of the syllabus of plaintiff's brief) is contained the following: "After property has been adjudged to the state in default of a bidder, the same shall be continued to be assessed in the name of the person to whom it belonged at the date of the sale for the space of one year thereafter only." Act 1882, No. 96, § 60. In the body of the decision, the court said: "His further averment is that there was no warrant in law for the levy and assessment against said property during the years 1884 to 1892, inclusive; on the theory, doubtless, that no taxes could lawfully be assessed against the property in favor of the state while she was invested with title thereto." See page 569. Your honor will observe that the assessment was, in that case, not in the name of the state as property of the state, but in the name of Cammack and Schultz; not for one year only, nor assessed separately for taxes from 1880 to 1891. In other words, the assessment was exactly like the one in the case at bar. Under that state of facts the court said: "The remaining question is whether

the two tax sales of the property made to the state in December, 1884, rendered it exempt from taxation during the period of time it was property of the sovereign, and consequently operated the nullity of the tax liens and mortgages securing the taxes of the year 1889, 1890, 1891, not covered by the prescription urged. \* \* \* It likewise appears to be clear that it was the definite purpose of the legislature to make property purchased by the state liable to subsequent taxation, state, parish, and municipal. \* \* \* We are clearly of the opinion that the law in question (i. e. Act No. 80 of 1888) is neither unconstitutional nor illegal, and that the municipal taxes assessed against the property in controversy for the years 1889, 1890, and 1891 are legal, and the inscription thereof in the book of mortgages is legal and valid." The court went on to say that under section 6 of Act No. 80 of 1888, Ory, as "purchaser of the property charged with the payment of municipal taxes that were assessed subsequently to the adjudication to the state, voluntarily assumed responsibility for their payment, but that his vendee, having made no assumption, was not responsible, and therefore was entitled to have the inscriptions erased." The points decided in the Powers Case were the following: (1) That the general assembly may constitutionally provide for property adjudicated to the state being subjected to municipal taxation during the whole time of her proprietorship. (2) That the state, being the owner of property, can sell the same, fix the price, and impose such conditions upon purchasers as she deems fit and proper. (3) That the terms of Act No. 80 of 1888 charge the purchasers from the state with full knowledge that the taxes assessed are assumed as part of the purchase price, and this assumption is a condition of the sale. This places the act of 1888 on exactly the same footing as Act No. 82 of 1884 as interpreted in the Martinez Case, 42 La. Ann. 678, 7 South. 796. (4) That, though Ory had not paid the purchase price he had assumed and with which the property was charged, he could transfer the property to a third person, who could have the tax privileges erased, and urge reasons and defenses of which Ory could not have availed himself. This was in conflict with the positive declaration in the Martinez Case that, where an assumption of taxes formed part of the purchase price, no title could pass until payment of such price. The present contention of the city is that every point above set forth in the Powers Case is still the law, except the last, which has, after full consideration, been overruled in *Remick v. Lang* (La.) 17 South. 461, in which the court said: "The manifest purpose of the act (No. 82 of 1884) was to enable the state, by selling property it held for unpaid taxes, to realize those taxes. \* \* \* True, the language of the act is, 'he shall assume and promise to pay,' but this cannot be deemed to mean that the state shall have some kind of remedy or mere claim or lien for taxes. \* \* \* If this mere assumption be accepted as the meaning of this act of 1884, the act perishes under the construction, as far as respects the manifest objects of the legislation; that is, to realize the taxes due. Under the construction contended for, the act doubtless is a boon to tax-sale purchasers, but there its benefit ceases. \* \* \* It was in view of the object of this act of 1884 to enable the state to realize its unpaid taxes, and in full view of the result so well illustrated in this case, of a construction which in effect gives up the taxes of the state, that led to the interpretation of the act of 1884 announced in our previous opinion. To that conclusion we adhere. It means that when the state sells property under the act of 1884 it is to get the taxes to realize which the act was passed, and, unless that payment is made, no title passes. This interpretation gives to the act potency to realize from the state cash for its unpaid taxes, instead of mere assumptions of tax-sale purchasers. This interpretation also denies that the purchaser at the tax sale can defeat the payment of the taxes required to be paid under the act of 1884 by the simple expedient of transferring the property. The act is notice to all of the requisite to pass title under it. In our opinion, the tax title is of no validity." Your honor will observe that the supreme court, in reaching this conclusion, had the Powers Case before them, as it is cited as authority in the briefs (page 918, 47 La. Ann.), and was referred to by Justice Watkins, the organ of the court in the Powers Case, in his concurring opinion in *Remick v. Lang*, as follows: "I place my concurrence in the decree in this case on the ground that the purchaser under Act No. 82 of 1884 failed to pay the taxes that

were assessed on the property since 1880, \* \* \* and which taxes he had assumed as part of the purchase price. This is the exact import of our opinion in *Martinez v. State Tax Collectors*, 42 La. Ann. 677, 7 South. 796. It was affirmed in *State v. Recorder of Mortgages (La.)* 12 South. 880." It is perfectly clear from the above that the purpose of the court was to restore the jurisprudence to the position it occupied under the *Martinez Case* and before the *Powers Case*, and to finally declare that, where the taxes are part of the purchase price, no title can pass to the purchaser from the state until they are paid; and that he cannot defeat the tax claim by transferring the property to a third person. In other words, no one can give a better title than he had; having none, he can transfer none.

It has been sought by learned counsel for complainant to exclude the act of 1888 from the ruling in *Remick v. Lang*, because the case had reference to Act No. 82 of 1884. The attempt was ingenious, but it was a distinction without a difference. The two statutes were passed in pursuance of the same policy,—for the purpose of preserving and collecting taxes due to the state and city. The former related to property adjudicated to the state for taxes anterior to 1879, the latter to property adjudicated to the state for taxes since 1880. Both have been judicially decreed to fasten on the purchaser an assumption of payment of taxes as part of the purchase price in the *Martinez* and *Powers Cases*, respectively. The act of 1888 is even stronger in its intention to preserve the taxes, for it goes beyond the imposition of an assumption on the part of the purchaser, as in the act of 1884, and in its sections 5 and 6 charges the property itself with the taxes forming part of the purchase price, and makes the sale subject to their payment. It is difficult, therefore, to perceive why the reasoning and conclusion in *Remick v. Lang* as to the intention and object of the act of 1884 should not apply with equal, nay, with greater, force to the act of 1888.

The plea of prescription of the tax privileges urged by complainant cannot avail. As was said in *Case of Martinez*: "There is no ground for the plea of prescription; the plaintiff assumed the taxes due on the property. They were part of the purchase price." The city tax being imprescriptible, the complainant and his property would, under this view, be liable for all unpaid city taxes. The same case is authority against complainant's right to question the validity of the assessment made while the property was in the hands of the vendor, the state. On page 680, 42 La. Ann., and page 796, 7 South., it was said: "The plaintiff is estopped from contesting the validity of the assessments. He assumed the payment of the taxes in the name of the person to whom the property was assessed. He purchased under these assessments. He cannot claim to be the owner of the property and repudiate the title under which he claims." Reference is again made to the cases considered by your honor in your opinion in 60 Fed. 974, and also particularly to *Reinach v. Duplantier*, 46 La. Ann. 151, 15 South. 13.

For further answer to the contention that the law directs the assessment for one year only in the name of the owner, we submit the following: The sale of the property to the state in the *Powers Case* was made under the provisions of Act No. 96 of 1882, the same act as the one under which some of the property in the case at bar was adjudicated to the state. Under the provisions of section 60 of that act, the property "shall continue to be assessed in the name of the person to whom it belonged at the date of the sale until the lapse of one year from the date of recording the act of sale to the state." The act does not say that it shall not be assessed for more than one year in the name of the owner, but that it shall be for at least that time; the evident purpose of the enactment being that the name of the owner of record should remain on the rolls until the constitutional and legal delay for redemption had expired. There can certainly be deduced from the text of the law no prohibition against the state assessing the property as it deemed proper after the direction of the statute as to one year had been obeyed. It was with those lights before it that the supreme court decided in the *Powers Case*, in the language already cited, that the property could be legally and constitutionally assessed while in the hands of the state, and that such assessment warranted a tax for which purchaser and property were liable as part of the purchase price. The court then proceeded to maintain the validity of

the taxes and tax privileges for 1889, 1890, 1891, all made long after one year from the date of the adjudication of the property to the state. The analogy with the instant case is absolutely complete and convincing. The provisions of Act No. 98 of 1886, § 62, are identical with those of section 60 of Act No. 96 of 1882 on the same subject-matter, and under which sales to the state were made of some of the property in controversy herein. Both the act of 1882 (section 89) and that of 1886 (section 94) contain the following clause: "That no sale of property for the taxes of the year immediately past due, shall in any manner affect, invalidate or extinguish the claims of the state of any municipality or parish for the taxes due on said property, for any previous year or years, either before or since the adoption of the constitution." It must be remembered in this connection that the deeds in this record from the state to the purchaser declare that the property shall be free of all incumbrances "except all unpaid municipal taxes, and all state, parish, and municipal taxes which have become due and exigible subsequent to the adjudication to the state."

PARLANGE, District Judge. Two points were raised by complainant's counsel during the argument of this matter, viz.: (1) That, under the Powers Case, 45 La. Ann. 572, 12 South. 880, when the state acquires property because of nonpayment of taxes, and subsequently sells the property, the purchaser from the state is liable for the taxes he assumes when he purchases, but the vendee of the purchaser from the state is not liable for such taxes, and takes the property free from the same; (2) that after the state has acquired the property of a delinquent taxpayer, no valid assessment of the same can be made while it belongs to the state, except only for one year immediately after the acquisition by the state. Both points must be decided against the complainant. See *Reinach v. Duplantier*, 46 La. Ann. 152, 15 South. 13, and *Remick v. Lang*, 47 La. Ann. 915, 17 South. 461, both of which were decided after I passed upon the present case (60 Fed. 974). The point as to assessment after acquisition by the state was passed upon in the Powers Case and also in *Reinach v. Duplantier*. The law is clearly stated in the brief of the assistant city attorney. The application for a rehearing is refused.

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STUART v. HAYDEN et al.

(Circuit Court of Appeals, Eighth Circuit. December 30, 1895.)

No. 666.

1. NATIONAL BANKS — THEIR STOCK SUBSCRIPTIONS AND CAPITAL A TRUST ESTATE.

The capital, the unpaid subscriptions to the capital stock, and the liability of the holders of the paid-up stock to pay an additional amount equal to the par value of their stock under section 5151, Rev. St., constitute a trust estate sacredly pledged for the security of the creditors of a national banking association.

2. SAME — DIVERSION OF THEIR ASSETS.

The willful destruction or diminution of any part of this trust estate, or the diversion of the proceeds of any of it from the creditors of the bank, is a fraud upon these creditors, and subjects its perpetrator to a suit by them or their legal representative for proper relief.

3. SAME—FRAUDULENT TRANSFER OF STOCK VOIDABLE IF INJURIOUS TO CREDITORS.

A shareholder of a national banking association, who, for the purpose of escaping his individual liability, transfers his shares in a failing bank to one who, for any reason, is unable to respond as promptly and effectually as he was to the liability their ownership imposes, commits a fraud upon the creditors of the bank, renders his transfer voidable at their election, and leaves himself subject to the individual liability imposed by the ownership of the stock if the creditors elect to pursue him.

4. SAME—RECEIVER PROPER PARTY TO ENFORCE LIABILITY OF A FRAUDULENT TRANSFEROR OF STOCK.

The receiver of a national bank is the proper party to maintain a suit on behalf of its creditors to set aside a fraudulent transfer of stock by one of its stockholders and to enforce his individual liability.

5. PRACTICE—THE CHANCELLOR'S FINDING OF FACT PRESUMPTIVELY CORRECT.

When the court has considered conflicting evidence, and made its finding and decree thereon, they must be taken to be presumptively correct; and unless an obvious error has intervened in the application of the law, or some serious or important mistake has been made in the consideration of the evidence, the decree should be permitted to stand.

6. FACTS CONSIDERED.

The facts in this case considered, and the finding of the court that the stockholder Stuart had transferred his stock for the purpose of escaping individual liability, to the damage of the creditors, sustained.

7. PRACTICE—CROSS BILL.

A cross bill is brought either to aid in the defense of the original suit or to obtain a complete determination of the controversies between the original complainant and the cross complainant over the subject-matter of the original bill. If its purpose is other than this it is not a cross bill. A cross bill may not interpose new controversies between codefendants to the original bill, the decision of which is unnecessary to a complete determination of the controversies between the complainant and the defendants over the subject-matter of the original bill. If it does so, it becomes an original bill, and must be dismissed, because there cannot be two original bills in the same case.

8. NATIONAL BANKS—FRAUDULENT TRANSFER OF STOCK VOIDABLE, NOT VOID.

A transfer of stock by the stockholders of a national bank for the double purpose of escaping individual liability and defrauding the purchaser is valid until disaffirmed, not void until affirmed; and it may be affirmed by the transferee and disaffirmed by the creditors of the bank, or vice versa.

9. SAME—FRAUD UPON VENDEE IMMATERIAL IN RECEIVER'S SUIT.

The transferees of such stock, who are parties defendant to a suit by a receiver of the national bank to enforce the individual liability against the transferor on the ground that he transferred the stock to escape it, cannot by a supposed cross bill inject into such a suit the litigation of the question whether or not the vendor deceived and defrauded them by the transfer.

10. RESCISSION OF CONTRACT—RETENTION OF PURCHASED PROPERTY FATAL.

Silence, delay, vacillation, acquiescence, or the retention and use of any of the fruits of a fraudulent sale or trade that are capable of restoration, for any considerable length of time after the discovery of the fraud, are fatal to the right to rescind the same.

Appeal from the Circuit Court of the United States for the District of Nebraska.

On December 23, 1892, the Capital National Bank of Lincoln, Neb., was, and for eight years theretofore had been, a national banking association incorporated and doing business as such under the acts of congress relative to national banks. It had a nominal capital of \$300,000. On January 23, 1893, this banking association failed, and in March of that year Kent K. Hayden, one of the appellees, was appointed receiver of this bank by the comptroller

of the currency of the United States. When the bank failed in January, 1893, its assets were about \$900,000 and its liabilities over \$1,400,000. From the year 1885 until its failure it had frequently suffered heavy losses. During this time it had accumulated worthless paper to the amount of more than \$300,000, and more than \$50,000 of its capital had been tied up in real estate. The appellees Augustus T. Gruetter and Charles F. Joers were copartners engaged in the furniture business at Lincoln, in the state of Nebraska, under the firm name of Gruetter & Joers. They owned a building in Lincoln and the ground on which it stood, which they traded to the appellant, Ambrose P. S. Stuart, for \$67,500, on December 23, 1892. The appellant, Stuart, had been a stockholder and director of this banking association for many years, and was on December 23, 1892, the chairman of the finance committee of its board of directors. On that day he bought of Gruetter & Joers their building and the land on which it stood for the sum of \$67,500, and paid for it by assuming a mortgage of \$30,000 thereon, by transferring to them 150 shares of the stock of this bank of the par value of \$15,000, for the agreed price of \$18,000, and by giving them about \$19,500 in cash. On June 10, 1893, the comptroller of the currency of the United States found that, in order to pay the debts of this banking association, it was necessary to enforce the individual liability of its stockholders under section 5151 of the Revised Statutes, and thereupon he made an assessment upon the shareholders of the bank of an amount equal to the par value of the stock held by them respectively, and directed the receiver, Hayden, to enforce this liability by suit if necessary. The receiver thereupon exhibited his bill in the court below against the appellant, Stuart, in which he alleged that the transfer of his stock on December 23, 1892, was made with a knowledge of the failing condition and insolvency of the bank, for the purpose of defrauding its depositors and creditors, and of escaping from the liability imposed upon him by section 5151 of the Revised Statutes; that the transferees, Gruetter & Joers, were irresponsible, and unable to discharge the liability imposed by the ownership of the stock; and he prayed that the transfer might be held void as to the creditors and depositors of the bank and the receiver, and that the latter might recover of the appellant, Stuart, the \$15,000 assessed upon this stock. Stuart interposed a demurrer, on the ground, among others, that Gruetter & Joers were not made parties to the bill. This demurrer was sustained, with leave to amend, and an amended bill was filed in which Gruetter & Joers were made parties to the suit, and substantially the same allegations as in the original bill were reiterated. Stuart answered this bill, admitted the trade of the stock for the real estate, but denied that this trade was made for the purpose of defrauding the creditors or depositors of the bank, or for the purpose of escaping his individual liability. The defendants, Gruetter & Joers, answered. Their answer was, in effect, an admission of the averments of the bill. After this answer had been filed, they prayed and obtained permission to file a cross bill. In their cross bill they alleged, in substance, that they were induced to make this trade by the false representations of the value of the stock and the financial condition of the bank made to them by the appellant, Stuart, and they prayed that the transfer and assignment of the stock might be wholly canceled and set aside by decree of the court, that they might be released from any liability by reason thereof, and that Stuart might be adjudged to make a full restitution to them of the sum of \$18,000 paid by them to him for the purchase of said stock by the conveyance of their block; but they did not tender or offer to restore to him the \$19,500 in cash which they had received as a part of the purchase price of the block, or to cause him to be released from his obligation to pay the mortgage of \$30,000, which was secured thereon. The appellant, Stuart, demurred to this cross bill on the grounds, among others, that the bill did not state such a case as in any manner constituted a defense to the original bill, or a ground for any relief against the complainant in that bill, and that it attempted to litigate an independent matter between the respondents to the original bill without interposing this matter as a defense to the original bill, and without in any way connecting the subject-matter of the cross bill with the matter set forth in the original bill. The court overruled this demurrer, testimony was taken, and, after final hearing, the court entered a decree—First, that the transfer of the 150 shares of stock from the

appellant, Stuart, to the appellees, Gruetter & Joers, was void as against the receiver, Kent K. Hayden, and that Stuart should pay to the receiver the full amount of the assessment upon that stock, together with interest thereon at 7 per cent. per annum from the 10th day of July, A. D. 1893; and, second, that the transfer of said stock was void as against the appellees Gruetter & Joers; that it should be set aside, canceled, and held for naught; that the stock should be reinstated upon the books of the Capital National Bank in the name of Stuart, and that said Stuart should pay to the appellees, Gruetter & Joers, \$18,000 with interest at 7 per cent. from the 3d day of January, 1893. Stuart appealed to this court from this decree.

C. C. Flansburg, for appellant.

G. M. Lambertson (F. M. Hall, Amasa Cobb, and A. E. Harvey, with him on the brief), for appellee Hayden, receiver.

John H. Ames, for appellees Gruetter & Joers.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

The capital, the unpaid subscriptions to the capital stock, and the liability of the holders of stock that is paid for to pay an additional amount equal to the par value of their stock under section 5151, Rev. St., are all parts of a trust estate sacredly pledged for the security of the creditors of a national banking association organized under the national banking acts. The willful destruction or diminution of any part of this trust estate, or the diversion of the proceeds of any of it from the creditors of the bank, is a fraud upon these creditors, and subjects its perpetrator to a suit by them or their legal representative for proper relief. *Hayden v. Thompson* (decided at the present term) 17 C. C. A. 592, 71 Fed. 60, and cases cited; *Peters v. Bain*, 133 U. S. 670, 690, 10 Sup. Ct. 354. A shareholder of a national banking association, who, for the purpose of escaping his individual liability under section 5151 of the Revised Statutes, transfers his shares in a failing bank, to one who, for any reason, is unable to respond as promptly and effectually as he was, to the liability their ownership imposes, commits a fraud upon the creditors of the bank, renders his transfer voidable at their election, and leaves himself subject to the individual liability imposed by the ownership of the stock if the creditors elect to pursue him. *Bank v. Case*, 99 U. S. 628, 630, 632; *Peters v. Bain*, *supra*; *Bowden v. Johnson*, 107 U. S. 251, 261, 2 Sup. Ct. 246; *Cook, Stock, Stockh. & Corp. Law*, § 265; *Johnson v. Laflin*, 5 Dill. 65, 86, Fed. Cas. No. 7,393; *Davis v. Stevens*, Fed. Cas. No. 3,653; *Nathan v. Whitlock*, 9 Paige, 152; *McClaren v. Franciscus*, 43 Mo. 452; *Marcy v. Clark*, 17 Mass. 329. After this bank had failed, and this receiver had been appointed, he was the proper party to, and the only party who could, maintain a suit on behalf of the creditors of this bank to set aside the fraudulent transfer referred to in the bill, and to enforce the individual liability of Stuart. *Hayden v. Thompson*, *supra*; *Bailey v. Mosher*, 11 C. C. A. 304, 63 Fed. 488, 491; *Bank v. Colby*, 21 Wall. 609; *Hornor v. Henning*, 93 U. S. 228; *Stephens v. Overstoltz*, 43 Fed. 771; *Bank v. Peters*, 44 Fed. 13. These propositions are too well settled to warrant more extended notice than their statement. By them the right of the re-



ceiver, Hayden, to enforce the individual liability, under section 5151, against the appellant, Stuart, must be governed.

In order to determine whether or not this receiver was entitled to enforce this liability, the court below was required to answer two questions, and two questions only. They were: (1) Did Stuart make this transfer of his stock to Gruetter & Joers on December 23, 1892, with knowledge, or with such notice as would, if pursued with reasonable diligence, have given him knowledge, that the bank was insolvent, or its failure impending, and for the purpose of escaping from his individual liability on the stock? And (2) did the transfer cause any damage to the creditors of the bank? The trial court, after considering the evidence submitted, answered both these questions in the affirmative, and the only question remaining for us to consider upon this branch of the case is whether there was sufficient testimony to fairly warrant these conclusions.

The record discloses these facts: The appellant, Stuart, was on December 23, 1892, and had been for many years, a stockholder, a director, and a member of the finance committee of the board of directors of this bank. He was in almost daily attendance at the bank's office, and he occasionally examined some of its bills receivable. He owned 150 shares of its stock of the par value of \$15,000, and he had \$10,300 on deposit in its vaults. He was an intelligent, educated gentleman, a retired professor of chemistry, who had been devoting his time and attention to loaning money and acting as a director of a bank. The bank had a nominal capital of \$300,000, and for six years it had constantly paid semi-annual dividends on its stock. It had had many losses, and heavy ones, but prior to February 2, 1892, no bad debts had been charged off, and on that day only \$21,402.46 was charged off on account of bad debts, while only \$30,000 of a surplus of about \$34,000 was also stricken off. At the time the transfer of this stock was made in December, 1892, the bank had about \$70,000 of overdue paper, and its books showed that it held about \$100,000 of overdue paper that it did not have at all. When the bank failed on January 23, 1893, one month after this transfer, its total assets were about \$900,000 and its total liabilities were \$1,463,016.17. \$660,600 of these assets were bills receivable. Of these, bills to the amount of \$68,596.82 were good, bills to the amount of \$141,393.27 were doubtful, and bills to the amount of \$319,611.90 were worthless. The bank had met with early, frequent, and disastrous losses. It had lost \$20,300 by the failure of Donnell, Lawson & Simpson in 1885. Stuart was aware of this failure, and knew that there was a loss by it, but did not know the amount of the loss, and did not examine the books to learn how heavy it was. It had lost \$14,000 by the failure of the Sherman County Banking Company. Stuart knew that there was such a loss, but did not know its amount. It held defaulted paper to the amount of \$40,000 or \$50,000, which resulted from the failure of a banker named Small, at Edgar, Neb., about 1886. Stuart knew that this loss had been made, but did not know its amount, and had been told by some of the officers of the bank that the latter had obtained real estate

enough to nearly even it up. The bank held bogus and worthless paper of the Western Manufacturing Company, signed by "E. Hurlbut, Jr., Manager," to the amount of about \$125,000, when it failed, in January, 1893. Two or three months before the transfer of this stock, the appellant, in the discharge of his duties as a member of the board of directors, and as chairman of its finance committee, had examined the bills receivable of the bank, but he could not remember whether there was then as much as \$100,000 of this paper in the bank, or whether or not there was any of it in the bank. One witness testified that at the time Stuart was negotiating for the purchase of the block from Gruetter & Joers, he told him that the price of the block in the trade was to be \$67,500, and that he would trade in his bank stock, if he traded at all. In answer to the remark of the witness that \$67,500 was an exorbitant price, and that he would rather have the bank stock, that he thought it better and safer, Stuart replied, "Well, we have to take some risk," and said that he did not like the way the officers of the bank were doing business, that he did not like the style, that a large share of the bank's capital was tied up in real estate, and that there was no prospect of dividends, and he preferred to do his own business and manage his own affairs. Another witness testified that on the morning that the bank failed, in January, 1893, he told her that he had not liked the management of the bank, and had felt anxious about it for a long time; that he did not like the manager's going into the Western Manufacturing Company business, and the stave business in Arkansas; that from that they went into the skating-rink business; and that when they went into the baseball business he told them that they must stop, and do a banking business. This witness further testified that Stuart then told her that the capital of the bank was impaired, and that he had known for quite a while that they had some bad debts, such as very poor paper, there, amounting to about \$136,000. When the appellant was interrogated regarding these conversations, his answer was substantially the same as that which he gave to the questions relative to his knowledge of the financial affairs of the bank,—that he did not remember what was said, although he remembered the fact that he had had the conversations. This, then, is the record: A national bank which has a nominal capital of \$300,000 has made such losses that its assets are worth but \$900,000 while its debts are more than \$1,400,000. It has \$660,600 of bills receivable, over \$300,000 of which are worthless. A director of several years standing, the chairman of the finance committee of its board of directors, whose business it is to examine and know the value of its assets and the amount of its liabilities, who did examine its bills receivable two or three months before this transfer, who knew that the bank had made heavy losses, but did not know and did not examine the books to learn how heavy, who disliked the management, and had long been anxious about it, who knew that there was no prospect of the bank's paying more dividends, that its capital was impaired, and that its managers had been in the stave business, the skating-rink business, and the baseball business, against his protest, that a large portion of its

capital was tied up in real estate, and that it had \$136,000 of very poor paper,—transferred his stock at a premium of 20 per cent., and drew \$10,300 in money that he had on deposit in the vaults of this bank to pay it to third parties in a trade for a building subject to a mortgage of \$30,000, only 30 days before the bank disastrously failed. Upon this record the court below found that the transfer was made for the purpose of escaping the individual liability imposed by the ownership of the stock, notwithstanding the fact that the appellant himself testified that he had no such intention, that he supposed that the bank was solvent, and notwithstanding the fact that the proof was uncontradicted that the trade was proposed and sought, not by him, but by Gruetter & Joers.

When the court has considered conflicting evidence, and made its finding and decree thereon, they must be taken to be presumptively correct; and unless an obvious error has intervened in the application of the law, or some serious or important mistake has been made in the consideration of the evidence, the decree should be permitted to stand. *Warren v. Burt*, 12 U. S. App. 591, 600, 7 C. C. A. 105, 110, 58 Fed. 101, 106; *Paxson v. Brown*, 27 U. S. App. 49, 62, 10 C. C. A. 135, 144, 61 Fed. 874, 883; *Kimberly v. Arms*, 129 U. S. 512, 9 Sup. Ct. 355; *Evans v. Bank*, 141 U. S. 107, 11 Sup. Ct. 885; *Furrer v. Ferris*, 145 U. S. 132, 134, 12 Sup. Ct. 821. After a careful examination of this evidence, we are unwilling to hold that the trial court committed any mistake in the consideration of the evidence applicable to the question under consideration, or in the conclusion which it deduced therefrom. On the other hand, the facts and circumstances in evidence, in our opinion, well warranted the answer to this question given by the court below, and would have led us to the same conclusion upon a trial *de novo*.

The second issue determined by the court below was whether or not the transfer of the stock caused any damage to the creditors of the bank. It is insisted by counsel for appellant, Stuart, that there could be no fraud upon the creditors of the bank unless the transfer was made to parties who were insolvent before the transfer was made; but this position is untenable. Suppose that Stuart had transferred his stock for \$18,000 to one who owed no debts, and who was worth exactly \$18,000, and the latter had paid him that amount for the stock, the result would have been that, although the transferee was perfectly solvent before the transfer was made, he would have been utterly insolvent after it was effected, and unable to pay a dollar upon the individual liability of \$15,000 which the ownership of the stock imposed. The creditors would have sustained the same damage as if the transfer had been made to one who was insolvent before he received it, and consequently the fraud upon them would have been the same in character and the same in effect. The question was not, therefore, whether the transferees were solvent or insolvent at the time of the transfer, but whether or not the individual liability of the transferees was as valuable as was that of the transferor. If it was not, the creditors were damaged and the fraud was actionable. The evidence leaves

this question without doubt. Stuart was solvent, and amply able to pay the \$15,000 in full, and at once. Gruetter & Joers were solvent before, but insolvent and unable to pay the liability after, the transfer. They paid to Stuart \$18,000 of their property for his stock, which was worth nothing, and which imposed upon them a liability of \$15,000. The operation decreased their assets \$18,000 and increased their liabilities \$15,000. It diminished the net value of their estate \$33,000. This made them insolvent, and rendered them unable to pay their individual liability on the stock in full. There was no error, therefore, in the answer given by the court to the second question; and that part of the decree which adjudged that the transfer of this stock was fraudulent and voidable as to the creditors of the bank and the receiver who represents them, and that the receiver was entitled to recover of the appellant the \$15,000 assessed upon this stock by the comptroller of the currency, was right.

But were the appellees Gruetter & Joers entitled to a decree in this suit against their codefendant, Stuart, for the avoidance of the transfer of the stock and the recovery of its estimated value in the trade for the real estate, on the grounds set forth in the paper which they style a "cross bill"? Before entering upon the discussion of this question, let us, if possible, get a clear conception of the character of this transfer, and the relation to it of the parties represented in this suit. The creditors of the bank and their representative, the receiver, assert that this transfer was made by Stuart to escape his individual liability upon the stock; that they were damaged by the transfer; and that, therefore, it should be avoided as to them; and we have so held. But these facts furnish no ground for setting aside the transfer as to the transferees Gruetter & Joers. They allege in their bill, however, that they were induced to purchase and accept the transfer of the stock by fraudulent misrepresentations as to its value, and as to the financial condition of the bank which Stuart made to them, and that on that ground the transfer should be set aside as to them. But these allegations, if well founded, would not authorize any court to set aside the transfer at the suit of the creditors or of the receiver. Such a transfer of stock may be valid as to the creditors and receiver and voidable as to the transferees (*Florida Land & Imp. Co. v. Merrill*, 2 C. C. A. 629, 52 Fed. 77, 81), and it may be valid as to the transferees and voidable as to the creditors and the receiver (*Bowden v. Johnson*, 107 U. S. 251, 261, 2 Sup. Ct. 246). Again, when this transfer had been completed and recorded in the books of the bank, it was not void as to any one. It was merely voidable at the election of those whom it defrauded. It was valid until disaffirmed, not void until affirmed. *Oakes v. Turnquand*, L. R. 2 H. L. 325, 344; *Mining Co. v. Smith*, L. R. 4 H. L. 64; *Upton v. Englehart*, Fed. Cas. No. 16,800. Each one of those defrauded by this transfer, upon his discovery of the fraud, had the right to disaffirm this transaction, but silence or acquiescence affirmed it. It follows that some of those defrauded might affirm, while others might repudiate it. The transfer, then, was valid as to all the

parties to this suit until each disaffirmed it. The receiver disaffirmed it, and filed his bill to avoid it as to himself, and to collect of Stuart the assessment upon the stock transferred, on the ground that he had transferred it to escape his individual liability, to the damage of the creditors of the bank. Stuart, by his answer, denied the material allegations of this bill. Gruetter & Joers answered that the allegations of the bill were true, and consented that the relief for which it prayed should be granted. The question recurs: Were they, after they had made this answer, entitled, upon filing a pleading in this suit which alleged that the transfer of the stock was voidable as to them, because they were induced to trade for it by the fraudulent misrepresentations of Stuart, to a decree that the transfer should be set aside as to them, that they were not liable for the assessment on the stock, and that they should recover of Stuart the amount which the stock was estimated to be worth in the trade? A cross bill is brought either to aid in the defense of the original suit or to obtain a complete determination of the controversies between the original complainant and the cross complainant over the subject-matter of the original bill. If its purpose is different from this, it is not a cross bill, although it may have a connection with the general subject of the original bill. It may not interpose new controversies between codefendants to the original bill, the decision of which is unnecessary to a complete determination of the controversies between the complainant and the defendants over the subject-matter of the original bill. If it does so, it becomes an original bill, and must be dismissed, because there cannot be two original bills in the same case. *Story, Eq. Pl. § 389; Cross v. De Valle, 1 Wall. 1, 14; Ayres v. Carver, 17 How. 591; Rubber Co. v. Goodyear, 9 Wall. 807, 809; Stonemetz Printers' Mach. Co. v. Brown Folding-Mach. Co., 46 Fed. 851; Fidelity Trust & Safety Vault Co. v. Mobile St. Ry. Co., 53 Fed. 850, 852; McMullen v. Ritchie, 57 Fed. 104.* Tested by these rules, the pleading filed by Gruetter & Joers was not a cross bill. It was not brought in aid of their defense to the original suit, for they had none. They confessed the allegations of the original bill. It was not necessary, in order to obtain a complete determination of the controversies between the complainant and the defendants in the original suit over the subject-matter of the original bill,—the liability for the assessment on this stock,—for those issues must necessarily be completely disposed of by the decision of that suit. If, as the receiver claimed it should be, the transfer of the stock was avoided as to him by the decree in that suit, that would discharge Gruetter & Joers from all liability for the assessment upon the stock, for the transfer could not be void as to the receiver and impose a liability upon Stuart, and valid as to the receiver and impose one upon Stuart's transferees at the same time. This pleading of Gruetter & Joers attempted to bring into this suit a new and independent controversy between the codefendants in the original suit, the decision of which depended upon facts not material to the issues between the complainant and any of the

defendants, while the decision of the latter issues depended upon facts not essential to the determination of the new controversy between the codefendants which this pleading sought to import. It contained none of the essentials of a cross bill and every characteristic of an original bill, except the statement of a cause of action, and that exception did not aid its sufficiency as a cross bill. The demurrer to it should have been sustained.

There is another reason why this supposed cross bill should be dismissed. Gruetter & Joers neither pleaded nor proved in this case a state of facts which would entitle them in any court to the rescission of the transfer of the stock and the recovery of its purchase price, which they asked in this pleading and obtained by this decree. They obtained this stock by this trade. They exchanged with Stuart a single piece of real estate in the city of Lincoln, which they owned, for this stock, \$19,500 in cash and the agreement of Stuart to pay a mortgage of \$30,000 which they owed. They have sought in this suit, and the court below has granted to them by this decree, a rescission of the transfer of the stock, and its reinstatement upon the books of the bank in the name of Stuart, and a recovery from him of \$18,000, the value at which the parties estimated the stock in the trade, with interest, while they still retained the \$19,500 in cash and the agreement of Stuart to pay the mortgage of \$30,000, and he retains the real estate. This part of this decree is a perfect non sequitur. Conceding that Gruetter & Joers were induced to make this trade by the fraudulent misstatements of Stuart, they could not rescind it in the part which was burdensome and affirm it in the part which was beneficial to them. They could not rescind it as to the stock and affirm it as to the cash. They must either rescind or affirm it altogether. One who is induced to make a sale or trade by the deceit of his vendee has a choice of two remedies upon his discovery of the fraud: He may affirm the contract, and sue for his damages; or he may rescind it, and sue for the property he has sold. The former remedy counts upon and affirms the validity of the transaction; the latter repudiates the transaction, and counts upon its invalidity. The two remedies are utterly inconsistent, and the choice of one rejects the other, because a sale cannot be valid and void at the same time. Now, the supposed cross bill of Gruetter & Joers, and the proof in this record, show that they elected to affirm, and did affirm, the contract, and sue for damages for the deceit; and these facts conclusively estop them from obtaining any relief on the ground of rescission. The sale or exchange was valid until disaffirmed. Upon the discovery of the fraud they could not, if they would, avoid an immediate choice of an affirmance or a repudiation of the trade. If one who is induced to make a trade or sale by fraud would rescind it, he must immediately, upon his discovery of the fraud, announce his intention so to do, and return all the consideration he has received, to the end that the parties may be put in statu quo before subsequent transactions have made such action impossible. Silence, delay, vacillation, acquiescence, or the retention and use of any of

the fruits of the sale or trade that are capable of restoration, for any considerable length of time after the discovery of the fraud, constitute a complete and irrevocable ratification of the transaction. *Rugan v. Sabin*, 10 U. S. App. 519, 531, 3 C. C. A. 578, 580, 53 Fed. 415, 418; *Kinne v. Webb*, 12 U. S. App. 137, 144, 4 C. C. A. 170, 174, 54 Fed. 34, 38; *Scheffel v. Hays*, 19 U. S. App. 220, 226, 7 C. C. A. 308, 312, 58 Fed. 457, 460; *McLean v. Clapp*, 141 U. S. 429, 12 Sup. Ct. 29; *Grymes v. Sanders*, 93 U. S. 55, 62. The supposed cross bill utterly fails to state a case for rescission, because it does not show that Gruetter & Joers ever returned to Stuart the \$19,500 in cash which they received from this trade, or that they ever released Stuart from his agreement to pay the mortgage of \$30,000 upon the property they conveyed. They could not rescind this trade, and recover back that which they gave in exchange, or any part of it, while they retained at least \$49,500 in value that they had received from it. The proof, if it were possible, is more fatal to them than the pleading. The record discloses the fact that they made their election, and chose to affirmatively ratify this transaction, more than a year before they filed this bill for its rescission. It shows that on January 23, 1893, they brought an action at law against Stuart in one of the courts in the state of Nebraska to recover of him damages to the amount of \$18,000 for his fraudulent misrepresentation of the value of this stock at the time of the trade. This was, in effect, an action for a part of the purchase price of the real estate which they had conveyed, although it was in form an action for deceit. It could be brought and maintained on the ground that the sale or trade of the real estate was valid, and its title was vested in Stuart, and on no other theory. That suit is still pending. It was a distinct and affirmative ratification of the transfer of this stock and the conveyance of the real estate, after full knowledge of all the facts, and it barred Gruetter & Joers of all right to rescind the trade thereafter. The result is that all that portion of the decree which grants to Gruetter & Joers any relief against the appellant, Stuart, was wrong.

The decree below must accordingly be reversed, without costs to either party, and the case must be remanded to the court below, with instructions to enter a decree to the effect that the transfer of the 150 shares of stock from Stuart to Gruetter & Joers was fraudulent and voidable as to the receiver, Hayden; that it be held for naught as to him, and that he recover of Stuart the assessment levied thereon, with his costs; that the appellees Gruetter & Joers are entitled to no relief against Stuart in this suit; that their supposed cross bill be dismissed, and that Stuart recover of them his costs thereon. It is so ordered.

PENN MUT. LIFE INS. CO. v. MECHANICS' SAVINGS BANK & TRUST CO.

(Circuit Court of Appeals, Sixth Circuit. February 4, 1896.)

No. 343.

1. LIFE INSURANCE—CONFLICT OF LAWS—PLACE OF CONTRACT.

A life insurance policy issued upon an application which is made part thereof, and which expressly provides that "the place of the contract shall be the city of Philadelphia, state of Pennsylvania," is to be governed by the laws of Pennsylvania, though the insured was a resident of Tennessee at the time of making the application.

2. SAME—APPLICATION—FALSE STATEMENTS—MATERIALITY.

A state statute providing that no misrepresentations or unproved statements of the applicant, made in good faith, shall effect a forfeiture, or be ground of defense, unless the same relate to some matter material to the risk (Act Pa. June 23, 1885), is remedial in its nature, and within the police power of the state.

3. SAME—CONSTRUCTION OF STATUTE—MATERIALITY OF REPRESENTATION.

The effect of such a statute is to leave open to judicial investigation, in the ordinary way, the question whether any fact concerning which inquiry was made, and an untrue answer given, was material to the risk. If found to be material, the policy will be avoided, whether the untrue answer was made in good faith or not. If found not to be material, then the breach of warranty will work no prejudice to the insured, if the answer was given in good faith; but if given in bad faith, and for the purpose of misleading the company, then the policy will be avoided, notwithstanding the immateriality of the fact inquired about.

4. SAME—REPRESENTATIONS AS TO OTHER INSURANCE—MUTUAL AID ASSOCIATIONS.

A question in an application, as to whether the applicant has his life insured "in this or any other company? (If so, give the name of each company, and the kind and amount of the policy)," does not include insurance in mutual benefit associations, and a failure to disclose such insurance is not a misrepresentation.

5. SAME.

It is not a true answer to such a question merely to name some of the regular insurance companies in which the applicant has other insurance, omitting to name others. Such an answer necessarily implies that there is no other insurance than that stated, and if there is other insurance the answer is false.

6. SAME—EVIDENCE AS TO BAD FAITH—FALSE STATEMENTS IN OTHER APPLICATIONS.

In determining whether a false statement in respect to other insurance was made innocently or not, it is competent to show that, in answers to similar questions in applications for other policies, the insured made answers equally untrue. Nor is the relevancy of such answers destroyed by the fact that they were given subsequent to the application in question, though the possibility that the fraudulent intent present in them might have been formed after an innocent mistake affects their probative force.

7. SAME—MATERIALITY OF FALSE STATEMENTS—EXPERT EVIDENCE.

By the weight of authority in this country, an insurance expert cannot be asked his own opinion whether an undisclosed or misrepresented fact is or is not material to the risk; but he may be asked concerning the usage of insurance companies generally in respect to charging higher rates of premium, or in rejecting risks, when made aware of the particular fact in question. This rule is applicable to life insurance when the question relates to one of a class of facts which life insurance companies are frequently required to consider in relation to the acceptance of risks, so that the witness may base his answer on a well-defined practice of such companies; but care must be taken that he shall not substitute his



own opinion, or that of his own company only (neither of which is relevant), for the usage of companies generally. As the modern practice of life insurance companies seems to be not to vary the premium, except for age, and either to accept risks of the same age, or reject them altogether, the question should, in such cases, be limited to whether insurance companies generally, if made aware of the undisclosed fact, would reject the risk.

8. SAME—QUESTIONS FOR JURY.

The question of the materiality of a fact in respect to which false statements have been made is always for the jury, unless the answers in the application are expressly made the basis of the contract; and even in the latter case the question is for the jury where the statute declares that innocent misrepresentations in relation to matters not material to the risk shall constitute no defense. Act Pa. June 23, 1885; *Society v. Llewellyn*, 16 U. S. App. 405, 7 C. C. A. 579, 58 Fed. 940, explained.

9. SAME.—CONCEALMENTS OF DISEASES.

Whether mere temporary ailments or affections, such as sore throat, chancreoid, indigestion, etc., are to be regarded as diseases, within the meaning of the policy, so that a failure to disclose them is a misrepresentation or concealment of a material fact, is a question for the jury.

10. SAME—STATEMENTS AS TO OCCUPATION.

A question as to the occupation of an applicant for insurance, being truly answered by the statement that he is a bank teller, does not require him to further disclose that he is an habitual embezzler. The embezzling is merely a misfeasance in his position as teller, and not an occupation in itself. *New York Bowery Fire Ins. Co. v. New York Fire Ins. Co.*, 17 Wend. 359, and *Sun Mut. Ins. Co. v. Ocean Ins. Co.*, 1 Sup. Ct. 582, 107 U. S. 485, followed.

11. SAME—GENERAL PROVISION AS TO DISCLOSURES.

A general statement in the application that no circumstances or information has been withheld, touching the applicant's past and present state of health and habits of life, with which the insurance company ought to be made acquainted, refers only to the questions and answers in the application, and is equivalent to a warranty that such answers are full and complete. Such statement does not refer to thefts or embezzlements of which the applicant may have been guilty, but concerning which no inquiry was made.

12. SAME—DUTY AS TO VOLUNTARY DISCLOSURES.

The strict rule enforced in cases of marine insurance, requiring full disclosure of all material matters, and avoiding the policy, even in cases of suppression through mistake, is not applicable, according to the weight of authority in this country, to cases of life insurance. An applicant for life insurance, who has fully and truthfully answered all the questions put to him, may rightfully assume that the range of the examination has covered all matters deemed material by the insurer, and is not required to search his memory for circumstances of possible materiality not inquired about. All that is required is that there shall be no suppression in bad faith, with intent to mislead the insurer.

13. SAME—BURDEN OF PROOF AS TO MATERIALITY.

The burden of proof to establish the materiality of a misrepresentation or concealment, as well as the fraudulent intent, where that is necessary, is on the defendant. Nor is the burden shifted where it is admitted that the insured made an untrue answer concerning other insurance; for, if there be a presumption that his failure to mention it was intentional, this is met by the presumption that a man does not make a fraudulent misstatement, and the question is therefore for the jury, upon all the evidence.

**In Error to the Circuit Court of the United States for the Middle District of Tennessee.**

This action was on a policy of insurance for \$10,000 issued December 2, 1892, by the Penn Mutual Life Insurance Company to John Schardt, on his

own life. Schardt died April 17, 1893, during the currency of the policy. Just before his death he had assigned the policy to the Mechanics' Savings Bank of Nashville, to secure a large debt owed by him to the bank. Since his death the bank has made a general assignment for the benefit of creditors to J. J. Pryor, for whose benefit, as assignee, this suit was brought. The trial resulted in a judgment for the full amount of the policy and interest, in favor of the plaintiff below, and the insurance company brings the judgment here for review on writ of error. The defendant filed 19 pleas to the declaration, averring that both by misrepresentation of facts warranted to be true in the application and policy, and by concealment of a fact material to the risk, the policy was avoided.

The opening words of the policy were:

"In consideration of the application for this policy, which is hereby made a part of this contract (a copy of which is hereto attached), and of the payment by John Schardt of the premiums as hereinafter provided, the Penn Mutual Life Insurance Co. hereby promises to pay at its home office, in the city of Philadelphia, Pennsylvania," etc.

The questions and answers in the application which are material to the controversy here were as follows:

"1, A. Give your name in full and post-office address? A. John Schardt, Nashville, Tenn.

"B. Present and previous occupations? (State kind of business.) B. Present teller in Mechanics' Bank. Previous, same."

"6, A. Have you your life insured in this or any other company? (If so, give the name of each company, and the kind and amount of each policy.) A. Yes; \$10,000 in Northwestern, 20 pay life; \$5,000 in Aetna; \$1,000 in N. Y. Mutual Life, renewable term."

After these answers this statement was signed by the applicant:

"I hereby warrant and agree, that I am temperate in my habits, now in good health, and ordinarily enjoy good health, and that in the statements and answers in this application no circumstance or information has been withheld touching my past and present state of health and habits of life, with which the Penn Mutual Life Insurance Company ought to be made acquainted; \* \* \* and that the statements and answers to the printed questions above, together with this declaration, as well as those to be made to the company's medical examiner, shall constitute the application, and be the basis of this contract, and the place of contract shall be the city of Philadelphia, state of Pennsylvania."

Then followed the medical examination of the insured, of which only the questions and answers given below have a bearing on the issues in this case:

"\*9, A. How long since were you attended by a physician or professionally consulted one? \*A. A year.

"B. For what disease? \*B. A cold.

"C. Give the name and residence of such physician? C. Dr. T. E. Enloe, Nashville, Tenn."

"11, A. Do you now use intoxicating liquors? A. None whatever."

"C. Have you always been temperate in their use? (If not, explain the duration and extent of excess, and when last.) C. Yes.

"12, A. Have you ever used opium, morphia, chloral, or any narcotic, unless regularly prescribed by a physician? (If so, explain fully.) A. No.

"B. Have you had asthma, consumption, spitting of blood, habitual cough and expectoration, palpitation, or any disease of the throat, heart or lungs? B. None except—No.

"C. Have you ever had cancer or any tumor, chronic diarrhoea, discharge from the ear, dropsy, fistula, gall stones or gravel, open sores, inflammatory rheumatism, gout, syphilis or stricture, or any disease of the liver, kidneys, or bladder? C. None except—No."

"14. Have you had any illness or disease other than as stated by you above? (If so, state full particulars.) No.

"Give here particulars as to date, duration, severity, etc., of each disease you have had.

"\*Explain fully 9, A and B.

"None.....

"It is hereby agreed: That all the foregoing statements and answers made to the company's medical examiner are warranted to be true and are offered to the company as a consideration of the contract."

It was conceded that at the date of the application Schardt had a policy for \$5,000 in the New York Life Insurance Company, which he failed to mention. In order to show an intent on his part to deceive by this omission, defendant offered to show that in applications for policies in other companies for \$25,000 each, made by him, one in February, 1893, and the other early in March following, he had also untruthfully stated the amount of existing insurance on his life. This offer was rejected by the court. Schardt's salary as teller was \$1,500, and he had but a small amount of property. When he died in April, 1893, he had \$80,000 of insurance on his life, nearly all of which had been written within six months. It was conceded that, for more than a year prior to his death, Schardt had been constantly embezzling the funds of his bank, and that his indebtedness to the bank thus criminally incurred amounted at the time of the application for this policy to little less than \$100,000, and at his death exceeded that sum. He did not disclose the fact of his crime to the defendant at the time of his application, or at any other time. His death in April, 1893, was caused by congestion of the brain and other vital organs, caused by the mental strain which a disclosure of his crime brought on. Defendant introduced evidence tending to show that, six years before the application, Schardt had had the syphilis, a venereal and constitutional disease; that thereafter he had sore throat, due to syphilis; and that in 1892 he had had the gonorrhea, a venereal disease. In rebuttal, plaintiff adduced evidence making it probable that Schardt did not have the syphilis, but only a local sore, difficult to distinguish from the first symptom of syphilis, called a "chancroid," which was of no seriousness as a disease; that its resemblance to syphilis in the first stages induced a treatment for syphilis; that the result of such treatment was a cauterization of the throat, and a subsequent local inflammation of the throat; that Schardt then changed his physician, and employed Dr. Enloe, the one named in the application, who became the regular physician of himself and family during the next six years until his death, and during this period treated him for this throat trouble, and for indigestion, at times. Evidence was introduced by plaintiff tending to rebut testimony for defendant that Schardt was afflicted with gonorrhea in 1892. Defendant called insurance experts to testify in regard to the materiality of the facts in respect to which it was claimed that Schardt had been guilty of misrepresentation or concealment. The court permitted the experts to say whether, in their opinions, the facts misstated or concealed were material, but refused to allow them to say whether, by the usage of all insurance companies, such facts were regarded as material to the risk.

The defendant requested the court to instruct the jury to bring in a verdict for the defendant because it appeared by the undisputed evidence that Schardt's warranties of the truth of his representations in regard to facts material as a matter of law had been broken, and the policy avoided, in the following particulars, to wit: First, in that the amount of existing insurance of his life was greater than stated; second, in that he had had the syphilis; third, in that he had had a sore throat; fourth, in that he had had a chancroid; fifth, in that he had had indigestion; sixth, in that his occupation was that of an embezzler, as well as bank teller. Defendant asked the same instruction on the ground that Schardt had concealed from it and its agents the fact that he was an embezzler in the sum of \$100,000,—a fact claimed to be material to the risk, as a matter of law. These requests were refused by the trial court on one ground, among others, that by the terms of the policy this was a Pennsylvania contract, and was to be construed in the light of a statute of that state which made the effect of a breach of these warranties in avoiding the policy to depend on the materiality of the fact misrepresented, or the good faith of the applicant, and that under such a construction the materiality of the fact misstated was a question for the jury, and so, also, was the good faith of the applicant. The court charged the jury that the plaintiff was entitled to recover the amount of the policy unless the defendant could show that Schardt had made untrue statements, and that the facts thus misrepresented were material to the risk, or that they had been misrepresented with intent to deceive the company, and that the burden of es-

tablishing these defenses was on the defendant. The court accordingly submitted to the jury the question whether the fact that Schardt had a policy in the New York Life Insurance Company was material to the risk, and, if not material, whether the omission by Schardt to include it in his answer was in good faith. He took the same course with respect to the other representations, leaving the question of their untruth, materiality, and good faith to the jury. The defendant excepted to so much of the charge as imposed upon the defendant the burden of showing that Schardt's failure to include in his existing insurance the New York Life policy was with intent to defraud, or that it was material to the risk, and requested upon this subject the following charge, which the court refused: "The undisputed evidence shows that Schardt omitted to disclose, in his answer to question 6, A, that, in addition to the insurance therein stated, he had been insured, and was then insured, and had a policy, in the New York Life Insurance Company, for five thousand dollars, which it was his duty to have done. The presumption is that he knew of this additional insurance. In fact, it is not controverted that he did. The presumption, also, is that he intentionally suppressed the fact. The presumption, also, is that the question, answer, and information sought by the question, as well that disclosed as that suppressed, were material. The defendant makes out a prima facie defense by referring to the question and answer, and proving the omission to state in his answer the policy in the New York Life Insurance Company; and the burden is on the plaintiff to show that the omission was not intentional, and that the matter suppressed was not material." Upon the question of concealment of the fact, the court charged the jury as follows: "It is again insisted, as the court understands the line of defense, that, in addition to the answers which it is alleged are false, that the insured concealed from the insurance company a fact about which he was not asked in the policy, and that by reason of that concealment the policy is avoided. That fact is that he was at the time a defaulter to the bank of which he was an officer. Now, it is not insisted that this is a false answer to anything asked here, because in the policy and in the application there is no answer made upon that point at all; and, in the absence of any answer at all upon the point, it constitutes no part of the written application or policy, and is therefore not governed by the same rule as stated to you as governing the other propositions. If the answers to the written questions were false and material, as explained to you, that would avoid the policy, without more, but in respect to a fact about which no question is asked, in order that the concealment from the company of such a fact as that should avoid the policy, it must have been intentionally concealed; and the omission to state it because the insured did not think it material, or the entire omission to speak of it because not asked about it, or because it was at the time not recollected or was forgotten, or its omission in any manner in good faith, would not avoid the policy. For the concealment of a fact such as that, outside of anything asked in the policy to have that effect, as stated, it must have been intentional." To this action of the court the defendant took the following exceptions: "(4) Said counsel next then and there excepted to so much of said charge as instructs the jury that before the failure of John Schardt, the insured, to disclose to the defendant company the fact of his defalcation to the plaintiff bank, at the time of the application and policy in question, could be available as a defense to his action, the concealment must have been intentional on the part of the said insured, and that, if his failure to divulge the fact arose from any of the causes stated in said charge, that such defense could not be established; and said counsel, insisting that the purpose, design, or intention of the insured in withholding the fact from the knowledge of the company is not material in making out said defense, except to the opinion of the court in its decision to the contrary."

F. C. Maury and J. B. Daniel, for plaintiff in error.

M. T. Bryan, E. H. East, and Vertrees & Vertrees, for defendants in error.

Before TAFT and LURTON, Circuit Judges, and HAMMOND, J.

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TAFT, Circuit Judge (after stating the facts as above). There can be no doubt that this policy is to be construed according to the law of Pennsylvania. It is expressly provided in the application, which is made part of the policy, that "the place of contract shall be the city of Philadelphia, state of Pennsylvania." In *Wayman v. Southard*, 10 Wheat. 1-48, Chief Justice Marshall stated it to be a principle of universal law that "in every forum a contract is governed by the law with a view to which it is made." See *Pritchard v. Norton*, 106 U. S. 124, 136, 1 Sup. Ct. 102, and cases there cited. In this case no necessity exists for presumption from the circumstances, because the intention of the parties is express.

An act of the legislature of Pennsylvania passed June 23, 1885, provides that:

"Whenever the application for a policy of life insurance contains a warranty of the truth of the answers therein contained, no misrepresentation or untrue statement in such application, made in good faith by the applicant shall effect a forfeiture or be a ground of defense in any suit brought upon any policy of insurance issued upon the faith of such application unless such misrepresentation or untrue statement relate to some matter material to the risk."

At common law it is held that the warranty of the truth of the answer to a specific inquiry in the application implies the agreement that the subject-matter of the question and answer is to be regarded as material, and that an untrue answer thus warranted avoids the policy, whether the answer be made in good faith or not. *Anderson v. Fitzgerald*, 4 H. L. Cas. 484. It is contended by counsel for the insurance company that the same mode of determining the materiality of representations must obtain under this statute. If so, then it is difficult to see what change the statute was intended to effect, because every matter warranted would be material, and the good faith in the statement would remain of as little importance as it did without the statute. This is one of a class of statutes passed in many states to relieve against the hardships arising from the strict enforcement at common law of warranties in insurance policies concerning matters having no real or proximate relation to the risk assumed by the insurer. By the aid of such warranties, and the innocent mistakes of the insured, it often happened that the insurer was able to escape liability on a ground having no real merit, and of the purest technicality. That such statutes are remedial in their nature, and are quite within the police power of the legislature, is no longer a debatable question. *White v. Insurance Co.*, 4 Dill. 177, Fed. Cas. No. 17,545; *Society v. Clements*, 140 U. S. 226, 11 Sup. Ct. 822; *Wall v. Assurance Soc.*, 32 Fed. 273; *Eagle Ins. Co. of Cincinnati v. State*, 153 U. S. 446, 14 Sup. Ct. 868; *Reilly v. Insurance Co.*, 43 Wis. 449; *Insurance Co. v. Leslie*, 47 Ohio St. 409, 24 N. E. 1072; 4 Thomp. Corp. §§ 5491, 5524. As the statute was passed to prevent defeat of the policy by mere stringency of stipulation, a reasonable interpretation of it will not permit the mere fact of warranty in form to render every statement of fact material to the risk. Its manifest purpose was to leave open to ju-

dicial investigation in the ordinary way the question whether the fact concerning which inquiry was made, and an untrue answer given, was material to the risk. If it is in this manner found to be material, then the plain implication of the statute is that the usual penalty for breach of insurance condition and warranty shall follow, and the policy be avoided, whether the answer be made in good faith or not. If, however, the question untruly answered relates to something not found to be material to the risk, and if the answer is in good faith, then the breach of warranty works no prejudice to the insured or his representatives. If, though the question untruly answered relates to something not directly material to the risk, the untrue answer is made in bad faith,—that is, with a knowledge of its falsity, and for the purpose of misleading the company into the contract,—the implication of the statute is that the rule at common law shall prevail, and the policy shall be avoided. The statute has been construed by the supreme court of Pennsylvania, and our conclusions above stated are in accordance with the views of that court. *Hermany v. Association*, 151 Pa. St. 17, 24 Atl. 1064. In that case the court say (page 23, 151 Pa. St., and page 1064, 24 Atl.):

"This act has effected a change in life insurance contracts,—a much-needed change so far as some companies are concerned. The questions of materiality and good faith are ordinarily questions of fact, and therefore for the jury. They were certainly so in this case." "The evident purpose of this legislation was to strike down, in this class of cases, literal warranties, so far as they may be resorted to for the disreputable purpose of enforcing actually immaterial matters. It provides a rule of construction for the purpose of preventing injustice, and it is as much the duty of courts to enforce such rules as it is to administer the statute of frauds and perjuries."

The construction of a state statute by the highest court of the state is usually authoritative in courts of the United States. *Burgess v. Seligman*, 107 U. S. 20, 2 Sup. Ct. 10. And, even if it were otherwise, we should reach the same conclusion in this case. The court of appeals of Maryland has had occasion to construe this same statute, and has given it a like interpretation. *Association v. Ficklin*, 74 Md. 172, 21 Atl. 680, and 23 Atl. 197.

Having settled the construction of the statute, we come now to the questions of evidence. The circuit court was right in holding that within the scope of the question, "Have you your life insured in this or any other company? (If so, give the name of each company and the kind and amount of the policy)," were not included Schardt's certificates of insurance in the Knights of Pythias and Royal Arcanum Mutual Aid Associations. It will be conceded that these associations, which are primarily for social and charitable purposes, and for securing efficient mutual aid among their members, are not usually described as insurance companies. That the certificate which they issue to a member, insuring upon certain conditions the payment of a sum certain to the member's representatives on his death, has much resemblance in form, purpose, and effect to an insurance policy, is true; and, if we were called upon to give the application a wide and liberal construction

in favor of the insurance company, we might properly hold that the question embraced in its scope every association or individual contracting to pay money to one's representatives in the event of his death. Such a construction might be warranted by the probable purpose of the question to enable the company to judge how great a motive his life insurance would furnish the applicant for self-destruction, or the fraudulent simulation of death. But we are here considering a contract and application drawn with great nicety by the insurance company, and framed with the sole purpose of eliciting from the insured full information of all the circumstances which the company's long experience has led it to believe to be valuable in calculating the risk. We cannot presume the company to have been ignorant of the fact that large numbers of persons have taken out life insurance in mutual benefit associations which are not ordinarily described as insurance companies, and that doubt has often arisen whether the contracts they issue are properly or technically described as life insurance at all. *Insurance Co. v. Chamberlain*, 132 U. S. 304, 10 Sup. Ct. 87. Having in view the well-established rule that insurance contracts are to be construed against those who frame them (*Indemnity Co. v. Dorgan*, 16 U. S. App. 290, 309, 7 C. C. A. 581, 58 Fed. 945; *Insurance Co. v. Crandal*, 120 U. S. 527, 533, 7 Sup. Ct. 685), and that any doubt or ambiguity in them is to be resolved in favor of the insured, we conclude that a certificate in a mutual benefit and social society was not within the description, "policy of life insurance in any other company." We are fortified in the conclusion by the fact that this contract is a Pennsylvania contract, and the courts of that state have uniformly held that mutual aid associations and insurance companies are so clearly to be distinguished that statutes applying to insurance companies and their policies do not have application to mutual aid associations, and the certificates of life insurance which they issue to their members. In *Dickinson v. Ancient Order United Workmen*, 159 Pa. St. 258, 28 Atl. 293, the defendant association sought to avoid its certificate on the ground of misrepresentation in the application. The plaintiff objected to the introduction of the application because it had not been attached to the policy in accordance with the Pennsylvania statute which forbade the introduction by an insurance company, in defense of a suit on its contract of insurance, of an application not attached to the policy when issued. It was held that the statute did not apply, because the defendant association was not an insurance company, but belonged to the distinctly recognized class of organizations, known as "benevolent associations." See, also, *Association v. Jones*, 154 Pa. St. 99, 26 Atl. 253; *Com. v. Equitable Ben. Ass'n*, 137 Pa. St. 412, 18 Atl. 1112; *Com. v. National Mut. Aid Ass'n*, 94 Pa. St. 481; *Lithgow v. Supreme Tent* (Pa. Sup.) 30 Atl. 830; *Theobald v. Supreme Lodge*, 59 Mo. App. 87; *Sparks v. Knight Templars*, 1 Mo. App. Rep'r, 334. It is true that in other states it has been held that such associations are within the description of "insurance companies," and that the contracts they make are properly termed

"policies," as those terms are used in the statutes of such states. *State v. Nichols*, 78 Iowa, 747, 41 N. W. 4; *Insurance Order v. Lewis*, 12 Lea, 136; *Assurance Fund v. Allen*, 106 Ind. 594, 7 N. E. 317; *Com. v. Wetherbee*, 105 Mass. 159; *Sherman v. Com.*, 82 Ky. 102. In this conflict of authority, we must lean towards the decisions of the state courts of that state, according to the laws of which we must construe this contract, and, for the reasons already given, hold that certificates of membership in mutual benefit benevolent associations were not embraced in the question asked by the company in that state.

We now come to the questions of evidence with respect to the \$5,000 policy in the New York Life Insurance Company which Schardt omitted in his answer to the question concerning other insurances. It is first insisted for the plaintiff below that his answer was not untrue. He was asked if he had other policies in other companies, and, if so, to state the companies and amount. It is urged that when he gave three such policies the question was answered correctly, and that his failure to give the fourth policy did not involve a false statement, but only left the answer incomplete, but true in everything stated. Several cases are cited to the point that such an answer is not a misrepresentation. In *Perrine v. Society*, 2 El. & El. 317, the applicant was asked what was his profession, and he answered that he was an "esquire." In fact, he was an ironmonger. It was held that there was no misrepresentation here, but, at the most, only a concealment or falsehood by implication; that the answer was true, as far as it went. The same ruling was made by the court of appeals of New York in *Dilleber v. Insurance Co.*, 69 N. Y. 256. There the applicant was asked to state the physicians he had consulted in the last 10 years. He answered that he had consulted Dr. Paine 9 years before. In fact, he had also consulted another physician. It was held that, the answer being true as far as it went, there was no breach of the warranty; that the answer was full and true. We do not think that these cases can be supported. In *Insurance Co. v. Raddin*, 120 U. S. 183, 7 Sup. Ct. 500, the supreme court held that, where the answers to questions were obviously incomplete, the insurance company, by failing to inquire further before issuing the policy, waived any right to complain of such incompleteness; but the court clearly indicated its view that if such an answer was apparently complete, but in fact was otherwise, it was a false answer, and a breach of the warranty of its full truth. *Towne v. Insurance Co.*, 7 Allen, 52, 53; *London Assurance v. Mansel*, 11 Ch. Div. 363; *Bliss, Ins.* (2d Ed.) 189, 190; *Phil. Ins.* §§ 550, 565, 567. The answer to such a question contains the necessary implication that there is no other insurance than that stated, and, if there is other insurance, it is as false as if the existence of other insurance were expressly denied. As already stated, any answer to a question, though concerning a matter not material to the risk, if made with intent to deceive the insurance company, would avoid the policy. Hence, even assuming that the question of other insurance was found by the jury to



be not material to the risk, the company still had a complete defense, if it could show that the answer had been made in bad faith. The intent of Schardt in omitting the New York Life policy, therefore, became a substantial issue, and evidence relevant to show his intent should have been admitted. The company offered to prove that, in answers to similar questions in applications for other policies, he had made answers equally untrue. We think this evidence was relevant and competent. It might have been forcibly argued on behalf of the defendant that Schardt had a motive to suppress the amount of other insurance, in the fear that, if the defendant knew all his then insurance, it would prompt inquiry into his purpose in carrying insurance in an amount out of proportion to his regular income of \$1,500, upon which he was obliged to support a family, and would lead to a rejection of his application. And if the defendant could show a similar suppression of the same fact in the two applications for the later policies for \$25,000 each, made within three months thereafter, when the same motive may be supposed to have been present, it would properly strengthen the argument that his suppression of the extent of his insurance in this case was with intent to conceal and deceive. Such evidence would have a tendency to show that his omission in the three cases was not by accident, but by design. It is a well-established rule of evidence that, where the issue is the fraud or innocence of one in doing an act having the effect to mislead another, it is relevant to show other similar acts of the same person having the same effect to mislead, at or about the same time, or connected with the same general subject-matter. The legal relevancy of such evidence is based on logical principles. It certainly diminishes the possibility that an innocent mistake was made in an untrue and misleading statement, to show similar but different misleading statements of the same person about the same matter, because it is less probable that one would make innocent mistakes of a false and misleading character in repeated instances than in one instance. Thus, where one was on trial for selling skimmed milk for fresh milk, in violation of the statute, it was held competent to show other instances of similar sales on other days by the accused about the same time, because, if he sold skimmed milk in repeated instances, it was rendered more probable that he knew its character in each instance. He might have made the mistake once, but not frequently. *Bainbridge v. State*, 30 Ohio St. 264. So, in this court, where the question was of the defendant's motive and knowledge in making statements concerning the character of a silver mine, we held it competent to show an elaborate and fraudulent scheme to mislead, not the plaintiff, but another, into the purchase of the mine, although the scheme was concocted and carried into attempted execution at least two years before the statements and sale to the plaintiffs. It was the circumstances that the acts related to the sale of the same mine, and that the motive for its sale might be presumed to continue, that removed the objection based on remoteness in point of time.

Mining Co. v. Watrous, 9 C. C. A. 415, 61 Fed. 163. Judge Lurton, in delivering the opinion of the court in that case, said:

"It is not, in such a case, essential that these former acts of fraud were not contemporaneous with the transaction under inquiry. If they were frauds of like character, and especially if they concerned former efforts to sell the same property, they are admissible. Remoteness in point of time may weaken their evidential value, but will not ordinarily justify exclusion."

Judge Lurton cites in support of this view *Ross v. Miner*, 67 Mich. 410, 35 N. W. 60; *Hoxie v. Insurance Co.*, 32 Conn. 21; *Rafferty v. State*, 91 Tenn. 655, 16 S. W. 728; *Bottomley v. U. S.*, 1 Story, 136, Fed. Cas. No. 1,688; *Jordan v. Osgood*, 109 Mass. 461; *Castle v. Bullard*, 23 How. 174; *Butler v. Watkins*, 13 Wall. 457; *Insurance Co. v. Armstrong*, 117 U. S. 598, 6 Sup. Ct. 877; *Blake v. Assurance Soc.*, 4 C. P. Div. 94. It would seem clear from the foregoing that the objection made by counsel for the plaintiff that the other false statements of other insurance were too remote in point of time is not tenable. But it is suggested that the fact that the instances sought to be proven were subsequent to the instance in issue destroys their relevancy, because the fraudulent intent present in them might have been formed after an innocent mistake. This possibility, of course, affects the probative force of these subsequent instances to show fraud, but we do not think it makes them inadmissible. In *Wood v. U. S.*, 16 Pet. 342, the question was whether there had been fraud in invoicing importations under the customs revenue law. It was objected that, while similar undervaluations in other importations prior to the one in issue might be admissible, still it was error to admit such undervaluations in later importations. To this, Mr. Justice Story, speaking for the court, said:

"The other objection has as little foundation, for fraud in the first importation may be as fairly deducible from other subsequent fraudulent importations by the same party as fraud would be in the last importation from prior fraudulent importations. In each case the *quo animo* is in question, and the presumption may equally arise and equally prevail."

For the error in excluding evidence of false statements concerning other insurance in the subsequent policies, the judgment herein must be reversed. The case will doubtless be tried again, however; and it becomes our duty, therefore, to examine and decide other questions made upon this record by the defendant which must, of necessity, arise again on the second trial.

At the trial the defendant introduced witnesses who had been long engaged in the life insurance business, and was permitted by the court to ask them whether the facts concerning which it was either admitted or claimed that Schardt had made untrue statements, and the fact of his embezzlements which he did not disclose, were material to the risk; but the court declined to permit an answer to the question whether, by the usage and practice of all insurance companies, such facts were regarded as material. This latter ruling of the court was excepted to by the defendant company. The question of evidence thus presented has been before the courts of England and America in many different phases, and the decisions present a bewildering conflict of authority. In the

leading case of *Carter v. Boehm*, 3 Burrows, 1905, the question arose what effect, if any, was to be given to the opinion of a broker that certain statements in a letter within the knowledge of the insured should have been communicated to the insurer, and that if they had been the insurer would not have "meddled" with the insurance. The subject of insurance was a so-called fort and warehouse in the island of Sumatra, and the danger insured against was capture by the enemy. The facts stated in the letter, not communicated, were a report of an abandoned plan of the French in the previous year to attack the place, and the surmise of the writer that a similar plan might be carried out during the then current year. Lord Mansfield said of the evidence:

"But we all think the jury ought not to pay the least regard to it. It is mere opinion, which is not evidence. It is opinion after the event. It is opinion without the least foundation from any previous precedent or usage. It is an opinion which, if rightly formed, could only be drawn from the same premises from which the court and jury were to determine the cause, and therefore it is improper and irrelevant in the mouth of a witness."

Prior to this, in 1740, Chief Justice Lee, of the common pleas, had admitted as evidence the opinion of insurance brokers that contents of a letter concerning a ship should have been disclosed. *Seaman v. Fonereau*, 2 Strange, 1183. Lord Kenyon (Lord Mansfield's successor) held that commercial men might testify that, had a fact been known concerning the voyage of a ship, it would have made a difference of 15 per cent. in the premium, and that many underwriters would not have taken the risk on any terms, and expressed the opinion that such evidence was good evidence, admissible upon the same ground that the evidence of persons versed in arts and science was admitted on questions involving them. *Chaurand v. Angerstein*, Peake, 45. In *Haywood v. Rogers*, 4 East, 590, before Lord Ellenborough, evidence of insurance brokers as to the effect of certain facts upon insurance premiums was admitted without objection, but it was not given any weight by the court. In *Littledale v. Dixon*, 1 Bos. & P. (N. R.) 152, the common pleas court considered evidence (admitted, so far as appears, without objection) that the knowledge of the safe arrival of two ships which had left the same port after the one insured would not vary the premium actually demanded. In *Berthon v. Loughman*, 2 Starkie, 258, Mr. Justice Holroyd, of the queen's bench, held that, upon the question of the materiality of a fact, it was competent to ask an insurance broker what effect its disclosure would have among underwriters generally to increase the premium, but not what the witness would do in a particular case. In the preceding year, Chief Justice Gibbs held that a rumor, if material, ought to be communicated, but held that the opinion of underwriters as to whether the rumor, or any other fact, was material, was inadmissible, stating that Lord Mansfield and Lord Kenyon had discountenanced this kind of evidence. *Durrell v. Bederley*, Holt, N. P. 286. With respect to Lord Kenyon, as we have seen, he was hardly accurate. In *Rickards v. Murdock*, 10 Barn. & C. 527, Lord Tenterden, of the queen's bench, was in accord with his colleague, Mr. Justice Holroyd, and held that underwriters

might testify that a fact not disclosed was material; and his ruling was not disturbed by the full court. In *Elton v. Larkins*, 5 Car. & P. 392, before Tindal, C. J., evidence of underwriters was admitted to the point that time of the vessel's sailing was material, and that, had it been known, the policy would not have been issued. In this case, Wilde, sergeant, stated that such evidence, in spite of Lord Mansfield's objection, seemed to have crept into competency. In *Chapman v. Walton*, 10 Bing. 57, a case heard by the court of common pleas in banc, the question was somewhat different. It was on an issue whether an underwriter had been derelict in altering insurance under instructions. The evidence of underwriters was held competent upon the point of what a reasonably skillful and prudent underwriter would have done. In admitting the evidence, however, Chief Justice Tindal, of the common pleas, relied on Justice Holroyd's decision in *Berthon v. Loughman*, and expressly dissented from the view of his predecessor, Chief Justice Gibbs, in *Durrell v. Bederley*. In *Quin v. Assurance Co.*, Jones & C. 316, the Irish exchequer chamber followed *Rickards v. Murdock* and *Berthon v. Loughman*, and admitted evidence of the secretary of the insurance company that knowledge by his company of an undisclosed fact would have raised the rate of insurance premium it would have demanded. In *Campbell v. Rickards*, 5 Barn. & Adol. 840, precisely the same question came before the court of queen's bench in banc which had been before that court in *Rickards v. Murdock*. The decision in the latter case was overruled, and it was held that the evidence of underwriters upon the materiality of the undisclosed fact was not competent. The case is put on the authority of Lord Mansfield and Chief Justice Gibbs, and the then recent decision of the common pleas in *Chapman v. Walton* is not referred to. This is the last English case where the question has been raised and discussed. In *Ionides v. Pender*, L. R. 9 Q.B. 531, evidence of underwriters that overvaluation of the cargo was a material fact to be known, that in such a case the risk was considered speculative, that some underwriters would not take such risks, and others would take it only at an advance in the premium of from 25 to 30 per cent., was admitted without objection, and seems to have formed one of the chief grounds for the judgment of the court, delivered by Mr. Justice Blackburn. It may fairly be said, from this review of the English cases, that the question is an open one. See 1 Smith, Lead. Cas. Eq. 572. Even in those cases where evidence of underwriters has been admitted, no distinction has been recognized, except, possibly, by Mr. Justice Holroyd in *Berthon v. Loughman*, 2 Starkie, 258, between the individual opinions of such witnesses as to the materiality of undisclosed or misrepresented facts, and their statements, based on usage, of the effect which a knowledge of such facts would have among underwriters generally, upon insurance premiums.

In this country, though all the cases are not easily reconciled, it is not so difficult as in England to reach a satisfactory result. At first, in marine cases, it was generally held that underwriters

might be asked the direct question whether the facts undisclosed were material to the risk. Mr. Justice Washington permitted it in two cases. *Moses v. Insurance Co.*, 1 Wash. C. C. 386, Fed. Cas. No. 9,872; *Marshall v. Insurance Co.*, 2 Wash. C. C. 357, Fed. Cas. No. 9,133. In *McLanahan v. Insurance Co.*, 1 Pet. 170, the question was whether the time of sailing was material to the risk, as a matter of law; and, in pointing out why it was a question for the jury, Mr. Justice Story said:

"The material ingredients of all such inquiries are mixed up with nautical skill, information, and experience, and are to be ascertained, in part, upon the testimony of maritime persons, and are in no sense judicially cognizable at law. The ultimate fact itself, which is the test of materiality,—that is whether the risk be increased so as to enhance the premium,—is in many cases an inquiry dependent upon the judgment of underwriters and others who are conversant with the subject of insurance."

In *Hawes v. Insurance Co.*, Fed. Cas. No. 6,241, the issue was whether the failure to disclose that a vessel was aground was a material fact, and an underwriter was called to give evidence. Mr. Justice Curtis said:

"I do not allow you to ask the witness what he himself, as an underwriter, would have done, but whether, from his knowledge of the business, he is able to state that the facts in question would or would not have an influence with underwriters generally, in determining the amount of the premium. \* \* \* Here the inquiry is, in substance, whether the market price of insurance is affected by particular facts. If the witness, being conversant with the business, has gained, in the course of his employment, a knowledge of the practical effect of these facts, or similar facts, upon premiums, he may inform the jury what it is."

The question soon arose in fire insurance cases. In *Merriam v. Insurance Co.*, 21 Pick. 162, where the issue was whether a condition of the policy that no alteration while the policy was current should be made in the building insured, which would increase the risk of fire, was violated, the court held that the alteration must have been such that a higher rate of premium would have been demanded for insurance of the building in its altered form than before. With this as a test of materiality, which, as we have seen, was approved by Mr. Justice Story in *McLanahan v. Insurance Co.*, *supra*, the same court, in subsequent cases, has established a distinction, to be enforced in the use of insurance expert evidence on such an issue, which was hinted at by Mr. Justice Holroyd in *Berthon v. Loughman*, 2 Starkie, 258, and by Mr. Justice Curtis in *Hawes v. Insurance Co.*, Fed. Cas. No. 6,241. It is clearly stated by Mr. Justice Gray in *Luce v. Insurance Co.*, 105 Mass. 297. There the issue was whether risk of fire was increased by leaving a house unoccupied. Following decisions of the same court in *Mulry v. Insurance Co.*, 5 Gray, 541, and *Lyman v. Insurance Co.*, 14 Allen, 329, the court held that insurance experts could not testify that it did increase the risk, because it was only a matter of common knowledge. The learned justice continued, however, as follows:

"But whether such a change in the occupation is material to the risk might also be tested by the question whether underwriters generally would charge a higher premium. *Merriam v. Insurance Co.*, 21 Pick. 162. That being a

matter within the peculiar knowledge of persons versed in the business of insurance, testimony of such persons upon that point is admissible."

Cited in support of this are the remarks of Justice Story and of Justice Curtis above quoted. The distinction stated in *Luce v. Insurance Co.* has been approved by the same court in the late case of *First Congregational Church of Rockland v. Holyoke Mut. Fire Ins. Co.*, 158 Mass. 475, 33 N. E. 572, and has been recognized by courts of other states. *Insurance Co. v. Rowland*, 66 Md. 236, 244, 7 Atl. 257; *Insurance Co. v. Gruver*, 100 Pa. St. 266. Such a distinction would also seem to be the basis of the ruling in *Martin v. Insurance Co.*, 42 N. J. Law, 46. In the later New York fire insurance cases, though they are hardly to be reconciled with *Insurance Co. v. Cotheal*, 7 Wend. 72, it seems to be ruled that insurance experts may be asked directly whether the fact in question would increase the risk. *Hobby v. Dana*, 17 Barb. 111; *Cornish v. Insurance Co.*, 74 N. Y. 297; *Leitch v. Insurance Co.*, 66 N. Y. 102. Reliance is had by the New York courts upon the opinion of Chancellor Kent, expressed in his Commentaries (volume 3, p. 285), that such evidence is admissible. The same ruling is made in *Kern v. Insurance Co.*, 40 Mo. 19, and in *Mitchell v. Insurance Co.*, 32 Iowa, 424, and *Russell v. Insurance Co.*, 78 Iowa, 216, 42 N. W. 654. In *Schenck v. Insurance Co.*, 24 N. J. Law, 451, it was held proper to ask a fireman of 10 years' experience whether a second story to an L increased the risk. In *Brink v. Insurance Co.*, 49 Vt. 442, it was held that the owner of a sawmill, who had altered it, might testify that in his opinion the alteration did not increase the risk of fire. And in *Daniels v. Insurance Co.*, 12 Cush. 416, an insurance expert was allowed to state that the erection of a partition did not increase the risk; but this is not to be harmonized with the later Massachusetts cases. The great weight of authority in this country, however, is against the view that an insurance expert may be asked his own opinion whether the undisclosed or misrepresented facts were material to the risk. In addition to the Massachusetts cases above cited, there is a most satisfactory discussion of the subject in *Insurance Co. v. Harmer*, 2 Ohio St. 455, and in *Hill v. Insurance Co.*, 2 Mich. 481. Other cases to the same effect are *Schmidt v. Insurance Co.*, 41 Ill. 295; *Joyce v. Insurance Co.*, 45 Me. 169; *Cannell v. Insurance Co.*, 59 Me. 582; *Thayer v. Insurance Co.*, 70 Me. 539; *Kirby v. Insurance Co.*, 9 Lea, 142. In *State v. Watson*, 65 Me. 74, the issue was, in a prosecution for arson, whether it could be expected that fire from one building would be communicated to another building, some distance away from the first. It was held improper to admit evidence of insurance experts on this question. And a similar ruling was made by the supreme court of the United States in *Railroad Co. v. Kellogg*, 94 U. S. 472,—an action for damages for burning a warehouse by locomotive sparks. The issue was whether the communication of fire from a pile of lumber to the warehouse and other buildings might have been reasonably anticipated, and insurance experts were called. Their evidence was held inadmissible; and Mr. Justice Strong, in delivering the opinion of the court, cites the language of Lord Mansfield in *Carter v. Boehm*, of Chief Justice Gibbs in *Durrell*

v. Bederly, and of Lord Denman in *Campbell v. Rickards*, in support of this conclusion. It is in accord with the better reason, also, to exclude opinions of insurance experts upon the point whether an undisclosed fact was material to an insurance risk. If it requires scientific knowledge or peculiar skill to trace the possible causal or evidential connection between the fact claimed to be material and the loss or death insured against, then, of course, the testimony of those learned in the necessary science, or trained in the particular craft, should be furnished to the jury, to enable them properly to estimate the weight which a reasonably prudent insurer would naturally give to the fact, in his calculation of chances. But where the calculation of the chances involves a consideration only of facts of everyday life, of the motives of men living in the same community with members of the jury, and of those ordinary physical and natural causes of which every man is presumed to have an understanding, it is difficult to see why an insurance examiner should be permitted to influence the jury by giving his sworn opinion on the very issue which they are assembled to try, and of which they are presumed to have the same opportunities upon which to found a reliable judgment as he. It is true, he may have had occasion, in his business, to consider and weigh facts of this character, for this purpose, much more frequently than the jury, but that does not render his opinions on the facts competent evidence. It is the business of judges and lawyers to consider and estimate the value of evidence, and for their own use they doubtless formulate in their minds certain rules for weighing and sifting facts and motives, and by such practice may have acquired great skill in divining the truth; but no one would say that their judgment of the facts of a case could be given in evidence before a jury to assist the jury in its deliberations.

The better authorities, however, seem to sustain the rule that the insurance experts may testify concerning the usage of insurance companies generally in charging higher rates of premium or in rejecting risks, when made aware of the fact claimed to be material. The distinction between this and the rule just discussed may seem at first a close one, but on consideration it appears to be sound. It may be asked why, if one insurance man of long experience cannot give his individual opinion that a fact is or is not material to a risk, should it be competent for him to state the opinions of a great many insurance men on the same question? A fact is material to an insurance risk when it naturally and substantially increases the probability of that event upon which the policy is to become payable. Materiality of a fact, in insurance law, is subjective. It concerns rather the impression which the fact claimed to be material would reasonably and naturally convey to the insurer's mind before the event, and at the time the insurance is effected, than the subsequent actual causal connection between the fact, or the probable cause it evidences, and the event. Thus, it is by no means conclusive upon the question of the materiality of a fact that it was actually one link in a chain of causes leading to the event. *Watson v. Mainwaring*, 4 Taunt. 763; *Jones v. Insurance Co.*, 3 C. B. (N. S.) 65; *Rose v. Insurance Co.*, 2 Ir. Jur.

206; *Insurance Co. v. Schultz*, 73 Ill. 586. And, on the other hand, it does not disprove that a fact may have been material to the risk because it had no actual subsequent relation to the manner in which the event insured against did occur. A fair test of the materiality of a fact is found, therefore, in the answer to the question whether reasonably careful and intelligent men would have regarded the fact, communicated at the time of effecting the insurance, as substantially increasing the chances of the loss insured against. The best evidence of this is to be found in the usage and practice of insurance companies in regard to raising the rates or in rejecting the risk on becoming aware of the fact. If the rates are not raised in such a case, it may be inferred that reasonably careful men do not regard the fact as material. If the rates are raised, or the risk is rejected, then they do.

The question still remains whether the rules above stated are applicable to life insurance cases. Certainly, there is the same ground for excluding the individual opinions of insurance men upon the materiality of particular facts as in marine and fire insurance. Of course, the evidence of physicians as to the tendency of diseases and bodily conditions or habits to shorten life is competent, but insurance men are not experts upon these subjects. Facts other than those relating to the health and habits of the applicant usually either relate to the motive of the applicant to destroy himself, or increase the probability of death by exposure to bodily injury. Of the materiality of this class of facts the jury can judge quite as well as one experienced in passing on insurance risks. They are within the common knowledge of mankind. The evidence of the insurance experts that certain facts were material to the risk was therefore incompetent.

The question of the competency of the evidence of insurance experts as to the usage of life insurance companies generally to raise premiums or reject risks when made aware of an undisclosed or misrepresented fact is more uncertain. In *Rawls v. Insurance Co.*, 27 N. Y. 287, 290, the defendants made a general offer to prove by experts in the business of life insurance that a person who was in the habitual use, to excess, of intoxicating drinks, would not be considered an insurable subject. The court said:

"This was rightly excluded. It was entirely immaterial what description of subject persons or companies engaged in the business of life insurance would consider good or bad risks. The inquiry did not relate to matters of science or skill, but called, in effect, for the opinion of witnesses as to what persons engaged in a particular business would consider prudent to do in certain cases."

The case was followed in *Higbie v. Insurance Co.*, 53 N. Y. 603, and the same ruling was made in a life insurance case in West Virginia. *Schwarzbach v. Protective Union*, 25 W. Va. 622, 652.

It is very hard to reconcile the decision in *Rawls v. Insurance Co.* with the subsequent fire insurance cases, already referred to, of *Cornish v. Insurance Co.*, 74 N. Y. 297, and *Leitch v. Insurance Co.*, 66 N. Y. 102. It will not do to distinguish them on the ground that the one relates to life insurance, and the others to fire insurance, because the case upon which the court relies in *Rawls'*



case is *Joyce v. Insurance Co.*, 45 Me. 168,—a fire insurance case. After a full consideration, we can see no reason why, in this regard, the rule in life insurance cases should be different from that in fire insurance cases. Our conclusion is in accordance with a decision of the supreme court of Pennsylvania, delivered by Chief Justice Black, in *Hartman v. Insurance Co.*, 21 Pa. St. 466. In that case an applicant had stated that he was a farmer, when in fact he was a railroad man and a slave catcher. One familiar with the insurance business, it was held, might testify that in his own and all other companies a high rate of premium was charged for a railroad man, and that no insurance would be issued upon the life of a slave catcher, whose occupation was considered extra hazardous. The case is cited in *First Congregational Church of Rockland v. Holyoke Mut. Fire Ins. Co.*, 158 Mass. 475, 33 N. E. 572, as supporting the distinction formulated by Justice Gray in *Luce v. Insurance Co.*, 105 Mass. 297, and we think it may be so treated. Of course, such evidence as this is only to aid the jury, and will not be conclusive upon them; but, according to the best-considered authorities, it is admissible. If the fact, the materiality of which is in question, is one of a class of facts which life insurance companies are frequently required to consider in relation to the acceptance of risks, so that a witness may base an answer on a well-defined practice of insurance companies, we think such an answer competent. But care must be taken that the witness shall not substitute his own opinion, or that of his own company only, neither of which is relevant, for the usage of companies generally. The modern practice of life insurance companies seems to be, not to vary the premium, except for age, and either to accept risks of the same age, or reject them altogether. If so, there would seem to be no means of judging the materiality of any other fact than that of age, from the usage or practice of insurance companies, except by their acceptance or rejection of the risk; and the question should be limited, in such cases, therefore, to whether insurance companies generally, if made aware of the undisclosed fact, would reject the risk. The question which the court refused to permit was whether the misrepresented or concealed fact would be regarded among insurance companies generally as material. This was rightly rejected. The proper form in which the question might have been put to a duly-qualified witness was:

"Are you able to say, from your knowledge of the practice and usage among life insurance companies generally, that information of this fact would have enhanced the premium to be charged, or would have led to a rejection of the risk?"

It was clearly right in the trial court to refuse to direct the jury to return a verdict for the defendant on the ground that the \$5,000 policy in the New York Life Insurance Company on Schardt's life was a fact material to the risk, as matter of law. Where the parties have not, by the terms of the application and policy, impliedly stipulated that each subject inquired about shall be material, the question whether a fact is material to the risk is always

a question for the jury. Now, but for the statute of Pennsylvania already considered, the provisions of the policy here in suit would certainly render the answer to each question of the application material, with all the consequences thus imposed by the law of insurance; but, as already stated, it was the chief purpose of the statute to destroy such conventional materiality, and to open to judicial investigation the question on its merits. Much reliance is had by counsel for plaintiff in error on the language of Mr. Justice Gray in *Insurance Co. v. Raddin*, 120 U. S. 183, 189, 7 Sup. Ct. 500, where, in delivering the opinion of the court, he said:

"Whether there is other insurance on the same subject, and whether such insurance has been applied for and refused, are material facts, at least, when statements regarding them are required by the insurers as part of the basis of the contract."

In support of this are cited the following cases: *Carpenter v. Insurance Co.*, 16 Pet. 495; *Jeffries v. Insurance Co.*, 22 Wall. 47; *Anderson v. Fitzgerald*, 4 H. L. Cas. 484; *Macdonald v. Insurance Co.*, L. R. 9 Q. B. 328; *Edington v. Insurance Co.*, 77 N. Y. 564; *Id.*, 100 N. Y. 536, 3 N. E. 315. In each one of these cases it will be found that by the terms of the policy the application and its answers were made the basis of the contract, and the question and answer concerning other insurance gave that fact a contractual materiality. The same thing is true of the other cases cited by counsel for the plaintiff in error: *Insurance Co. v. Winslow*, 3 Gray, 431; *Ryan v. Insurance Co.*, 46 Wis. 674, 1 N. W. 426; *Byers v. Insurance Co.*, 35 Ohio St. 614; *Cooper v. Insurance Co.*, 50 Pa. St. 299; *Insurance Co. v. Small*, 14 C. C. A. 33, 66 Fed. 494; *Bard v. Insurance Co.*, 153 Pa. St. 261, 25 Atl. 1124; *Mitchell v. Insurance Co.*, 51 Pa. St. 402; *Obermeyer v. Insurance Co.*, 43 Mo. 576; *Hutchison v. Insurance Co.*, 21 Mo. 101. In *London Assurance v. Mansel*, 11 Ch. Div. 370, cited for plaintiff in error, the action was in equity to set aside a policy; and, of course, it became a question for the court to decide whether that which had been concealed was material. But the court in that case intimated that it would have been a question of fact for the jury, in an action at law, had the parties not foreclosed the inquiry by an implied stipulation that it should be material. In *Insurance Co. v. Lawrence*, 2 Pet. 49, the concealed or misrepresented fact related to the interest of the assured in the subject of insurance, and Chief Justice Marshall points out with much clearness and force why it might, and would naturally, be quite material to the risk; but an examination of Mr. Justice Story's opinion in the same case when it was again before the court shows that the remarks of the chief justice were not intended to settle the materiality, as matter of law, for on the second hearing the court expressly decided that the question was one of fact for the jury. See *Insurance Co. v. Lawrence*, 10 Pet. 516, 517. The circuit court of appeals of the Third circuit has had occasion quite recently to consider when the materiality of a fact is for the jury, and, in a clearly-stated opinion, Judge Wales shows that it is always for the jury, unless the answers in the application are expressly made the basis of the contract. *Casualty Co. v. Alpert*, 14 C. C. A. 474, 67 Fed.

460. In *Insurance Co. v. Ruden's Adm'r*, 6 Cranch, 339, Chief Justice Marshall said:

"It is well settled that the operation of any concealment on the policy depends on its materiality to the risk, and this court has decided that this materiality is a question for the jury."

Other cases to the same effect are *Garcelon v. Insurance Co.*, 50 Me. 580; *Insurance Co. v. Deale*, 18 Md. 26; *Keeler v. Insurance Co.*, 16 Wis. 523; *Loan Co. v. Snyder*, 16 Wend. 481; *Daniels v. Insurance Co.*, 12 Cush. 416; *Insurance Co. v. Coates*, 14 Md. 285; *Insurance Co. v. Chase*, 5 Wall. 509. The remark in the opinion of this court in *Society v. Llewellyn*, 16 U. S. App. 405, 7 C. C. A. 579, 58 Fed. 940, from which it might be inferred that the question of the materiality of the insured's having delirium tremens is a matter of law for the court, in any case where inquiry is not foreclosed by express or implied stipulation, was unnecessary to the decision of that case, and cannot be supported.

The same reasons which made the materiality of the additional insurance a question for the jury required the court to submit the materiality of the embezzlements to that tribunal, and the exception based on the court's refusal to hold that they were material, as matter of law, cannot be sustained.

The court was clearly right in refusing to direct a verdict for the defendant on the ground that the uncontradicted evidence showed that Schardt had had syphilis, when he had denied it in his answers. The evidence left it a controverted issue of fact whether Schardt had suffered from this disease, and the questions of his having had it, and of its materiality, were both for the jury. Equally unobjectionable was the refusal to direct a verdict on the ground that it was admitted that Schardt had other diseases. The court left it to the jury to determine whether the sore throat and other ailments from which Schardt had suffered were really diseases, within the policy, and also to say whether they were material to the risk. It is well settled that mere temporary ailments or affections, not of a serious or dangerous character, which pass away, and are likely to be forgotten, because they leave no trace in the constitution, are not to be regarded as diseases, within the meaning of a life insurance policy. *Connecticut Mut. Life Ins. Co. v. Union Trust Co.*, 112 U. S. 250, 5 Sup. Ct. 119; *Insurance Co. v. Moore*, 6 App. Cas. 648; *Indemnity Co. v. Dorgan*, 16 U. S. App. 290, 7 C. C. A. 581, 58 Fed. 945, and cases there cited; *Insurance Co. v. Wise*, 34 Md. 582; *Wilkinson v. Insurance Co.*, 30 Iowa, 119; *Fitch v. Insurance Co.*, 59 N. Y. 557; *Cushman v. Insurance Co.*, 70 N. Y. 72, 77; *Goucher v. Association*, 20 Fed. 596; *Society v. Winthrop*, 85 Ill. 537; *Insurance Co. v. McTague*, 49 N. J. Law, 587, 9 Atl. 766; *Brown v. Insurance Co.*, 65 Mich. 306, 314, 32 N. W. 610; *Hann v. National Union*, 97 Mich. 513, 56 N. W. 834. The ailments which it was conceded Schardt had were of a character which made it entirely proper to submit to the jury the question whether they could be said to rise to the dignity of diseases, within the meaning of the policy. *Morrison v. Muspratt*, 4 Bing. 60; *Fitch v. Insurance Co.*, 59 N. Y. 557.

The trial court held, against the objection of defendant, that, when Schardt was asked what his occupation was, he answered truly that he was a bank teller, and that the scope of the question was not such as to require him to add that he was an habitual embezzler. We concur in this view. Neither the company nor Schardt could have thus understood the question. The embezzling was merely misfeasance in his position as teller. He was an unfaithful bank teller. But nothing in the question called upon him to say whether he was a good or bad bank teller. In *New York Bowery Fire Ins. Co. v. New York Fire Ins. Co.*, 17 Wend. 359, the issue was whether a contract of reinsurance was avoided by the failure of the company seeking reinsurance to communicate to the reinsurer facts known to it reflecting on the character of the original insured. The supreme court of New York held that it was, but in doing so expressed, through Justice Bronson, its opinion of what the duty of the original insured was in this regard:

"The general doctrine [i. e. of concealment] on this subject is not denied, but it is said that the character of Mortimer [i. e. the original insured] was not a fact material to the risk; that the person applying for insurance is not bound to say anything about his own character. The last branch of the remark is undoubtedly true. Had Mortimer applied to defendants for insurance, he was not bound, nor could it be expected, that he should speak evil of himself. Good manners on the part of the underwriter, and self-respect on the part of the applicant, would forbid a conversation on the subject of character. If the underwriter wished information on that point, he would naturally seek it from some other source." 17 Wend. 366, 367.

This passage is referred to with approval by the supreme court of the United States in the case of *Sun Mut. Ins. Co. v. Ocean Ins. Co.*, 107 U. S. 485, 510, 1 Sup. Ct. 582. Justice Bronson's discussion related to the disclosure of a fact not inquired about, and the rule there laid down was, of course, not intended to relieve an applicant from answering questions put to him, which, in their necessary scope, require statements from him which relate to his moral character. Nevertheless the reasoning of the court justifies the conclusion that the insured is not called upon to construe a simple question concerning his ordinary vocation into one calling for a statement of crimes or misfeasances of which he may have been guilty in pursuing such vocation. Then it is said that he had expressly warranted that, in his statements and answers in this application, no circumstances or information had been withheld touching his past and present state of health and habits of life, with which the Penn Mutual Life Insurance Company ought to be made acquainted, and that his habit of embezzling should have been communicated, to comply with that warranty. We are of opinion that these words refer to questions and answers in the application, and are equivalent to a warranty that the answers to the questions are full and complete. The habits of life referred to are those inquired about in the medical examination, and are those which have a direct relation to physical health, and could not be construed to refer to thefts or embezzlements of which the applicant may have been guilty, and concerning which no inquiry was made.

But, even if Schardt was not required by any specific question to disclose the fact of his embezzlements, the policy would still be avoided,

if it were material to the risk, and he intentionally concealed it from the company. This is not controverted. The issue of law between the parties is whether the policy would not be avoided, even if his failure to disclose it were due, not to fraudulent intent, but to mere inadvertence, or a belief that it was not material. It is insisted for the plaintiff in error that the motive or cause of the nondisclosure is unimportant, if the fact be found material to the risk, and was known to the insured when he obtained the insurance. The trial court took the other view, and instructed the jury accordingly. If this were a case of marine insurance, the contention for the plaintiff in error must certainly be sustained. The great and leading case on the subject is that of *Carter v. Boehm*, 3 Burrows, 1905, where Lord Mansfield explained the effect of concealment of material facts in insurance to avoid the policy. He said:

"Insurance is a contract upon speculation. The special facts upon which the contingent chance is to be computed lie most commonly in the knowledge of the insured only. The underwriter trusts to his representations, and proceeds upon confidence that he does not keep back any circumstance in his knowledge to mislead the underwriter into a belief that the circumstance does not exist, and to induce him to estimate the risk as if it did not exist. The keeping back such a circumstance is a fraud, and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent intention, yet still the underwriter is deceived, and the policy is void, because the risk run is really different from the risk understood and intended to be run at the time of the agreement."

*Carter v. Boehm* was the case of insurance of a fort and warehouse in the East Indies against capture by the enemy; and, although not strictly a case of marine insurance, it has usually been treated as such, because of the resemblance of the risk, in its speculative character, to that of a merchant vessel in time of war. That it states the rule enforced by the courts of this country in cases of marine insurance is established by many decisions. Perhaps the one most recently considered by the supreme court of the United States was a case of reinsurance of a marine risk. *Sun Mut. Ins. Co. v. Ocean Ins. Co.*, 107 U. S. 485, 1 Sup. Ct. 582. The very marked difference between the situation of the parties in marine insurance and that of parties to a fire or life policy has led many courts of this country to modify the rigor of the doctrine in its application to fire and life insurance, and to lean towards the view that no failure to disclose a fact material to the risk, not inquired about, will avoid the policy, unless such nondisclosure was with intent to conceal from the insurer a fact believed to be material; that is, unless the nondisclosure was fraudulent. In marine insurance the risk was usually tendered and accepted when the vessel was on the high seas, where the insurer had no opportunity to examine her, or to know the particular circumstances of danger to which she might be exposed. The risk in such a case is highly speculative, and it is manifestly the duty of the insured to advise the insurer of every circumstance within his knowledge from which the probability of a loss can be inferred, and he cannot be permitted to escape the obligation by a plea of inadvertence or negligence. In cases of fire and life insurance, however, the parties stand much more nearly on an equality. The subject of the fire insurance is usually

where the insurer can send its agents to give it a thorough examination, and determine the extent to which it is exposed to danger of fire from surrounding buildings, or because of the plan or material of its own structure. The subject of life insurance is always present for physical examination by medical experts of the insurer, who often acquire, by lung and heart tests, and by chemical analysis of bodily excretions, a more intimate knowledge of the bodily condition of the applicant than he has himself. Then, too, the practice has grown of requiring the applicant for both fire and life insurance to answer a great many questions carefully adapted to elicit facts which the insurer deems of importance in estimating the risk. In life insurance, not only is the applicant required to answer many general questions concerning himself and his ancestors, but he is also subjected to an extended examination concerning his bodily history. This was true in the case at bar. When the applicant has fully and truthfully answered all these questions, he may rightfully assume that the range of the examination has covered all matters within ordinary human experience deemed material by the insurer, and that he is not required to rack his memory for circumstances of possible materiality, not inquired about, and to volunteer them. He can only be said to fail in his duty to the insurer when he withholds from him some fact which, though not made the subject of inquiry, he nevertheless believes to be material to the risk, and actually is so, for fear it would induce a rejection of the risk, or, what is the same thing, with fraudulent intent. A strong reason why the rule as to concealment should not be so stringent in cases of life insurance as in marine insurance is that the question of concealment rarely, if ever, arises until after the death of the applicant, and then the mouth of him whose silence and whose knowledge it is claimed avoid the policy is closed. The application is generally prepared, and the questions are generally answered, under the supervision of an eager life insurance solicitor. Only the barest outlines of the conversations between the applicant and the solicitor are reduced to writing. The applicant is likely to trust the judgment of the solicitor as to the materiality of everything not made the subject of express inquiry, and, with the solicitor's strong motive for securing the business, there is danger that facts communicated to him may not find their way into the application. With respect to a contract thus made, it is clearly just to require that nothing but a fraudulent nondisclosure shall avoid the policy. Nor does this rule result in practical hardship to the insurer, for in every case where the undisclosed fact is palpably material to the risk the mere nondisclosure is itself strong evidence of a fraudulent intent. Thus, if a man, about to fight a duel, should obtain life insurance without disclosing his intention, it would seem that no argument or additional evidence would be needed to show the fraudulent character of the nondisclosure. On the other hand, where men may reasonably differ as to the materiality of a fact concerning which the insurer might have elicited full information, and did not do so, the insurer occupies no such position of disadvantage in judging of the risk as to make it unjust to require that before the policy is avoided it shall ap-

pear, not only that the undisclosed fact was material, but also that it was withheld in bad faith. To hold that good faith is immaterial in such a case is to apply the harsh and rigorous rule of marine insurance to a class of insurance contracts differing so materially from marine policies in the circumstances under which the contracting parties agree that the reason for the rule ceases. The authorities are not uniform, and we are able to take that view which is more clearly founded in reason and justice. In England, the tendency of the courts has been to hold that the same rules apply to fire and life insurance as to marine insurance, in reference to the effect of the concealment of material facts. In *Bufe v. Turner*, 6 Taunt. 338, it was held that the failure to disclose a fact which the jury found material to a fire risk avoided the policy, although the nondisclosure was in entire good faith. In *Huguenin v. Rayley*, Id. 186, and in *Morrison v. Muspratt*, 4 Bing. 60, the same ruling was made in cases of life insurance. In *Lindenau v. Desborough*, 8 Barn. & C. 586, which was also a case of life insurance and concealment, Bayley, J., stated his view thus:

"I think that in all cases of insurance, whether on ships, houses, or lives, the underwriter should be informed of every material circumstance within the knowledge of the assured, and that the proper question is whether any particular circumstance was in fact material, and not whether the party believed it to be so."

The other judges expressed similar opinions. This language is quoted with approval by Sir George Jessel, M. R., in *London Assurance v. Mansel*, 11 Ch. Div. 363. In *Abbott v. Howard*, Hayes, 381, the Irish exchequer chamber expressed approval of *Lindenau v. Desborough*, and followed it in a fire insurance case. In *Insurance Co. v. Lloyd*, 10 Exch. 523, the court of exchequer held, in a case of guaranty, that the rule as to concealments in life and marine insurance was the same. Chief Baron Pollock said:

"It seems to us an incorrect proposition that the same rule prevails in the case of guaranties as in assurances upon ships or lives, in which it is a settled rule that all material circumstances known to the assured are to be disclosed, though there be no fraud in the concealment. This is peculiar to the nature of such contracts, in which, in general, the assured knows, and the underwriter does not know, the circumstances of the voyage, or the state of the health."

This case is cited by Mr. Justice Swayne in delivering the opinion of the court in *Magee v. Insurance Co.*, 92 U. S. 93, on a question of guaranty; but such citation can hardly be regarded as a considered approval of the declaration by the court of exchequer that the rule as to concealments was the same in life as in marine insurance. In the course of the argument in *Lloyd's Case*, Baron Parke approves the statement of some able American law writer on insurance,—presumably Mr. Duer,—that the rule for the necessity of the disclosure of all material circumstances in cases of insurance is founded on mercantile usage, and not upon fraud. 10 Exch. 531. This only confirms our view that the rule had its origin in the peculiar exigencies of a very speculative business, to wit, marine insurance. To enforce it in respect to life insurance is to transfer the result of a usage

prevailing in one branch of business to another, where the conditions are very different, and are of a character that prevents the possibility of the existence of a definite usage, well known to both parties, in respect to the contracts made. It is the business of shipowners and their brokers frequently to deal in insurance, and they may be presumed to know the usages prevailing with respect to contracts that they are constantly making. In life insurance the insured never makes a business of taking such insurances, and in most cases he takes but one policy. In *Wheelton v. Hardisty*, 8 El. & Bl. 232, 283, the exchequer chamber held that an untrue statement of a material fact in a proposal for insurance, made, not by the insured, but by the person whose life was the subject of insurance, did not avoid the policy, in the absence of knowledge of its untruth by the insured. In this conclusion the court avowedly departed from the rule of law governing marine policies, by which such a statement is always treated as a warranty and condition of the policy. See, especially, the judgments of Martin and Bramwell, BB., and Crowder, J., pages 298, 300, 397. In *Thomson v. Weems*, 9 App. Cas. 671, which was a Scotch appeal in a life insurance case, Lord Blackburn said:

"In policies of marine insurance, I think it is settled by authority that any statement of a fact bearing upon the risk introduced into the written policy, is, by whatever words and in whatsoever place, to be construed as a warranty, and *prima facie*, at least, that the compliance with that warranty is a condition precedent to the attaching of the risk. I think that, on the balance of authority, the general principles of insurance law apply to all insurances, whether marine, life, or fire. See per Lord Eldon, C., in a Scotch appeal in a fire insurance case, *Insurance Co. v. Macmorran* (July 10, 1815) 3 Dow, at page 262. No question arises on that in the present case, but I do not think that this rule as to the construction of marine policies is also applicable to the construction of life policies."

Mr. Pollock states, in the fourth edition of his work on Contracts (page 490, note i), that *Wheelton v. Hardisty* virtually overrules *Lindenau v. Desborough*. It may be doubted whether it has this effect, because the latter case only established the doctrine that the withholding of any material fact "within the knowledge of the assured" avoided the policy, whereas in *Wheelton v. Hardisty* the untrue statement was not made by the assured, and its untruth was not known to him. But, while Mr. Pollock's view of the conflict between *Lindenau v. Desborough* and *Wheelton v. Hardisty* may not be precisely accurate, it is certainly true that the latter case, decided by the highest court in England before which the question has come in such a way as to require decision, is an authority for the proposition that the peculiar circumstances under which marine policies are issued require a construction of their terms that is not given to policies of life and fire insurance. It is said that the utmost good faith (*uberrima fides*) is required in all contracts of insurance, and hence the same rule of concealment must apply to life and fire insurance, and must avoid a policy for nondisclosure of a material fact, though in entire good faith. But it was the same standard of *uberrima fides* which held the insurer to his innocent misrepresentations as conditions precedent and warranties in marine insurance. Why should not a difference be also made in respect to innocent nondisclosures in



life and fire insurance? The distinction made in *Wheelton v. Hardisty* between marine and life insurance policies seems to justify the language of Mr. Pollock, in his *Contracts* (4th Ed., p. 490), where, after stating the rule of concealments and misrepresentation in marine insurance, he says:

"These rules have, in modern times, at any rate, been uniformly treated, both at law and in equity, as determined by the exceptional and speculative nature of this particular contract, and not affording ground for any conclusions of general law. That they do not apply to the contract of life insurance is clear from the judgments in the exchequer chamber in *Wheelton v. Hardisty*, though a different opinion formerly prevailed, and in this very case was not contradicted in the court below."

Mr. Pollock refers to *London Assurance v. Mansel*, 11 Ch. Div. 363, as deciding that a material concealment avoids a policy of life insurance, but says:

"Probably a 'material fact' means, for this purpose, a fact such that its concealment makes the statement actually furnished, though literally true, so misleading, as it stands, as to be, in effect, untrue."

Certainly, this was all that it was necessary to decide in that case, although the words of Sir George Jessel are much broader. And, what is of prime importance to us, the supreme court of the United States has expressly approved the conclusion which the master of rolls reached in that case, on its facts, with an equally express dissent from the wider effect of his language. *Insurance Co. v. Raddin*, 120 U. S. 183, 7 Sup. Ct. 500, and the remarks of Mr. Justice Gray on page 192, 120 U. S., and page 500, 7 Sup. Ct.

Coming now to the American authorities, we find very early in reported cases a disposition to depart from the strict rules of marine insurance law in the consideration of fire and life policies. In *Loan Co. v. Snyder*, 16 Wend. 481, Chancellor Walworth, delivering the opinion of the supreme court of errors of New York, refers to the peculiar rule of construction applied to that "anomalous and informal instrument called a 'marine policy,'" and expresses the opinion that it is not to be applied in its strictness to fire policies. The same view is expressed in *Jolly's Adm'rs v. Baltimore Equitable Soc.*, 1 Har. & G. 295, by the court of appeals of Maryland. In *Burritt v. Insurance Co.*, 5 Hill, 188, Bronson, J., speaking for the supreme court of New York, after referring to the rule by which nondisclosure of material facts avoids a marine policy, although no inquiry be made, and although it is the result of innocent mistake or inadvertence, said (page 192):

"But this doctrine cannot be applicable—at least, not in its full extent—to policies against fire. If a man is content to insure my house without taking the trouble to inquire of what materials it is constructed, how it is situated in reference to other buildings, or to what uses it is applied, he has no ground for complaint that the hazard proves to be greater than he had anticipated, unless I am chargeable with some misrepresentation concerning the nature or extent of the risk. It is therefore the practice of companies which insure against fire to make inquiries of the assured, in some form, concerning all such matters as are deemed material to the risk, or which may affect the amount of premium to be paid. This is sometimes done by the conditions of insurance annexed to the policy, and sometimes by requiring the applicant to state particular facts in a written application for insurance. When thus called

upon to speak, he is bound to make a true and full representation concerning all the matters brought to his notice, and any concealment will have the like effect as in the case of a marine risk."

The use of "concealment," in this last passage, should be remarked. It means there a failure fully to answer a question put; and it was such a concealment which Sir George Jessel had to consider in *London Assurance v. Mansel*, and was defined by Sir Frederick Pollock. It is not a mere silence upon a matter not made the subject of inquiry. It is necessary to determine in which sense the word is used in decided cases, before their bearing on the present question can be clearly understood. Here we are considering only the duty of the insured in respect to something not inquired about. The supreme court of the United States, in *Clark v. Insurance Co.*, 8 How. 235, 249, suggests a distinction between fire and marine insurance, in reference to the obligation of the insured to speak when not inquired of, and cites in support of it the Maryland and New York cases just referred to. In *Gates v. Insurance Co.*, 5 N. Y. 469, the court of appeals held that in the case of a fire policy, where the insured makes a full answer to all the questions put to him, he is not answerable for an omission to mention the existence of other facts, about which no inquiry is made unless he withholds mention of them with intent to defraud. "He has a right to suppose that the insurer, in making inquiries in respect to particular facts, deems all others to be immaterial to the risk to be taken, or that he takes upon himself the knowledge or waives information of them." See, also, *Browning v. Insurance Co.*, 71 N. Y. 508; *Woodruff v. Insurance Co.*, 83 N. Y. 133; *Short v. Insurance Co.*, 90 N. Y. 16; *Haight v. Insurance Co.*, 92 N. Y. 55. In *Insurance Co. v. Harmer*, 2 Ohio St. 452, which was a fire insurance case, the defense was made that, previous to the issuing of the policy, there had been a fire in the insured premises, which had not been disclosed to the insurer. The court charged the jury that, if they found the circumstance to be material to the risk, the policy was void, "whether concealment resulted from fraud, accident, or mistake." Judge Ranney—one of Ohio's greatest judges—presided at the circuit in this cause, and delivered the opinion of the supreme court. In the supreme court he expressed the view that he was in error in his charge, in thus enforcing the rule of marine insurance in a fire insurance case. Such an expression of opinion was not necessary to the conclusion in the case, but the high standing of the judge gives great weight to even his obiter dictum. He said:

"It is not now true, whatever may be thought of the older authorities, that there is no difference in this respect [i. e. as to the rule of concealment] between marine and fire insurance, nor that a failure to disclose every fact material to the risk, upon which information is not asked for, or suppressed with a fraudulent intent, will avoid a policy of the latter description. The reason of the rule, and the policy in which it was founded, in its application to marine risks, entirely fall when applied to fire policies. In the former the subject of insurance is generally beyond the reach, and not open to the inspection, of the underwriter, often in distant ports or upon the high seas, and the peculiar perils to which it may be exposed, too numerous to be anticipated or inquired about, known only to the owners and those in their employ; while in the latter it is, or may be, seen and inspected before the risk is assumed, and its construction, situation, and ordinary hazards as well

appreciated by the underwriter as the owner. In marine insurance the underwriter, from the very necessities of his undertaking, is obliged to rely upon the assured, and has therefore the right to exact a full disclosure of all the facts known to him which may in any way affect the risk to be assumed. But in fire insurance no such necessity for reliance exists, and, if the underwriter assumes the risk without taking the trouble to either examine or inquire, he cannot very well, in the absence of all fraud, complain that it turns out to be greater than he anticipated. And so are the latest and best authorities."

In Massachusetts, in the earlier authorities, the stringent rule of marine insurance as to concealments was declared applicable with all its rigor to fire policies. In *Curry v. Insurance Co.*, 10 Pick. 535, it was held that if the assured did not communicate facts within his knowledge which increased the risk, though he was not questioned concerning them, and though he supposed the facts not to be material, the policy was void. This can hardly be reconciled with the later cases in the same court. In *Washington Mills Emery Manuf'g Co. v. Weymouth B. Mut. Fire Ins. Co.*, 135 Mass. 503, the question was whether a failure to state that the insured did not own the land on which the buildings stood avoided the policy. No fraud appeared. The court said:

"The defendant saw fit to issue this policy without any specific inquiries of the plaintiff as to the title to the land, and without any representations by the plaintiff upon this point. It was its own carelessness, and it cannot avoid the policy without proving intentional misrepresentation or concealment on the part of the plaintiff. An innocent failure to communicate facts about which the plaintiff was not asked will not have this effect"; citing *Com. v. Hide & Leather Ins. Co.*, 112 Mass. 136; *Fowle v. Insurance Co.*, 122 Mass. 191; *Walsh v. Association*, 127 Mass. 383.

Nor does Chief Justice Shaw's definition of "concealment" in a fire insurance case seem to be as broad as that prevailing in marine insurance. In *Daniels v. Insurance Co.*, 12 Cush. 416, he said, in defining the term as used in a fire policy (page 425):

"'Concealment' is the designed and intentional withholding of any fact material to the risk, which the assured, in honesty and good faith, ought to communicate to the underwriter. Mere silence on the part of the assured, especially as to some matter of fact which he does not consider it important for the underwriter to know, is not to be considered as such concealment."

There are many other cases of fire insurance in which it is held that a nondisclosure of a material fact not inquired about does not avoid the policy unless it appears to have been withheld with fraudulent intent. *Alkan v. Insurance Co.*, 53 Wis. 136, 10 N. W. 91; *Van Kirk v. Insurance Co.*, 79 Wis. 627, 48 N. W. 798; *Insurance Co. v. Stultz*, 87 Va. 629, 636, 13 S. E. 77; *Sanford v. Insurance Co.* (Wash.) 40 Pac. 609; *Pelzer Manuf'g Co. v. St. Paul F. & M. Ins. Co.*, 41 Fed. 271.

The number of life insurance cases in which the question has arisen is small. In *Rawls v. Insurance Co.*, 27 N. Y. 287, the court of appeals held that, where an applicant for life insurance fully and truly answered all questions put to him by the company, the mere omission to state matter, though material to the risk, would not be a concealment, and would not affect the validity of the policy, because the applicant might presume that the insurer had questioned him on

all subjects which he deemed material. In *Mallory v. Insurance Co.*, 47 N. Y. 52, 57, the same court sustained a charge to the jury, that, if the applicant did not conceal any fact which, in his own mind, was material in making the application, the policy was not void. See, also, *Cheever v. Insurance Co.*, 4 Am. Law Rec. 155. In *Vose v. Insurance Co.*, 6 Cush. 42, the supreme judicial court of Massachusetts announced the principle, as applicable to life policies, that the concealment of a material fact will avoid the policy, though it is the result of accident or negligence, and not of design. The case did not call for the application of such a principle. The applicant was asked if he was afflicted with any disease. He answered that he was not. At the time he had consumption, and had experienced several of the premonitory symptoms. His answers were made the basis of the policy. It is probable that the term "concealment," as used in this case, refers to an incomplete answer to a general question, rather than a failure to volunteer a fact not asked for, because the court uses in the opinion language which is incorporated in the headnote as follows:

"It is the duty of the insured to disclose all material facts within his knowledge. Although specific questions, applicable to all men, are proposed by the insurers, yet there may be particular circumstances affecting the individual to be insured, which are not likely to be known to the insurers; and the concealment of a material fact, when a general question is put by the insurers, at the time of effecting the policy, which would elicit that fact, will vitiate the policy."

But, whatever the effect of this case, we think the modern tendency, even of Massachusetts decisions, is to require that a non-disclosure of a fact not inquired about shall be fraudulent, before vitiating the policy; and, as already stated, this view is founded on the better reason. The subject is by no means as clear, upon the authorities, as could be wished, and the text writers find much difficulty in reconciling the cases. May, *Ins.* (3d Ed.) §§ 202, 203, 207. We hold that the charge of the circuit court upon this question was correct.

It is also objected that the court was wrong in charging the jury that the burden of proof to establish the materiality of the misrepresentation or concealment, as well as the fraudulent intent, where that was necessary, was upon the defendant. Unquestionably, this is the general rule. 2 Greenl. Ev. (15th Ed.) § 398; *Tidmarsh v. Insurance Co.*, 4 Mason, 439, 441, Fed. Cas. No. 14,024; *Fiske v. Insurance Co.*, 15 Pick. 310; *Jones v. Insurance Co.*, 61 N. Y. 79; *Insurance Co. v. Ewing*, 92 U. S. 377; *Insurance Co. v. Brown*, 57 Miss. 308. It is urged for the defendant, however, that, because it was admitted that Schardt made an untrue answer concerning his other insurance, the presumption was that his failure to mention it was intentional, and that the court should have so instructed the jury. Had the defendant requested such a charge, the question would then have been presented for decision. But, instead of requesting such an instruction, defendant framed a single charge, which instructed the jury that they should presume, not only that the failure to mention the fact was intentional, but

also that it was material. This was erroneous, and the court rightly refused to give it. But we do not think that the defendant was entitled to the instruction that the admission that Schardt had a policy in the New York Life Insurance Company, and failed to mention it, raised the presumption that his omission was intentional, or—what is the same thing—that it was fraudulent. There is a natural, and perhaps a legal, presumption of the continuance of a state of knowledge as of the state of sanity or marriage, and, it being admitted that Schardt once knew that he had taken this policy for \$5,000, that he continued to know, and so remembered that he had the policy when he answered the question as to other insurance. But the presumption is not conclusive. Men do forget entirely a fact previously known to them, and they do forget it temporarily, so that they may make an untrue statement inadvertently about it, though recently known to them. The possibility or probability of their doing so depends on the character of the fact in question, and all the circumstances under which the misstatement concerning it is made. There is also a presumption that a man does not make a fraudulent misstatement, but men frequently do nevertheless make such statements; and the question whether the presumption is overcome depends on the evidential weight to be given to all the circumstances, including possible motive, together with the positive evidence of witnesses. The two presumptions in this case covered the same ground, and were conflicting. Neither was conclusive, and it was for the jury to determine from all the circumstances what the truth was. It would seem proper that an instruction referring to one of these presumptions should also refer to the other, and should point out the duty of the jury to weigh the facts and circumstances in the light of both. Nothing here said, however, is intended to measure the duty of the court in instructing the jury as to presumptions from particular facts when other facts and circumstances affecting the weight of the presumption, or rebutting it, appear in the case, or when other and conflicting presumptions may also have application to possible phases of the evidence. It is, and must be, largely within the discretion of the court, even when a special instruction on the subject is requested, to determine in such case whether it is useful to call the attention of the jury to presumptions from particular facts at all, when such presumptions do not shift, as between the parties, "the duty of going forward with the evidence," as it is sometimes called. Instructions as to such presumptions are more or less in the nature of comment on the evidence, the scope of which is always within the discretion of the trial court. For the error already referred to in the exclusion of evidence, the judgment of the circuit court is reversed, with instructions to order a new trial.

## ENQUIRER CO. v. JOHNSTON.

(Circuit Court of Appeals, Seventh Circuit. March 5, 1896.)

No. 234.

## 1. LIBEL—DAMAGES—IMPUTATION OF UNCHASTITY.

Upon the trial of an action brought by a woman for a libel, involving a charge of unchastity, the plaintiff was permitted to show that she had three young children, and the court, in charging the jury, instructed them that, in determining the amount of damages, they might take into consideration plaintiff's family relations, the injury to her feelings, and her sense of shame and dishonor; that they should award her such sum as would fully and fairly compensate her for all the wrongs and injury inflicted; and added that they should remember that the reputation of a woman, and especially a mother having children, for chastity, is a thing of inestimable value. The admission of the evidence and the latter portion of the charge were assigned as error. *Held* no error.

## 2. LIBEL—EVIDENCE—IDENTIFICATION OF PLAINTIFF.

In an action for libel, an acquaintance of plaintiff may testify that, upon reading the libelous publication, he understood it to refer to plaintiff.

## 3. SAME—EVIDENCE—SIMILAR PUBLICATIONS.

Upon the trial of an action for a libel published in a newspaper, it is not error to exclude evidence of similar publications in other papers; the inquiry being so framed as to include publications which might be subsequent to or copied from that sued on.

## 4. SAME—NEWSPAPERS—DEGREE OF CARE.

It is not error, in an action for a libel published in a newspaper, to charge the jury that the greater extent of circulation makes the libels of a journalist more damaging, and imposes special duties, as to care to prevent the risk of such mischief, proportionate to the peril.

## In Error to the Circuit Court of the United States for the District of Indiana.

Plaintiff in error is the proprietor of a daily newspaper published in Cincinnati. On August 27, 1892, Mrs. Annie M. Johnston, defendant in error, was, and for some months had been, a resident of the city of Logansport, in the state of Indiana. She was a widow, with three small children, and she resided at an hotel in Logansport, kept by one J. D. Johnston, a brother of her deceased husband, and called the "Johnston House." On the day next after the date mentioned, the following matter appeared in said newspaper:

"Miss Scull Told on Her Landlord. His Wife Gotirate, and the House-keeper was Bounced. A Peculiar Hotel Strike.

"Special Dispatch to the Enquirer.

"Logansport, Indiana, August 27.—A decided novelty in the way of a strike occurred here to-day, and the Johnston Hotel, one of the city's leading hostleries, has been almost forced out of business for the time on its account. All of the female help have quit. The city being notoriously short in this line already, the proprietor is experiencing considerable trouble in filling the twenty-five vacancies existing. The trouble grew out of the discharge of the housekeeper, Miss Emma Scull, which occurred last evening. Miss Scull came here from Leavenworth, Kan., several years ago, and has made an enviable reputation by the neat and painstaking manner in which she conducted affairs at the Johnston. In an interview this morning with the proprietor and landlord, J. D. Johnston, the Enquirer correspondent learns that the housekeeper was fired for making trouble between himself and wife. Mrs. Johnston is away on a visit with her brother, Thomas Dugan, of Springfield, Ohio. During her absence the housekeeper kept Mr. Johnston under surveillance, and this week wrote his wife a letter accusing him of undue intimacy with the wife of a deceased brother. Mrs. Johnston, according to the landlord's own words, 'being naturally of a jealous disposition, immediately

became enraged upon receipt of this letter, and wrote back, raising h—-l. It didn't take Mr. Johnston very long, after getting this letter, to see the housekeeper and give her her time. The other girls, upon learning of her discharge, also packed their personal effects, and walked out in a body, with their Saratogas under their arms."

The issue of the paper containing this was sold on the streets of Logansport by newsboys, and at news stands, and elsewhere throughout the country. Defendant in error brought suit for libel in the circuit court of Cass county, Ind. The cause was transferred to the circuit court of the United States for the district of Indiana, and there she recovered a judgment for \$4,000.

Addison C. Harris and Alex. Murray, for plaintiff in error.

W. P. Kappes and M. Winfield, for defendant in error.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

SHOWALTER, Circuit Judge (after stating the facts as above): Defendant in error testified as a witness on the trial. She was asked by her counsel, "How many children have you?" and answered that she had three, aged, respectively,  $6\frac{1}{2}$ ,  $5\frac{1}{2}$ , and  $3\frac{1}{2}$  years. In his charge to the jury, the court said: "In determining the amount of damages, you may take into consideration her family relations and her social standing, the injury, if any, to her feelings, her wounded sensibilities, and her sense of shame and dishonor." This direction and the foregoing question and answer are assigned as errors, the point of objection being that the jury were thereby given "the right to consider, as an element of damage sustained by plaintiff," the fact that she had three children of the ages stated.

The hurt by a libel is primarily to reputation, meaning the esteem in which the person libeled is held by others. Involved in this is the pain or suffering personal to the injured party, to wit, the consciousness of degradation attaching to himself and those whose lot in life is determined by his own. It is not the sense of this record that the children of defendant in error were to be compensated. The children were part of her environment. Her relation to them was such as might make the hurt to herself more acute and permanent, such as might render her more sensitive to and more helpless against the wrong done. This court cannot hold that the fact objected to was improperly brought to light, especially in view of the peculiar character of the publication in question. *Barnes v. Campbell*, 60 N. H. 27; *Bolton v. O'Brien*, 16 L. R. Ir. 97, 110; *Chesley v. Tompson*, 137 Mass. 136; *Klumph v. Dunn*, 66 Pa. St. 141; 3 Suth. Dam. p. 259, § 1210; *Id.* p. 2599, § 1214. The matter quoted from the charge, in connection with the remainder of the charge as quoted below, could not have misled the jury.

The trial judge said, in concluding his charge:

"In determining the amount of damages, you may take into consideration her family relations and her social standing, the injury, if any, to her feelings, her wounded sensibilities, and her sense of shame and dishonor. You may also take into consideration the publicity given to the accusation, and all the circumstances in evidence bearing on the character and extent of her injury, and award her such sum as shall fully and fairly compensate her for all the wrongs and injury inflicted upon her by such publication. In determining what amount would be just and proper, you may take into consideration any circumstance in the evidence which tends to show that the defendant was

not actuated by actual malice, or that it acted in good faith, in the honest belief that it was publishing the truth, in making the publication, as matters in mitigation of the damages. You should, however, remember that the reputation of a woman for chastity, and especially the reputation of a mother, having children, for chastity, is a thing of inestimable value, and that any injury done to such reputation by the publication of false and libelous charges ought to be compensated for by the assessment of damages which should be a full and adequate satisfaction for all the wrong and injury inflicted upon her."

Counsel for defendant (plaintiff in error) then said:

"I will ask your honor to state the rule that in this case the jury must not, in assessing damages, in any event allow anything by way of vindictive or punitive damages."

And the court added:

"I will do so, although I think it is covered in my charge. While it is your duty to return, if you should return a verdict for the plaintiff, a verdict for such sum as shall fully and fairly and completely compensate her for all the injuries that she has suffered, or will suffer in the future, you are not permitted to assess anything by way of punishment, or vindictive damages; simply compensatory damages."

Error is assigned upon the following words, taken from the foregoing portion of the charge: "You should, however, remember that the reputation of a woman for chastity, and especially the reputation of a mother, having children, for chastity, is a thing of inestimable value." This sentence did not involve any proposition of law. In view of the context, it could not have been understood by the jury as anything more than an observation, sentiment, or opinion which the judge saw fit to express. That to the normal woman, especially if she be in a state of widowhood with small children around her, a reputation for chastity is of very great importance, is an inference which the ordinary observer, whether he happen to be judge or juror, will be apt to draw from social phenomena in this country. But it is an inference of fact. The legal effect of the charge here was not altered by the words objected to.

In *Smith v. Association*, 14 U. S. App. 173, 5 C. C. A. 91, and 55 Fed. 240, which was a case very like the present, the trial judge, referring substantially to the same matter as that spoken of by the trial judge in this case, said in his charge: "It is impossible to arrive by any arithmetical calculation at the amount of damages to which she is entitled on this account." Responding to the error assigned on this pronouncement, the court of appeals said: "This was a truthful statement, and the jury being further instructed that they were to compensate for the actual injury caused, that, while the amount was in their control, the amount should be reasonable and should be just, the defendant's exception is clearly unsound." It is not claimed in the case at bar that the jury were not correctly instructed as to the measure of damages. The error upon the statement above quoted from the charge is therefore not well assigned.

To one A. C. Barnett, a witness called by defendant in error, was put by her counsel the following question: "You may state, Mr. Barnett, after reading the article [meaning the publication in question], to whom did you understand it referred when it spoke of Mr. Johns-



ton's intimacy with the wife of a deceased brother?" The witness answered: "I understood it to mean Mr. Johnston and the widow that had come from Australia, that he had sent for." Counsel for plaintiff in error objected to the question, saying: "That, while the facts and circumstances might be proven, it was for the jury to determine who was meant." In this court the point is argued by both sides as though the witness had answered that, upon first reading the publication, he understood defendant in error to be the person referred to by the words "the wife of a deceased brother." Mr. Barnett was himself an hotel keeper in Logansport. He knew Johnston, and had been acquainted with defendant in error during all the time of her residence in Logansport.

In *Odgers on Libel and Slander* (page 567), it is said: "The plaintiff may also call at the trial his friends or others acquainted with the circumstances, to state that, on reading the libel, they at once concluded that it was aimed at the plaintiff. It is not necessary that all the world should understand the libel; it is sufficient if those who know the plaintiff can make out that he is the person meant." To the same effect is the text in *Falkard's Starkie on Libel and Slander* (4th Eng. Ed. p. 589).

In *Eastwood v. Holmes*, 1 Fost. & F. 349, Willis, J., ruled out the question: "To whom did you understand the article to apply?" But in that case the publication showed on its face that it applied to an entire class of dealers, and not to the particular person who brought the suit. Moreover, the court held the publication itself not actionable. Decisions in England and in this country seem in general to be in accord with the text as quoted from *Odgers*. *Du Bost v. Beresford*, 2 Camp. 512; *Cook v. Ward*, 6 Bing. 412; *Broome v. Gosden*, 1 C. B. 728; *Bourke v. Warren*, 2 Car. & P. 307; *Knapp v. Fuller*, 55 Vt. 311; *McLaughlin v. Russel*, 17 Ohio, 481; *Prosser v. Callis*, 117 Ind. 105, 19 N. E. 735.

One's reputation is the sum or composite of the impressions spontaneously made by him from time to time, and in one way or another, upon his neighbors and acquaintances. The effect of a libelous publication upon the understanding of such persons, involving necessarily the identity of the individual libeled, is of the essence of the wrong. The issue in a libel case concerns not only the sense of the publication, but, in a measure, its effect upon a reader acquainted with the person referred to. The accuracy of the witness as to identity may be tested by cross-examination. At all events, and in view of the answer by Mr. Barnett, which appears to be the only matter in the record suggesting the possibility that there might have been some "wife of a deceased brother" other than this defendant in error to whom the publication in fact referred, this court cannot hold the error in question well assigned.

One Gravis, a witness called by plaintiff in error, testified that two daily newspapers, *The Pharos* and *The Daily Journal*, were published in Logansport. Error is assigned upon the refusal of the court to permit an answer to the following question put to this witness: "You may tell the jury whether publications of the purport of the one

you have there [being the article published in the Cincinnati Enquirer] were published in those papers?" This inquiry covered publications which might be subsequent to or copied from that sued on. It was not error to exclude an answer.

In the course of the charge, the court said:

"There is no privilege in journalism which will excuse a newspaper in publishing false and defamatory charges when any other like publication by another person would not be excused. Whatever functions the journalist performs are assumed for his own advantage, and are laid down at his will, and are performed under the same responsibility attaching to all other persons. A journalist is not above the law. The greater extent of circulation makes his libels more damaging, and imposes special duties, as to care to prevent the risk of such mischief, proportionate to the peril."

The last sentence, which is the matter assigned as error, is a truism; namely, that whoever, for personal profit, voluntarily makes use of an instrumentality which may be exceptionally hurtful to another, must, for that reason, be the more careful. The word "satisfaction," near the close of the charge, as before quoted in this opinion, obviously means "equivalent" or "compensation."

The judgment is affirmed.

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ATWOOD v. CHICAGO, R. I. & P. RY. CO. et al.

(Circuit Court, W. D. Missouri, W. D. February 5, 1896.)

1. NEGLIGENCE—PLEADING AND PROOF—DIRECTING VERDICT.

The administratrix of one A. brought an action, to recover damages for his death, against two railroad companies, the R. Co. and the U. Co., alleging that the R. Co. operated its trains between certain points over the railroad of the U. Co., but not alleging upon what terms or conditions the R. Co. used such railroad; that on a certain day, when trains on both roads were to leave the station at L., it was the duty of the R. Co.'s train, which followed the U. Co.'s train, to wait at L. 10 minutes after the departure of the latter, and it was the duty of the U. Co., by its train dispatcher at L., to hold the R. train at L. 10 minutes after the departure of the U. train; but that the R. train negligently left 5 minutes after the U. train, and the U. Co. negligently permitted it to do so, in consequence of which the R. train ran into the U. train, causing the death of A., the conductor of the latter. No negligence was alleged other than the starting of the trains from L. too near together. No definite evidence was given by the plaintiff to show what interval actually elapsed between the departures of the two trains from L., though the rules of the U. Co. required an interval of 10 minutes. The whole drift of the plaintiff's evidence tended to show that, after the R. train left L., the employees in charge of it, knowing the U. train was in front, could, by the exercise of due care, have avoided the accident. *Held*, that plaintiff could recover only by proof of the negligence alleged in the complaint; and as there was nothing to justify a finding that the U. Co. started the trains from L. too close together, or that such act, if proved, was the proximate cause of the injury, the jury should be instructed to find for the U. Co.

2. SAME—RESPONDEAT SUPERIOR.

It was shown that the R. Co. used the U. Co.'s tracks under a contract which provided that the U. Co. should have the exclusive right to make rules for the operation of that part of the railroad used by the parties jointly, and that all trains should move in accordance with the order of the superintendent of the U. Co. Accordingly, *held*, that the R. Co., having no right or power to direct the movements of its trains while on

the track of the U. Co., could not be held responsible to third parties on the doctrine of respondeat superior, for any negligence of the men in charge of the train while running over such tracks, though they were in its employ and paid by it.

Action to recover from the Chicago, Rock Island & Pacific Railway Company and the receivers of the Union Pacific Railway Company damages resulting to plaintiff from the death of her husband, who was killed on the Union Pacific Railway, a few miles west of Kansas City, in a collision between two trains, on the 2d day of January, 1894, which were being operated on said railway.

The Rock Island Company owned and operated a railway from Denver to the city of Topeka, and its trains were run and operated over the Union Pacific Railway from Topeka to Kansas City, and from Kansas City to Topeka, under a contract made between the Union Pacific Company and the Rock Island Company. The contract, among other things, provided that the Union Pacific Company should make rules and regulations for the operation of its railway between the points above mentioned, which should have like application to all engines and trains which may be moved over said railway, and that the trains of both companies should move under and in accordance with the orders of the superintendent or train dispatcher of the Union Pacific Company. The Rock Island train was manned by employes hired and paid by that company. The deceased, at the time of the collision, was in charge as conductor of the Union Pacific train, and was an employe of and working for that company. The plaintiff alleged in her petition that the death of her husband was caused by the negligence and carelessness of the employes of the Rock Island Company in charge of its train.

David Overmeyer and D. W. Mulvane, for plaintiff.

John W. Beebe and N. H. Loomas, for defendant Union Pac. Ry. Co.

W. F. Evans, Frank P. Sebree, and J. E. Dolman, for defendant Chicago, R. I. & P. Ry. Co.

PHILIPS, District Judge (orally). At the conclusion of the plaintiff's evidence, each defendant has interposed, in the nature of a demurrer to the evidence, an instruction directing the jury to find for the defendants notwithstanding the evidence. It is evident that the petition in this case was framed on the theory of the right of a joint action against the defendant corporations growing out of concurring acts of negligence contributing to the injury in question. It alleges that the defendant the Rock Island Railway Company "operated its trains between the city of Topeka, Kansas, and Kansas City, Missouri, over the railroad of the said Union Pacific Railroad Company, hereinafter described." There is no averment as to the relation existing between these two companies,—no allegation as to the terms or conditions upon which the Rock Island Company operated its trains over the track of the Union Pacific Railroad Company. It appears from the petition that the railroad track was and is the property of the Union Pacific Company. Whether by lease or other contract the Rock Island Company ran its trains on this railroad does not appear. The averment of the petition would hold good even if the Rock Island Company were a mere intruder or trespasser upon this road.

When it comes to the specific allegations by which it was sought

to fix the liability of the Union Pacific Railroad Company for this injury, it is alleged as follows:

"Plaintiff further alleges that said Union Pacific train No. 1-12 left Lawrence about 4:30 o'clock on the morning of the 2d day of January, 1894; that, under the rules governing the operation of all the trains upon the railroad in question, it was the duty of the Chicago, Rock Island and Pacific train to remain at Lawrence ten minutes after the departure of the said Union Pacific train; that it was the duty of the receivers of the Union Pacific Railway Company, through its train dispatchers and telegraph operators, to hold said Rock Island train at Lawrence for ten minutes after the departure of the Union Pacific train, but, wholly disregarding its duty in that respect, the Chicago, Rock Island & Pacific train negligently and carelessly left Lawrence, and followed said Union Pacific train, within five minutes after the departure of said Union Pacific train; that, wholly disregarding their duties in that respect, said receivers of the Union Pacific Company negligently and carelessly permitted said Rock Island train to leave Lawrence within five minutes after the departure of said Union Pacific train No. 1-12."

There is no other negligent act or omission of duty contributing to the injury alleged against the Union Pacific Railway Company.

It is a well-recognized rule of pleading and practice in this jurisdiction, following the repeated rulings of the supreme court of this state, that the proof can never be broader than the averments of the petition; that a party cannot recover upon other ground of negligence than that specifically alleged; for the reason that the defendant comes to court with his evidence to meet the issue, and none other, presented by the plaintiff's petition. It is not correct, as claimed by counsel for plaintiff, that recovery may be had upon this petition because of the assumed failure of the defendant to hold the train at some other point 10 minutes between Lawrence and the place of disaster. Under the petition, Lawrence is the initial point, and the negligence on the part of the Union Pacific Company is limited and restricted to the station at Lawrence. The neglect is alleged to have occurred there, and not elsewhere. There was no special effort on the part of the plaintiff to show by direct testimony the precise time or minute at which the Rock Island train was permitted to follow the Union Pacific train out of the Lawrence station, and there was certainly no effort on the part of the Union Pacific Railway Company to help out the plaintiff in respect of this issue, whatever other assistance she may have received from the Union Pacific Company in her effort to fix the responsibility for her husband's death on the Rock Island Company. It is true, as contended by plaintiff's counsel, that there is some evidence tending to show that the Rock Island Company, at the Lawrence station, assisted in pushing and starting the Union Pacific train out of that station; but how long it stopped after that time we do not know. It appears that there was a watering station and a switch at Bismark Grove, at which trains were accustomed to stop, which was near the corporate limits of the city of Lawrence; that the Rock Island train pulled up there as if to pass the Union Pacific train, which was not accomplished. As to what interval of time in fact elapsed between the leaving the station at Lawrence of these two trains it is im-

possible to determine from this evidence. The rules prescribed by the Union Pacific Railway Company declare exactly how these trains should leave the station; that no train should leave a station until it has permission or direction from the train dispatcher or operator at that place. Where a party undertakes to recover judgment against another, to take the property of one, and appropriate it to his use, upon the ground of an imputed negligent act, the evidence ought to be so direct and tangible as to satisfy the conscience of both court and jury that a case is made out.

And, even if it could be held that there is sufficient evidence to go to the jury to determine the time within which the train in question did leave Lawrence station, the next question which confronts the court and jury is, was there any real connection between the time of the departure of the Rock Island train from Lawrence and the accident in question? No recovery can be predicated upon an imputed negligent act unless such act contributes directly to the injury. The whole drift of the plaintiff's testimony in this respect, assisted by the employes, agents, and lawyers of the Union Pacific Railway Company, being directed to show that after passing beyond Lawrence, knowing that the Union Pacific train was in advance of the Rock Island train, and could be readily seen, so that, by the exercise of due care and caution on the part of the Rock Island engineer and servants, the accident could have been prevented, it is quite inconceivable that, under the evidence presented, there was any such connection between the time of leaving Lawrence station and the collision to warrant the conclusion that the failure of the Union Pacific Company's agents at Lawrence to restrain the Rock Island train there for 10 minutes contributed directly or even remotely to the accident. Therefore, to maintain this action, it must be held under such a petition, on general principles of law, that the Union Pacific Company is liable for damages resulting from injury to one of its own employes by reason of the negligent act of the Rock Island Company while running its train over the track of the Union Pacific Company.

Counsel for the latter company direct the attention of the court to the decisions of the court of appeals of Texas and of the supreme court of Indiana which hold, in effect, that the company in whose service the employe is, the employer himself being free from negligence contributing to the injury, is not liable for the injury resulting from the wrongful act of a third party. The argument of these courts is that the liability, as in the case of the Union Pacific Company to its own employes, must spring either from a contractual relation, or from some obligation which the law, on principles of public policy, imposes. It being the duty of the employer to furnish a reasonably safe place for his employes to work in, to furnish suitable and reasonably safe implements and instruments with which to work, and keep the machinery in reasonably safe condition, so as not to expose the employe to unnecessary danger, when it has done this it has performed its full

duty under the law to its own employé. Therefore, they say that where the master has not been guilty of any negligence himself which contributes directly to the injury, and the injury comes to the employé outside of any act of the employer, beyond the control of the immediate master, by some vis major, both reason and justice demand that the master shall not be held liable therefor. Whether or not this ruling would apply to the case at bar, to an injury occurring in the state of Kansas, where the master, under the special statute, is made liable for an injury resulting to his servant by the negligent act of a fellow servant, I do not deem it essential to the conclusion reached to determine. My conclusion in this case is predicated of the evidence as applied to the pleadings between the plaintiff and the Union Pacific Railway Company. The demurrer to the evidence or the instruction asked by the Union Pacific Railway Company will be given.

In respect to the case against the Rock Island Company, I am free to confess that the question presented is not free from embarrassment; and I have not had the time, in the progress of this trial, and since the argument, to give it extended consideration. The plaintiff bottoms her right of recovery against the Rock Island Company upon the ground that the death of her husband, who was the conductor on the Union Pacific train, resulted from the negligence of the servants of the Rock Island Company as to the manner in which they operated the train of the latter company at the time of the injury; that they negligently and wantonly permitted the Rock Island train to run down upon the train on which the conductor Atwood was located, causing his death. The liability of this company must arise either from some contractual relation between the defendant and the injured party, or from some duty the company owed to the public. It does not spring from any contractual relation, because of the relation of master and servant between the defendant company and the conductor Atwood on the Union Pacific train. It must therefore spring from the duty which the defendant company was under at the time to the public, and which it was in position to exert. While it is true that third parties cannot be affected by any contract to which they are not parties, it is competent in this case, as a matter of defense, for the defendant company to show how it was upon this road at the time of the injury, whether it was there under such conditions and circumstances as to give this plaintiff a cause of action against it. Without stopping to recount the authorities, it will be found that the liability of railroad companies for personal injuries to third parties grows out of the fact that such companies at the time were running and operating the train which caused the injury. In other words, that it was running and operating the railroad. It is common law that where one railroad company leases its railroad to another railroad company, and the latter is operating the road, and an injury is done to a third party, both the lessor and lessee may be held responsible therefor; the lessor upon the ground that it cannot escape its obligation to

the public by devolving the operation and management of its road upon another party, and the latter upon the ground that it controlled and operated the train at the time of the injury. The former having obtained a franchise from the state authorizing it to operate a railroad, it cannot abdicate, so far as the public is concerned, and escape its responsibility, no matter what the terms of the contract between it and the lessee as to the liability of the latter over to the former for injuries and losses occasioned by the negligent acts of the lessee. It is true that the contract between the Union Pacific Company and the Rock Island Company uses the words that the Union Pacific Company "lets, leases, and demises to the party of the second part, for nine hundred and ninety-nine years," the right to run the trains of the Rock Island road over the Union Pacific tracks between Topeka, Kan., and Kansas City, Mo.; but this contract does not establish the relation of lessor and lessee between the two railroads. It was not competent for the Union Pacific Railway Company, under its charter from the government of the United States, to throw off its obligation to the public to run and operate its road by devolving that duty upon the Rock Island Company by contract.

The law in this respect is well stated by Justice Miller in *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.*, 118 U. S. 309, 6 Sup. Ct. 1094, as follows:

"As the just result of these cases, and on sound principle, unless specially authorized by its charter, or aided by some other legislative action, a railroad company cannot, by lease or any other contract, turn over to another company, for a long period of time, its road and all its appurtenances, the use of its franchises, and the exercise of its powers; nor can any other railroad company, without similar authority, make a contract to receive and operate such road, franchises, and property of the first corporation."

This doctrine has been applied by Judge Sanborn, of this circuit, to a contract between these two parties almost on all fours with the one under consideration. See *Union Pacific Ry. Co. v. Chicago, R. I. & P. Ry. Co.*, 2 C. C. A. 174, 51 Fed. 309, in which it is held, in effect, that such a contract does not establish the relation of lessor and lessee between the two companies. The contract under review in that case gave the Chicago, Rock Island & Pacific Railroad Company the right to use the track in conjunction with the Union Pacific Railroad Company over the Omaha bridge, and through the city of Omaha, some few miles, to make connection with its own road. That contract used the language "that the Pacific Company hereby lets to the Rock Island Railroad Company," for the purposes mentioned, the right of occupation for 999 years, just as in the case at bar. It contains provisions almost counterparts of those in the contract in question. It provides for making each party liable to the other for injuries to third persons, and gives to the Union Pacific Railroad Company the right to make rules and regulations for the operation of the road, just as in the case at bar; and the two contracts were doubtless drawn by the same lawyers. In respect of that contract, Judge Sanborn said:

"By this contract, the Pacific Company does not surrender or transfer any part of its road or property; on the other hand, it retains their possession, and reserves to itself, by the express terms of the contract, the absolute control, through its own superintendent, of the operation of every train of every company that enters upon these tracks."

Looking at the contract in question, it is evident that it was in the mind of the distinguished lawyers who drew it between these two railroad companies that they recognized a primary liability on the part of the Union Pacific Railway Company to third persons for damages, both to stock and injuries to third parties, resulting from the running of trains of the Rock Island Company over this track; for the contract expressly provides, in effect, that, where recovery shall be had against the Union Pacific Railway Company for damages consequent upon the negligent act of the Rock Island Company, the Rock Island Company shall be answerable over to the Union Pacific Company therefor, to be settled between the parties by submission to arbitration. This was done evidently because of the recognition by the contracting parties of the well-settled rule that, where the lessor or party owning the road is mulcted in damages for injuries to persons or to property by reason of the negligent act of its lessee or the company using its track, there was no right of action in its favor over against the lessee or party having permission to run its trains over its track, in the absence of a special contract creating such liability; and it was for this reason that the parties to this contract put in the express provision just referred to. The contract also provided that the Union Pacific Company should not be bound by any judgment against the Rock Island Company, and vice versa, to which the one party or the other was not a party or had notice and the opportunity to interpose and make defense. No more importance, therefore, can attach to these provisions of the contract, than that they are a guaranty of the companies for their own protection. And the courts have repeatedly held that, in an action by a third party against the company owning the road, it is wholly immaterial what these provisions are between the two companies using the track. They do not affect the question of their respective liabilities to the public.

It is expressly stipulated in this contract that the Rock Island Company shall do no business between Topeka and Kansas City. It shall take neither freight nor passengers, nor make any contract in respect of business between these two points. The business and traffic on that part of the road belongs absolutely and exclusively to the Union Pacific Company. Nothing but the simple right is given to the Rock Island Company to send its trains over that part of the railroad of the Union Pacific Company under joint schedules. The third paragraph expressly provides that the Union Pacific Company shall have the exclusive right to make all rules and regulations for the operation of that portion of its railroad to be used by the parties jointly, which shall have like application to all engines and trains which shall be moved over said railroad. All trains shall move under and in accordance with the orders of the superintendent or train dis-



patcher of the party of the first part (the Union Pacific Company), which shall as nearly as may be practicable secure equality of rights and privileges to all trains of the same class. Therefore, between Topeka and Kansas City the Rock Island train passed under the rules and regulations made alone by the Union Pacific Company, and they moved under and in accordance with the orders of the superintendent and the train dispatcher who were servants of the Union Pacific Company. In other words, in their operation and movements between Topeka and Kansas City, the Rock Island trains were absolutely under the undivided control and jurisdiction of the officers and agents of the Union Pacific Company.

In order to subject the Rock Island corporation itself, so far as third persons are concerned, to liability for injuries resulting from the manner and mode of conducting their trains on this track, authority must be found in the doctrine of respondeat superior. A reference to the fundamental rule, as expressed in recognized authorities, will clearly present the thought that is in my mind.

Parsons on Contracts says:

"There must be some principle which limits and defines the rule of respondeat superior, and we think it may be clearly seen and fixed. It is this: The responsibility of the master grows out of, is measured by, and begins and ends with, his control of the servant."

Judge Cooley, in his work on Torts, says:

"But only as between two parties does the contract establish their relation and determine their rights. Whatever obligations the relation might impose on either as respects third parties would not depend upon the nature of the stipulation, but must spring from the relation itself. If one is injured by the servant of another, and the injury is in a manner connected with the fact of service, it would be immaterial to the injured party what the contract of service was, how long it was to continue, what compensation was to be paid for it, or what mutual covenants the parties had for their own protection. The liability of the master, if any, cannot depend upon circumstances with which the public has no concern; it must come from the fact that whenever one person has placed himself under another's direction and control, in a manner that should impose on the latter the obligation to protect third parties against any injury from the acts and omissions of his subordinate, it could not at all depend on whether the master was to pay anything, nor whether the service was permanent or temporary. His control of the action of the other is the important circumstance, and the particulars of his arrangements are immaterial."

Wood, in his work on Master and Servant, says:

"The simple test is: Who has the general control of the work? Who has the right to direct what shall be done and how to do it?"

The supreme court of this state, in *Hilsdorf v. City of St. Louis*, 45 Mo. 98, lays down this postulate:

"The rule that prescribes the responsibility of principals, whether private persons or corporations, for the acts of others, is based upon their power of control. If the master cannot command the servant, the acts of the servant are clearly not his. He is not master, for the relation implied by that term is one of power, of command; and, if a principal cannot control his agent, he is not an agent, but holds some other or additional relation. In neither case can the maxim respondeat superior apply to them, for there is no superior to respond."

As said by the supreme court of Vermont:

"The general principle of law is that a master is liable for the tortious acts of his servant which are done in the service of the master. This responsibility grows out of and is measured by his control of the service, and in fact it begins and ends with it." *Town of Pawlet v. Rutland & W. R. Co.*, 28 Vt. 297.

I hesitate not to assert that if we would go to the fundamental principle, which is always the safest guide, it would be found that the matter of the liability of the master depends and turns upon the question, who, at the moment of the imputed injury, had the control and direction of the movements of the servant whose misconduct or negligence caused the injury? If the servant at the time of the injury is not subject to the direction of the master sought to be charged upon the doctrine of respondeat superior, but is subject to the order and dominion of another, over whose actions the party sought to be charged has no control, the rule has no application. The learned counsel for plaintiff, recognizing the force of this contention, very ingeniously sought in argument to distinguish between the effect of the rules and regulations of the Union Pacific Company at stations where the power and authority of the superintendent or local agents of the Union Pacific Company could be directly and personally exerted upon the trainmen in charge of the Rock Island Company, and their inability to control them between stations, thus undertaking to limit the effect of this contract and these rules and the jurisdiction of the Union Pacific Company to stations where there was an opportunity, by telegraphic wires and operators, to inform the superintendent of the Union Pacific Company of any dereliction of duty on the part of the servants of the Rock Island Company; so that, when this tangible continuity of control should be for a moment broken, the obligation to operate the trains, and the fact of the operation, ceased,—was taken from one party, and conferred upon the other, making a sort of interchangeable jurisdiction. The contract contemplates no such absurdity. It is a doctrine as old as the Bible itself, and the common law of the land follows it, that a man cannot serve two masters at the same time; he will obey the one, and betray the other. He cannot be subject to two controlling forces which may at the time be divergent. So the English courts, which are generally apt to hit the blot in the application of fundamental rules, hold that there can be no application of the doctrine of respondeat superior in its application to two distinct masters; that the servant must be subject to the jurisdiction of one master at one time. This contract would cut its own throat had it provided that when at a station where there was a telegraph office, and, perchance, was present some superintendent or train dispatcher of the Union Pacific Company, the company would be responsible for anything done by the trainmen at the station, but the moment it passed outside of the station, and before it reached another, it was under the jurisdiction of the Rock Island Company, as its master. The contract means no such thing.

As said by the supreme court of Iowa in the case of *Miller v. Railroad Co.*, 76 Iowa, 655, 39 N. W. 188:

"But they claim that the trainmen were not under the control of Harris & Co. as to the speed at which the train was to be run over the road, and

as to the care with which the same was to be handled while in motion. There is no evidence that the defendant, by any direct act, retained any control over the train or its crew. On the contrary, it was at work in constructing a railroad. It was not run under any time card, or by the direction of any train dispatcher of the defendant. The fact that the engineer, fireman, brakemen, and conductor, who composed the train crew, were retained upon defendant's pay rolls, and received their wages from the defendant, does not tend to show that the defendant retained any control of the movements of the train."

Counsel has cited the court this morning to an Illinois case, which holds, in effect, that under a contract by which one railroad company permits another to use its track for connecting purposes, subject to the right of the owner company to make rules and regulations for the operation of all trains on the track subject to the control of its superintendent and train dispatchers, such superintendent and train dispatchers thereby become but the agents and servants of the company having the right of trackage. No authority is cited in support of this broad proposition, and it does not stand to the logic of the doctrine of respondeat superior. It would present the solecism of the master's responsibility where he was without the power at the time to control the act of the imputed servant. It certainly is not the doctrine of the court of appeals of the Sixth circuit, as laid down in the case of *Byrne v. Railroad Co.*, 9 C. C. A. 666, 61 Fed. 605. In that case the Ft. Scott Railroad Company employed a short line through the city of Memphis, belonging to another corporation, organized as a bridge company, for the purpose of transferring defendant's trains over the Mississippi river, and through the city of Memphis, connecting with the Memphis road at the outskirts of the city. In effecting this transfer, the dummy engine of the transfer company was used, but the train was manned by employes of the Memphis Railway Company, with the exception, perhaps, of the dummy engineer. In effecting this transfer through the city, the train ran over and killed a man. It was held that action would not lie for this injury against the Memphis Railroad Company, for the reason that at the time of the injury the relation of master and servant did not exist between the Memphis Railroad corporation and the servants in charge of the train; that, for the time being, they were under the control, management, and direction of the transfer company, which alone was responsible. The court cites approvingly the language of the English courts in support of its position. Lord Justice Bowen said:

"The question is not who procured the doing of the unlawful act, but depends on the doctrine of the liability of the master for the acts of his servants done in the course of his employment. We have only to consider in whose employ the man was at the time when the act complained of was done in this sense, that by the employer is meant the person who had a right at the moment to control the doing of the act." *Donovan v. Construction Syndicate* [1893] 1 Q. B. 629.

The supreme court of this state certainly maintains the same fundamental doctrine expressed in *Smith v. Railroad Co.*, 85 Mo. 418. In that case, the defendant company, from Pacific City, had no track into the city of St. Louis. To reach the city, it had a contract with

the Pacific Railroad Company to run its train over the latter's track. This was a contract similar to the one in question, which denied to the defendant company the right to carry passengers and freight between those two points, and prohibited it from admitting to its trains a passenger. A passenger entering upon its trains, however, at St. Louis, received an injury in transit, for which action was brought against the St. Louis & San Francisco Railway Company. It was held that the company was not liable, for the reason that at the time the employes and those in charge of the railroad company were absolutely under the control and jurisdiction of the Pacific Railroad Company. The contract in that case had a provision similar to the one in question, by which the Missouri Pacific Railroad Company was indemnified against any loss or liability on account of any accident or damage received on the road through the fault or negligence of defendant or its agents or employes. Chief Justice Henry, speaking for the court, said:

"Giving it its broadest scope, it does not alter the relation of the two companies to passengers from St. Louis to any station between that and Pacific. If it be so construed that if the plaintiff in this case had sued the Missouri Pacific Company, and recovered a judgment, the defendant would be liable to the Missouri Pacific Company, it is but a contract of indemnity, which of itself cannot create a liability on the part of defendant to such a passenger. That, by the agreement, the Missouri Pacific Company was to pay no part of the wages of the trainmen who were to be furnished by defendant, does not create a liability on the part of the defendant to a passenger from St. Louis to a station between that and Pacific, any more than an agreement between the Missouri Pacific Company and an individual by which the latter should assume the payment of the trainmen on one of its trains, the company, as in this contract, reserving to itself the control of the trains and trainmen and the movements of the train, would render such individual liable for injuries received by one through the negligence of such employes."

The learned judge, further on, says:

"The trainmen, though in the permanent employment of the defendant, were, while moving the train from St. Louis to Pacific, under the exclusive control and management of the Missouri Pacific, and the engineer and firemen were in the permanent employment of the latter company. Not an order could the defendant company have given as to the running of that train between St. Louis and Pacific."

Further on, he says:

"Upon what principle the St. Louis & San Francisco Co. can be held liable in this case I cannot conceive. It certainly would be an anomaly to hold one responsible for the acts of another over whom he had no control. Such a principle obtains in no action between individuals, and no reason can be assigned why it should apply in suits against corporations."

It is sticking in the bark to undertake to whittle away the underlying principles governing these cases by saying, as lawyers and courts too frequently do, that the facts are not the same. The facts can no more make law than law can make facts. Facts cannot control principles of law, but facts are made obedient to governing principles of law in their application to the rights and obligations of parties.

I have examined with some care the rules and regulations promulgated by the Union Pacific Company under this contract. They

place the management of the trains, the whole manner of their operation, the speed at which they shall run, under the management of the Union Pacific Railroad Company. They prescribe how they shall approach other trains, the distance to be observed between trains while occupying the same track going in the same direction, and the safeguards that each must throw out, and the circumspection and vigilance each shall exercise. It prescribes the whole manner, and takes charge, of the running of trains; and the party who failed to observe these rules and regulations was violating the rules and regulations of the Union Pacific Railway Company. The defendant, the Rock Island Company, was without the power or authority under this contract to give a single direction. If, in the judgment of the Union Pacific Company, it would have been safe for a train to keep within 500 yards or even 1,000 feet of a train in advance of it, it had a right under the contract to so run its trains. If, in the judgment of its superintendent or train dispatcher, it was expedient, under the exigencies of the occasion, that one train should follow within 500 or 1,000 feet of the other, in order to make up lost time, the Rock Island Company would have been powerless to prevent it. It could give no different direction, although, in its judgment, it was exceedingly hazardous and unsafe to so run the train. In short, by this contract, its trains were absolutely subject to the jurisdiction, control, and direction of the Union Pacific Company as to the manner and time of running over this track. Under this contract, the Union Pacific Company charged the defendant company so much for the use of its track,—a certain percentage of the cost of the road and maintenance. It gets an income out of the operation of the road by the defendant company. It could not, therefore, so far as third parties are concerned, escape its liability, it would seem, for an injury done by the trainmen on the Rock Island Company's train; at least, it so seems to me on the investigation I have been able to give this question since the argument last evening, before the adjournment of court.

The instructions asked by the defendants will therefore be given, with leave to the plaintiff, if she so desires, to take a nonsuit before the case goes to the jury.

Thereupon plaintiff submitted to a nonsuit.

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#### ATLANTIC AVE. R. CO. v. VAN DYKE.

(Circuit Court of Appeals, Second Circuit. February 20, 1896.)

No. 94.

#### 1. CHARGING JURY—QUESTION SUBMITTED.

Plaintiff, a lineman in the employ of the defendant street-railway company, was injured in consequence of the wagon on which he was standing while engaged in his work being struck by a car controlled by another servant of the defendant. When the plaintiff rested his case, defendant moved for the direction of a verdict in its favor, on the ground that the proof showed that the accident was caused by the negligence of a fellow

servant of plaintiff, and the court was about to give such direction, but permitted plaintiff to reopen his case for proof of some defect in the car. *Held* that, under these circumstances, the jury must be assumed to have understood that they were to pass only upon the question finally sent to them, viz. the existence of a defect in the car, though no instruction that defendant would not be liable if the accident happened solely by the negligence of plaintiff's fellow servant was either given or requested.

2. NEGLIGENCE—SAFE APPLIANCES.

The evidence showed that the car had no sand box to sand the track and enable the brake to work effectively; that none of the defendant's cars had sand boxes, but that defendant, at certain seasons of the year, not including that at which the accident happened, caused the track to be sanded by sending out a special car to scatter the sand, which defendant claimed to be a better method. The court charged the jury that the only question was whether the car had proper appliances for stopping it; that the defendant was not bound to provide the very best appliances, but to provide what is reasonable, and such as a prudent man would provide; and left it to the jury to determine whether the car had reasonable appliances for stopping, or there was a lack of what it really ought to have had, which prevented its being stopped, and caused the accident. *Held* no error.

3. EVIDENCE—OPINION—HARMLESS ERROR.

A witness for plaintiff, testifying as an expert in the mechanism of electric cars such as that which caused the accident, was asked whether such a car could be safely operated without a sand box, and testified that it could not. *Held* that, although the question was improper, as calling for an opinion on the question which the jury were to decide, the error was harmless, as the witness' subsequent testimony showed that he meant only that the brake would not work, on a greasy rail, without sand.

In Error to the Circuit Court of the United States for the Eastern District of New York.

This case comes here on a writ of error to review a judgment of the circuit court, Eastern district of New York, entered May 9, 1895, for \$6,192.43, in favor of the defendant in error, who was plaintiff below. The judgment was entered upon the verdict of a jury awarding \$6,000 as damages for personal injuries resulting from the negligence of plaintiff in error, who was defendant below. A motion to set the verdict aside was denied. 67 Fed. 296.

Louis Malthaner, for plaintiff in error.

Raphael J. Moses, for defendant in error.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. Defendant owned and operated an electric street railroad in the city of Brooklyn, using the so-called "trolley," or overhead wire, system. Plaintiff was one of a gang of linemen employed by defendant, engaged in putting in cross-overs, switches, etc., and repairing the wires. This work was done at night, with the aid of an extension or tower wagon. Plaintiff, on the night of the accident, a dry, fair night, was stringing a span wire at a part of the line which runs under the track of an elevated railroad, an operation which required him to stand on the movable platform of the tower wagon about 20 feet above the street. While thus engaged, one of the cars of defendant, in charge of a conductor, and operated by a motorman, came along at a high rate of speed, and

struck the tower wagon, knocking defendant off, whereby he sustained severe injuries. Defendant assigns error to the court's refusal to direct a verdict in its favor, to the charge to the jury, and to the admission of certain evidence.

There was evidence that the motive power was cut off and the brake applied while the car was yet from 30 to 60 feet short of the tower wagon. It was running on an up grade, and the conductor testified that with the normal condition of a dry track and any power on, going up grade at the usual rate, a car could be stopped within 10 feet. The jury were not specifically charged that defendant would not be liable if the accident happened solely by reason of the carelessness of the motorman, but no request was made so to instruct them. Moreover, when the plaintiff first rested his case, defendant moved for a direction in its favor on the ground that the proof showed that the accident happened through the negligence of a fellow servant. The court thereupon held that there was not sufficient evidence to send the case to the jury, and was about to direct a verdict for defendant, when, upon plaintiff's request, he allowed the case to be reopened for further proof as to some defect in the car. Under these circumstances it must be assumed that the jury understood that they were to pass only upon the question which the court finally sent to them. The car in question had no sand box. None of the cars of this line had. The sand box is an appliance whereby, when required, sand is deposited on the track in front of the wheels, whereby the track is roughened, and the progress of the car retarded. The motorman is thus enabled to have more complete control of his car than he would if the sand were not there. Defendant, in certain seasons of the year,—not in summer,—sends out a special car, in which are men with shovels, who throw sand into hoppers through which it falls upon the track. Defendant contended that this was a more approved method of sanding the track than by the use of a sand box on each passenger car. Sand is, of course, more necessary when the weather is frosty or foggy, and there is sometimes a dropping of oil and water and steam from an elevated railroad track, which would have a tendency to wet the track beneath, or to make it slippery. As this accident happened on September 13th, it is a fair inference that the sand car was not at the time in use. The court charged the jury: That the only question was whether the car had proper appliances on it for stopping it. That "the defendant was not bound to provide the very best appliances known for the purpose, but the defendant is bound to provide what is reasonable in view of what can be provided for such use; that is, appliances such as reasonable and prudent men would provide." That "if this car was a reasonable and proper car, reasonably fitted, such as a reasonable and prudent man would put upon the tracks and line, and, having in view all the dangers and all the circumstances, it is for you to say whether it had reasonable appliances for stopping it,—if this car had such appliances, it is enough, and the verdict should be for the defendant. It is for you to say, looking at all the testimony, and what the witnesses have said about what is usual and proper as to the necessity for such things, looking

it all over in every aspect,—whether you think this car was fitted and well equipped for stopping it; and if you do think so, then return a verdict for the defendant. That being the case, then this is an accident for which the defendant is not responsible.” That “if you can find that there was a lack of what the car really ought to have had that prevented its being stopped, and in that way injured him, then you will return a verdict for the plaintiff, and otherwise not.” And the court further charged: “The plaintiff must make out his case by a fair preponderance of evidence, so that you can see fairly that there was a defect; that the car ought to have had a sand box; that there was something that it didn’t have that it ought to have had, and the lack of which prevented the car from being stopped before it reached this wagon, and that that was what injured the plaintiff,—then he is entitled to a verdict.” Upon the evidence, this was a proper charge. If defendant wished more specific instructions as to the reasonableness of using some other method of applying the sand, as, for example, by the use of a sand car, it should have requested them; but in view of the evidence, which, so far as the record here shows, indicated that at the season of year when the accident happened the alternative method was not in use, it is doubtful whether such instructions could properly be given. Defendant excepted “to that part of the charge where it is said that the car ought to have a sand box, or that the track ought to have been sanded.” We find no such express instruction in the charge, nor any language in it which at all imports any such instruction. On the contrary, it was distinctly left to the jury to say whether the car was operated with reasonably fit appliances for stopping it.

The only other exception which need be considered is to the allowance of a question to plaintiff’s witness Bullock. He was an electrician, familiar with the “mechanism and machinery” of electrical cars. He was asked, “Can an electrical motor car be safely operated without a sand box, through the streets of the city of Brooklyn?” to which he answered, “No, sir; not through a city.” The question was duly objected to as incompetent, and exception to its allowance was reserved. The question was an improper one. It was for the jury, upon the whole evidence, to answer the question whether or not it was safe to operate an electric motor car without a sand box, in the streets of Brooklyn. As an expert, the witness was competent to testify as to the relative efficiency of the stopping devices when operated with or without sand; to state, if he could, within what time or within what space a car with a sand box and a car without a sand box could be stopped. To do even this, moreover, he would probably require more data than the question supplied him with. The condition of the track, the grade, the speed of the car, its weight, and consequent momentum, are undoubtedly essential elements of the problem. It is not the sand box itself which helps to stop the car, but the sand which comes out of the box, and it would produce the same effect however it got on the track. But, although the witness was thus invited and allowed to give his opinion as to how the jury should decide the case, we do not see that it has operated to the



prejudice of the defendant. The subsequent testimony of the witness showed that all he meant was that "the brake will not work on a greasy rail without sand," and that with sand "you can stop a car almost immediately"; and it is fair to assume that the jury so understood his evidence, and gave it weight accordingly. The judgment of the circuit court is affirmed.

(March 2, 1896.)

Upon a petition for rehearing the following memorandum was made:

PER CURIAM. There was no "inadvertent confusion" in the mind of the court as to the phrase "sand box" and "sand car," nor was there any "misapprehension" of the witness Frick's statement "a sand box is never used in the summer time, but in the winter time." The court found abundant support for the statement of fact challenged by the petition in the particular circumstances attending the accident and in the further statements of this same witness: "In the place of putting sand boxes in cars," "we run a particular car over our road at certain times;" "to sand the track;" "we do not keep sand on the track all the time;" "in certain seasons it is not necessary to run sand cars out at all;" "this accident did not happen in the time of year when it needed sand." The other points presented on this motion are sufficiently discussed in the original opinion. Motion for reargument denied.

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#### MERRILL v. TOWN OF MONTICELLO.

(Circuit Court of Appeals, Seventh Circuit. March 5, 1896.)

No. 257.

#### LIMITATIONS—ACCRUING OF RIGHT—MONEY HAD AND RECEIVED.

The town of M. issued certain bonds, which were placed in the hands of an agent to negotiate. The agent sold the bonds, and absconded with the proceeds. A purchaser of part of the bonds afterwards brought suit on them against the town, which defended the suit on the ground that the bonds were issued without authority of law, and this defense was sustained. The bondholder then made a demand upon the town for the money paid its agent for the bonds, or for a sum which the town had recovered from the defaulting agent, in case its liability were held to be limited to the amount it had actually received, and, such demand being refused, filed a bill against the town to obtain the same relief. *Held*, that the accruing of plaintiff's right of action was not postponed until the making of his demand, but the same arose at least as soon as the town, by interposing its answer in the action on the bonds, denied its liability, and more than six years having elapsed since that time, during which plaintiff was at liberty to assert his claim in his action at law, his right was barred.

Appeal from the Circuit Court of the United States for the District of Indiana.

Addison C. Harris, for appellant.

C. C. Spencer and Alex. C. Ayres, for appellee.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge. In the year 1878 the town of Monticello, Ind., issued a series of 210 ten-year coupon bonds, for \$100 each, and placed them in the hands of an agent to negotiate. The agent sold 143 of the bonds to a firm of brokers at Indianapolis for \$12,918.40, and those bonds the appellant, Merrill, afterwards purchased in open market at Boston. The other bonds were sold at par by the agent of the town, and passed into unknown hands. The agent defaulted and fled the country, but, of the money received for the bonds, the town recovered \$7,000, which the agent had deposited in a bank. The agent had also given to the town a bond with sureties for the faithful performance of the duties of the agency. The town brought suit upon that bond, and recovered judgment; but, the judgment having been reversed by the supreme court of the state upon technical grounds, the town dismissed the action. *Wilson v. Town of Monticello*, 85 Ind. 10. Interest coupons maturing after May, 1880, not having been paid, Merrill declared the principal of his bonds due, as by their terms provided, and in the year 1881 brought suit in the circuit court of the United States for Indiana to enforce payment. The town answered that the bonds were issued without authority of law, and were therefore void, and so the circuit court finally adjudged; and the judgment in 1891 was affirmed by the supreme court, as appears in *Merrill v. Monticello*, 138 U. S. 673, 11 Sup. Ct. 441, to which reference is made for a fuller statement of facts. In November, 1892, the appellant filed this bill, in behalf of himself and all holders of the bonds mentioned, whereby he sought to recover of the town the amount received by its agent in consideration of the sale of the bonds, or, in the event the town should be deemed liable only for the sum of \$7,000 which came to its possession, then that judgment be given for that sum, and that the town be required to assign and deliver up, for the use of the complainant and other bondholders, the obligation which it holds against its agent and sureties. Upon demurrer to the effect that a case had not been stated to warrant equitable relief, and that the cause of action was shown to have accrued more than six years before the suit was brought, the bill was dismissed. 66 Fed. 165. The bill shows that before bringing suit the appellant made, in conformity with the prayer of the bill, a formal demand upon the town authorities, which was refused; and it is insisted here that until that demand was made the right of action did not accrue, unless there had been unreasonable delay in making the demand, and that the pending of the suit upon the bonds was a sufficient excuse for not making an earlier demand. Expressions are quoted from the opinions of the supreme court in *Louisiana City v. Wood*, 102 U. S. 294, and *Bank v. Townsend*, 139 U. S. 67, 75, 11 Sup. Ct. 496, to the effect that, the bonds being invalid, the liability or implied contract of the town was that it "would, on demand, return the money paid to it by mistake," implying that a demand was necessary; but in neither case was there involved a question of limitation, or of the necessity for a demand before suit. The most favorable view to the appellant is that the case should be regarded as one of trust, but, if so, it is of an *implied or constructive trust* only; and, there having been no fraudu-

lent concealment of the cause of action, it seems to be the settled doctrine that a demand before suing was not necessary, and that "lapse of time is as complete a bar in suits in equity as in actions at law." Among cases cited upon the point are *Elmendorf v. Taylor*, 10 Wheat. 152, 174; *Speidel v. Henrici*, 120 U. S. 377, 386, 7 Sup. Ct. 610; *Smith v. Calloway*, 7 Blackf. 86; *Musselman v. Kent*, 33 Ind. 452; *High v. Board*, 92 Ind. 580; *Newsom v. Bartholomew Co.*, 103 Ind. 526, 3 N. E. 163; *Parks v. Satterthwaite*, 132 Ind. 411, 32 N. E. 82; *Kraft v. Thomas*, 123 Ind. 513, 24 N. E. 346; *Codman v. Rogers*, 10 Pick. 112; *Sturgis v. Preston*, 134 Mass. 372; *McDonnell v. Bank*, 20 Ala. 313; *Morrison v. Mullin*, 34 Pa. St. 12; *Palmer v. Palmer*, 36 Mich. 487; *Thrall v. Mead*, 40 Vt. 540; *Keithler v. Foster*, 22 Ohio St. 27; *Jameson v. Jameson*, 72 Mo. 640. The case of *Cowper v. Godmond*, 9 Bing. 748, upon which strong reliance has been asserted, does not support the contention of the appellant, because, so long as the defendant in that case did not repudiate the contract, the plaintiff was precluded from questioning its validity, and from claiming a return of the money which he had advanced or paid upon it. In this case the plaintiff, if entitled to stand in the shoes of the original purchaser of the bonds, and to demand a return of the price paid therefor, had the right to make the demand at any time; and, once the town had denied the validity of the bonds, as it did by its answer in the suit at law, we think it clear that the statute began to run against the right of action now set up, and, more than six years from that time having elapsed before the action was commenced, we are constrained to hold that the bar is complete. The complainant was under no compulsion to wait for the end of the action at law before taking the steps necessary to save the rights now asserted. It was not a case of election between inconsistent remedies. Assuming that the right of the original purchaser to a return of the price paid followed the bonds, though passed by delivery to subsequent purchasers,—that seems to have been recognized as the rule in *Louisiana City v. Wood*, supra, *Smeltzer v. White*, 92 U. S. 390, and *Parkersburg v. Brown*, 106 U. S. 487, 1 Sup. Ct. 442,—the appellant might have recovered the price shown to have been paid for his bonds by adding to his declaration in the action at law the common count for money had and received. The judgment below is affirmed.

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DENVER ONYX & MARBLE MANUF'G CO. v. REYNOLDS.

(Circuit Court of Appeals, Eighth Circuit. January 7, 1896.)

No. 629.

1. EVIDENCE—MARKET VALUE.

Upon a question of the market value of Arizona onyx, it is not error to refuse to permit a witness to testify as to the market value of Mexican onyx, there being no offer to show that the latter was equal, inferior, or superior to the former.

2. PLEADING—REPLEVIN—COLORADO CODE.

Under the Colorado Code of Procedure (sections 79, 80), which provides that "an action to recover possession of personal property" can be maintained in all cases where "the plaintiff is the owner of the property \* \* \*

or is lawfully entitled to the possession thereof," and the same is "wrongfully detained by the defendant," a complaint which alleges that the defendant "wrongfully took" and "unlawfully detains" the property is sufficient, whether the defendant acquired possession wrongfully or in good faith, if he has detained the property after demand.

In Error to the Circuit Court of the United States for the District of Colorado.

The defendant in error, John B. Reynolds, brought this action against the plaintiff in error, the Denver Onyx & Marble Manufacturing Company, in the circuit court of the United States for the district of Colorado, to recover the possession of certain blocks of Arizona onyx, marked and numbered as set out in the complaint, amounting, in the aggregate, to 540½ cubic feet, valued at \$6,500. The complaint alleges the plaintiff was lawfully possessed of the property on the 1st day of January, 1893; that he is still the owner of the property and entitled to the possession thereof; "that the said defendant, on or about the 1st day of September, A. D. 1893, at Phoenix, in the territory of Arizona, wrongfully took said goods, chattels, and personal property from the possession of this plaintiff; that on the 18th day of October, A. D. 1893, and before the commencement of this action, the plaintiff demanded of the defendant the possession of said goods, chattels, and personal property; that said defendant still unjustly and unlawfully detains said personal property from the possession of this plaintiff, to the damage of the plaintiff in the sum of two thousand dollars,—wherefore, plaintiff demands judgment against the defendant for the recovery of the possession of said goods, chattels, and personal property, or for the sum of six thousand five hundred dollars (\$6,500), the value thereof in case a delivery cannot be had, together with two thousand dollars damages, and costs of this suit." The answer denies the material allegations of the complaint, alleges the defendant is the owner of the property, and sets up as an affirmative defense that about the 9th day of December, 1892, the plaintiff and Guy H. Reynolds, who, it is alleged, were then the owners of the property, delivered it to the Phoenix Hay & Grain Company, by way of pledge, to secure the payment of \$154.44, and that that company afterwards assigned the debt, and delivered the pledged property for its security, to the defendant, and that the plaintiff has not paid or tendered payment of the debt. The replication denied all new matter in the answer. There was a trial to a jury, and a verdict and judgment for the plaintiff for the property, and, if the return of the property could not be had, then for the recovery from the defendant of \$5,250, the value thereof; and thereupon the defendant sued out this writ of error.

S. L. Carpenter, for plaintiff in error.

Edward O. Wolcott, Joel F. Vaile, and Charles W. Waterman filed brief for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge, after stating the case as above, delivered the opinion of the court.

As tending to throw some light on its value, the court below permitted a witness to testify, over the objection of the defendant, that it cost a trifle over nine dollars per cubic foot to quarry and lay down at Phoenix, Ariz., by the side of the railroad track for shipment, the Arizona onyx in controversy. It is conceded that, if the onyx had no market value at Phoenix, then the cost of production, and such other facts as had a tendency to show its value, would have been competent. *Ruppel v. Manufacturing Co.*, 96 Mich. 455, 55 N. W. 995. But it is said that the plaintiff proved it had a market value at Phoenix, Ariz., and also in New York, and that this proof superseded the necessity of

any other proof on the subject, and made the admission of the testimony as to the cost of production erroneous. As a rule, the cost of production and transportation is not the best, or even competent, evidence of the value of an article. Without going into an extended discussion of the rule on this subject, it is sufficient to say that the plaintiff proved, by two witnesses, that the market value of the onyx in Phoenix, Ariz., and in New York, was from three to six dollars per cubic foot more than it cost to produce it. There was no evidence to the contrary of this. So that, assuming that the admission of the testimony as to the cost of its production was technically erroneous, it was an error which did not prejudice, but made in favor of the defendant.

It is next assigned for error that the court refused to permit a witness to testify that the defendant had purchased Mexican Pedrara onyx for nine dollars per cubic foot in New York, but there was no offer to show whether this onyx was equal, superior, or inferior to the Arizona onyx, and the evidence offered was, therefore, clearly irrelevant.

The defendant offered to prove that it found the onyx in the possession of the administrator of one Mills, and purchased and received the possession of the same from him. It did not prove, or offer to prove, that Mills or his administrator ever owned the onyx, or had any right to sell the same, or to the possession thereof. The plaintiff's ownership of the onyx was not seriously contested. The testimony we are considering seems to have been offered for the purpose of laying the foundation for the following instruction, which the defendant asked, and the court refused to give:

"If the jury find that the defendant company purchased the onyx in question from another than the plaintiff, in good faith, for a valuable consideration, without knowledge of title in the plaintiff, and received possession from the vendor without knowledge of title in any other than the vendor, then the plaintiff cannot recover under his complaint in this action."

The contention of the counsel for the plaintiff in error is that this is an action of replevin in the cepit, and that such an action will not lie except where the taking by the defendant was wrongful; and that, if the defendant came into the possession of the property in good faith, by purchase or otherwise from the wrongdoer, he is not a wrongful taker; and that the plaintiff, although he may be the owner of the property, and entitled to the possession thereof, must in such cases bring replevin in the detinet, and not in the cepit. The complaint alleges that the defendant "wrongfully took" and "unlawfully detains" the property. This is a perfectly good complaint under the Colorado Code, which abolishes the common-law form of actions. The term replevin does not appear in the Code of that state. Under that Code, this is "an action to recover possession of personal property," and can be maintained in all cases where "the plaintiff is the owner of the property \* \* \* or is lawfully entitled to the possession thereof," and the same is "wrongfully detained by the defendant." Rice's Colo. Code Proc. §§ 79, 80, and notes. At common law replevin lay where there was an unlawful taking, and detinue where there was an unlawful detention. The remedy provided by the Code "to recover posses-

sion of personal property" supersedes the common-law action of replevin, whether in the cepit or in the detinet, and all the ancient learning relating to these distinctions became obsolete upon the adoption of the Code. 2 Nash, Pl. (4th Ed.) 812 et seq.; Nichols v. Michael, 23 N. Y. 264. Under the Code the action for the recovery of personal property lies, by one entitled to the possession, against one wrongfully holding the possession, whether the possession was acquired in good or bad faith. In the action, the plaintiff may, if he maintains his suit, recover damages for the taking or detention of the property, and, if the property cannot be returned, judgment for its value. The remedy is plain and complete. Burrage v. Melson, 48 Miss. 237; Nash, Pl. supra. The complaint in this case was sufficient, under the Code, whether the defendant acquired the possession of the onyx wrongfully or in good faith. However acquired, his possession was wrongful after the plaintiff made a demand for its delivery.

The judgment of the circuit court is affirmed.

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#### MISSOURI, K. & T. RY. CO. v. FULLER.

(Circuit Court of Appeals, Eighth Circuit. December 30, 1895.)

No. 626.

##### 1. ASSIGNMENTS FOR CREDITORS—BY WHOM DISPUTABLE.

A debtor of one who has made an assignment for the benefit of creditors cannot dispute the validity of the assignment upon every ground which would render it voidable as against a creditor who should object to it on such ground.

##### 2. PRACTICE ON APPEAL—EXCEPTION—DEFECT OF RECORD.

An exception to the evidence of a witness on the ground that he testified from a memorandum made long after the fact, cannot be sustained when the record does not contain the memorandum, or disclose whether it was prejudicial or not, or whether it was in fact used by the witness.

##### 3. TORTS—DEFENSES—INDEMNITY.

It is no defense to a wrongdoer that the injured party has been indemnified by insurance, or has collected all or a part of such indemnity.

##### 4. CHARGING JURY—LANGUAGE OF COUNSEL.

It is not error to refuse to instruct a jury in the language suggested by counsel, when correct instructions on the same points have already been given.

#### In Error to the United States Court in the Indian Territory.

On September 23, 1891, Manny G. Butler and Robert E. Butler, partners as Butler Bros., were the owners of a stock of general merchandise situated in the town of Chouteau, in the Indian Territory, which was burned on that day. On September 24, 1891, Manny G. Butler and Robert E. Butler made a general assignment for the benefit of their creditors to Orange Fuller, the defendant in error. He brought this action as such assignee to recover from the Missouri, Kansas & Texas Railway Company, the plaintiff in error, the value of this stock of goods, on the ground that the fire which destroyed it was negligently set by the employes of that company. The company denied the negligence charged against it, denied that Butler Bros. owned the stock of goods, and denied that they had assigned the claim for their destruction to the defendant in error. The case was tried to a jury, and a verdict was found and a judgment rendered against the railroad company. This writ of error was sued out to reverse this judgment.

Clifford L. Jackson, for plaintiff in error.

Harrison O. Shepard, James P. Grove, and Richard B. Shepard filed brief for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

Four supposed errors in the rulings of the court below upon the trial in this case are pressed upon our consideration, but they warrant no more extended notice than their statement. They present no question the answer to which is either doubtful or difficult.

1. It is contended that the general assignment from Manny G. Butler and Robert E. Butler to the defendant in error should have been excluded from the evidence on the ground that it directed the assignee to return any surplus of the proceeds of the assigned property which should remain after the payment of certain preferred creditors of the firm of Butler Bros., to the assignors, without providing for the payment of their individual creditors. This position is untenable for two reasons: (1) Because the assignment contained no such direction; and (2) because, if it had, the railroad company, a debtor of the assignors, could not assail it on that ground. By the terms of the deed the assignors were "Manny G. Butler and Robert E. Butler, of Chouteau, Cherokee Nation, First judicial division, Indian Territory, copartners doing business in the town of Chouteau under the firm name of Butler Brothers, parties of the first part," and they conveyed to the defendant in error "all and singular their copartnership and individual estate, real and personal, goods, chattels, effects, credits, choses in action, and property of every name and kind, whether held by and in the name of said parties of the first part, and each or either of them, or by and in the name of any other person for them," except property exempt from sale under execution. By the terms of the deed they preferred six creditors, as they lawfully might under the laws of the Indian Territory, and provided that, if any residue or surplus should remain, "the said party of the second part shall distribute the said moneys among all the other creditors of the parties of the first part ratably and in proportion to their respective demands. If any surplus shall remain of the property and estate hereby assigned after the payment of all the just debts owing by the parties of the first part, the party of the second part shall return the same to the parties of the first part, their executors, administrators, or assigns, according to their respective rights thereto." The parties of the first part were the individuals Manny G. Butler and Robert E. Butler, and the deed neither authorized nor required the assignee to return any of the proceeds of the property conveyed to the parties of the first part until all their debts, both partnership and individual, were fully paid. Moreover, if the deed had made such a provision, it would not have been void. It would have been voidable as against the creditors of the assignor who elected to attack it, simply. It would have been valid and unimpeachable as against the assignors, their debtors, and all their creditors who did not elect to disaffirm

and avoid it. The railroad company, a debtor of the assignors, could not successfully attack it on the ground that it was voidable as to creditors. *Rohrer v. Turrill*, 4 Minn. 407 (Gil. 309); *Allen v. Brown*, 44 N. Y. 228; *Stone v. Frost*, 61 N. Y. 614; *Sheridan v. Mayor*, etc., 68 N. Y. 30.

2. It is insisted that a witness was erroneously permitted to testify as to the number and character of the tools burned in the blacksmith shop, with a list of them before him, which he had made from memory some months after the fire occurred. This objection cannot be sustained, because the list does not appear in the record, so that we can see whether it could have been prejudicial or not, and because it does not appear from the record that the list was used by the witness when he gave his testimony as to the contents of this shop. The record is that the defendant objected "to witness testifying from the list handed him, and to sustain his position examines the witness." Then follows an examination, first by the counsel for the plaintiff in error, then by the court, and then by counsel for the defendant in error. The record then proceeds as follows: "Whereupon the court overruled defendant's objection, to which the defendant, by its counsel, then and there at the time duly excepted, and still excepts. Examined by Judge Shackelford: Q. Tell us what was there. A. I cannot read English. Q. Go on, and tell us what was in the shop. A. One anvil. Q. What was it worth? A. About \$22.00. Q. What else? A. One pair of bellows." And the testimony then proceeds with a long list of articles, many of which were suggested by the questions. This examination shows that the plaintiff in error could not possibly have been prejudiced by this ruling of the court. The record does not show that the list in question was in any language other than the English, or that the witness could have read it if it was. The presumption is that it was in the English language, and the proof is plenary that the witness could not read that language. A list that the witness could not read, though held in the hand of the witness, could not have prejudiced the plaintiff in error.

3. It is assigned as error that the court refused to permit the railroad company to show that the plaintiff had effected a compromise of claims against certain insurance companies that had issued policies of insurance upon the stock of merchandise which was burned. There was certainly no error in this ruling. It is no defense to the wrongdoer that his victim has hired a stranger to indemnify him against his attack, and has either collected a part or all of the indemnity promised.

4. The court below fairly and correctly charged the jury upon the questions of negligence and the burden of proof, and no exception to this charge has been urged in this court. It is, however, insisted that it was error for the court below to refuse to give to the jury five instructions relative to these questions, which were requested by counsel for plaintiff in error. The general rules of law embodied in these various instructions were properly declared in the language of the court in its general charge for the guidance of the jury. It is not error for the trial court to refuse to give instructions to the jury in



the language of the counsel, where the rules of law which they embody are properly announced to the jury for their guidance in the general charge of the court. *Railway Co. v. Jarvi*, 10 U. S. App. 439, 453, 3 C. C. A. 433, 53 Fed. 65; *Railway Co. v. Washington*, 4 U. S. App. 121, 1 C. C. A. 286, 49 Fed. 347; *Railway Co. v. O'Brien*, 4 U. S. App. 221, 1 C. C. A. 354, 49 Fed. 538; *Eddy v. Lafayette*, 4 U. S. App. 247, 1 C. C. A. 441, 49 Fed. 807; *Railway Co. v. Spencer* (decided at the present term) 18 C. C. A. 114, 71 Fed. 93.

The judgment below must be affirmed, with costs, and it is so ordered.

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### AMERICAN SURETY CO. v. PAULY.

(Circuit Court of Appeals, Second Circuit. February 20, 1896.)

#### No. 56.

1. FIDELITY INSURANCE—NOTICE OF LOSS—REASONABLE TIME.

The A. Surety Co. executed and delivered to the C. Bank a bond, insuring the bank against loss by any act of fraud or dishonesty of its cashier in connection with the duties of that office, or the duties to which, in the bank's service, he might be subsequently appointed, occurring during the continuance of the bond, and discovered within six months thereafter, and within six months from the death, dismissal, or retirement of the cashier from the service of the bank. The bond provided that the surety company should be notified of "any act" of the cashier which might involve a loss for which the company would be responsible "as soon as practicable after the occurrence of such act shall have come to the knowledge" of the bank, and it required proofs of loss to be furnished to the surety company. The bank suspended payment, and passed into the hands of a receiver, who afterwards notified the surety company of the discovery of dishonest acts of the cashier, furnished proofs of loss, and brought suit against the surety company on the bond. The evidence upon the trial as to the time when the dishonest acts of the cashier were discovered being conflicting, *held*, that the question whether the required notice was given with reasonable promptness was for the jury.

2. SAME—SUSPICIONS.

*Held*, further, that the terms of the bond did not require notice to be given of suspicions of dishonest acts.

3. SAME—ACTS IN SERVICE OF EMPLOYER.

The bank having suspended business on November 12, 1891, but the cashier having continued in the service of the receiver until March following, when he resigned, *held*, that the services so rendered by him after November 12th were rendered to the bank none the less because its affairs were controlled by a receiver, and the surety company was not absolved from liability for acts discovered more than six months from November 12th, but within six months from his resignation.

4. SAME—PROOFS OF LOSS—INTERPRETATION.

*Held*, further, that a proof of loss under the bond, which set forth with reasonable plainness, and in a manner by which a person of ordinary intelligence could not be misled, that certain sums of money had been taken from the bank by means of acts of the cashier, described in such proof, was sufficient, though it failed to aver explicitly that a loss had been caused to the bank.

5. EVIDENCE—BOOKS OF ACCOUNT.

The "teller's book" of the bank, which had been kept by one G., who died before the trial, was offered in evidence, to show that on certain

days no money was received for certificates of deposit. *Held* that, in connection with evidence of the course of business, by which, if received, such money would be entered in the book, the evidence was competent, though not conclusive.

6. SAME.

For the purpose of showing the dealings with the bank of the president, who was charged with having misappropriated the bank's money with the cashier's aid, the president's ledger account was put in evidence, together with the testimony of the bookkeeper who made the entries, and who swore that they were correctly made from the original deposit slips and checks furnished to him by the teller, who had died before the trial; that it had been the teller's duty to verify all deposit slips, and to pay the checks; and that all such slips and checks, when reaching the bookkeeper's hands, bore marks indicating that they had been verified or paid by the teller. *Held*, that the account was competent, and sufficiently proven.

7. SAME—SIMILAR BUT DISCONNECTED ACTS.

*Held*, further, that evidence of acts of fraud and dishonesty by the cashier, occurring before the date of the bond, and for which no claim was made against the surety company, but which were similar to the acts on which the claim was based, was admissible to show that the acts on which the claim was based were intentional, and not merely negligent, or due to oversight.

8. CORPORATIONS—NOTICE—KNOWLEDGE OF OFFICERS.

Prior to the issue of the bond sued on, the cashier and president of the bank had conspired to rob it, and had been engaged in fraudulent practices. When application was made for the bond, the surety company required a certificate from the bank of the cashier's good character. Such certificate was made by the president without, so far as appeared, any direct authority from the board of directors, or any knowledge by them that such certificate was made or required. *Held*, that the president's knowledge of the cashier's dishonesty was not to be imputed to the bank, so as to make it responsible for the misrepresentations contained in such certificate.

In Error to the Circuit Court of the United States for the Southern District of New York.

This was a writ of error to review a judgment for \$17,435.39 rendered against the American Surety Company, defendant below, in the circuit court, Southern district of New York. The plaintiff below sued as receiver of the California National Bank, at San Diego, to recover the amount of \$15,000, to which extent the surety company had contracted to make good any loss resulting from the fraud or dishonesty of one George N. O'Brien, the cashier of said bank. The judgment was entered upon the verdict of a jury.

George A. Strong, for plaintiff in error.

Wm. Mitchell, for defendant in error.

Before LACOMBE and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. One J. W. Collins, who had been cashier from the organization of the bank, in 1888, became its president in 1891. Thereupon George N. O'Brien was promoted, and made cashier. He applied to the defendant for a bond of indemnity to date from July 1, 1891, for \$15,000, in favor of the bank, as security covering his position in the bank's service. The defendant is a New York corporation, engaged in the business,

among other things, of issuing surety or guaranty bonds for persons in positions of public or private trust; and upon said application, and in consideration of a premium duly paid, it executed and delivered the bond in suit, which is correctly described by the trial judge as "in legal effect an insurance policy, by which the defendant undertook to guaranty the bank against loss arising from the fraud or dishonesty of O'Brien." The material parts of such bond are as follows:

"This bond, made July 1, 1891, between the American Surety Company of New York, \* \* \* of the first part, and George N. O'Brien, \* \* \* hereinafter called the 'employé,' of the second part, and California National Bank, hereinafter called the 'employer,' of the third part. Whereas, the employé has been appointed in the service of the employer, and has been assigned to the office or position of cashier by the employer, and has applied to the American Surety Company of New York for the grant by it of this bond: Now, therefore, in consideration of the sum of \$75 \* \* \* as a premium for the term of twelve months ending on the first day of July, 1892, at 12 o'clock noon, it is hereby declared and agreed that, subject to the provisions herein contained, the company shall, within three months next after notice, accompanied by satisfactory proof of a loss, as hereinafter mentioned, has been given to the company, make good and reimburse to the employer all and any pecuniary loss sustained by the employer of moneys, securities, or other personal property in the possession of the employer, or for the possession of which he is responsible, by any act of fraud or dishonesty on the part of the employé in connection with the duties of the office or position hereinbefore referred to, or the duties to which in the employer's service he may be subsequently appointed, and occurring during the continuance of this bond, and discovered during said continuance, or within six months thereafter, and within six months from the death or dismissal or retirement of the employé from the service of the employer. It being understood that a written statement of such loss, certified by the duly-authorized officer or representative of the employer, and based upon the accounts of the employer, shall be prima facie evidence thereof: provided, always, that the company shall not be liable by virtue of this bond for any mere error of judgment or injudicious exercise of discretion on the part of the employé in and about all or any matters wherein he shall have been vested with discretion, either by instruction or rules and regulations of the employer. And it is expressly understood and agreed that the company shall in no way be held liable hereunder to make good any loss which may accrue to the employer by reason of any act or thing done or left undone by the employé in obedience to or in pursuance of any direction, instruction, or authorization conveyed to or received by him from the employer or its duly-authorized officer in that behalf. \* \* \* The following provisions also are to be observed and binding as a part of this bond: That the company shall be notified in writing at its office in the city of New York of any act on the part of the employé which may involve a loss for which the company is responsible hereunder as soon as practicable after the occurrence of such act shall have come to the knowledge of the employer. That any claim made in respect of this bond shall be in writing, addressed to the company, as aforesaid, as soon as practicable after the discovery of any loss for which the company is responsible hereunder, and within six months after the expiration or cancellation of this bond, as aforesaid. And upon the making of such claim this bond shall wholly cease and determine as regards any liability for any act or omission of the employé committed subsequent to the making of such claim, and shall be surrendered to the company on payment of such claim. That the company shall not in any wise be responsible under this bond to a greater extent than \$15,000. \* \* \* That no suit or proceeding at law or in equity shall be brought to recover any sum hereby insured, unless the same is commenced within one year from the making of any claim on the company."

The bank suspended payment, and its assets were taken possession of by the bank examiner November 13, 1891. The plaintiff

was appointed receiver, and duly qualified as such on December 29, 1891. Having discovered, as he believed, acts of fraud and dishonesty on the part of O'Brien, resulting in loss to the bank, the receiver, after giving written notice, and sending to the company written proof of loss, the receipt of both of which was acknowledged, began this suit. By the complaint and the bill of particulars recovery is sought for various items, but at the close of the trial the court left it to the jury to determine as to certain transactions of October 13 and 14, 1891, only. The facts relating to these transactions are, briefly, as follows: On October 12, 1891, Collins, the president, was in New York, and effected a loan from the Western National Bank of that city to the California Bank. This loan was made on a note of the California Bank for \$20,000, and on the security of promissory notes the property of the California Bank amounting to \$36,230. The proceeds of the loan were credited by the Western National Bank to the California Bank, and subsequently drawn out by it. The loan was to the bank, and not to Collins. A truthful record of this transaction upon the books of the California Bank would have been a credit of the amount to "Bills payable," and a debit of the same to the Western National Bank. The actual entries on the books are a debit to the Western National, and a credit to J. W. Collins in his individual account, and no credit to "Bills payable." The result of such entries is that the proceeds of the loan obtained on the credit of the California Bank and by pledge of its collaterals, and which should have remained subject only to its disposal, were left subject to the order of Collins by his personal check. These entries were thus made in entire good faith, so far as appears, by the bookkeepers, in consequence of the act of O'Brien. On October 13, 1891, he filled up in his own handwriting a deposit tag, which represented that by telegraphic dispatch Collins had that day made a deposit in the California Bank of "\$20,000. Western National." On the same day a precisely similar transaction took place between Collins and the United States National Bank, whereby commercial paper the property of the California Bank was rediscounted, and the transaction falsely recorded on the books of said bank, by reason of a similar false deposit tag, prepared by O'Brien himself. The amount credited to Collins on this tag was \$24,500. It thus appeared that, as a result of O'Brien's acts in filling up these two deposit tags with statements which were false in fact, Collins' account with the bank was inflated in the amount of \$44,500. It further appeared that when the bank suspended payment on November 12, 1891, there was standing to his credit \$11,420.90 only; that is to say, the aggregate amount drawn out by Collins exceeded whatever balance he had standing to his credit on October 12, 1891, plus all subsequent deposits (except the two above described), by \$33,079.10. The bank therefore lost that sum by reason of these false credits, for, had it not been for the false credits, Collins' account would have been exhausted, and presumably his checks not honored, before any of this \$33,079.10 was

drawn out. That these two deposit tags were written by O'Brien is not disputed. They are in his handwriting. He was called as a witness by plaintiff, but declined to testify, on the ground that his answers might tend to incriminate him, since he was indicted by the grand jury upon certain charges growing out of his connection with the affairs and management of the bank. That the entries upon the tags were false is abundantly established on the proof. They called for entries to the credit of Collins on his individual account of the amounts obtained from the United States Bank and the Western National Bank, and the officers of those banks testified that their transactions of October 12th with Collins were loans, not to him, but to the California Bank. The mere fact, however, that the entries on the tags were false did not by itself prove "fraud or dishonesty" on the part of O'Brien; non constat that he acted ignorantly or negligently. There was, however, evidence that, although Collins' account showed that he had at all times a balance to his credit, he was in fact largely indebted to the bank by reason of other similar false entries; that on other occasions O'Brien himself had made similar entries. O'Brien's age, experience, and connection with the bank were shown, it appearing that he had been in control of the bank (during the absence of Collins) for several weeks at the time this transaction took place. Letters of his were introduced, tending to show knowledge of irregularities, and it was open to the jury upon the proof to infer that O'Brien knew when he made the entries on the tags that they falsely represented the transactions. The court left it to the jury to determine whether O'Brien's action in making these entries, manifestly false, was or was not dishonest or fraudulent. The jury were charged that: "If the conduct of the cashier in that transaction was a mere error of judgment, was an honest irregularity, plaintiff could not recover; but if he, knowing Collins was not entitled to be credited with these two items, believing that he was not entitled to be credited with them, nevertheless put those items to his credit, that was a dishonest act, and it was a fraudulent act within the meaning of the bond." The court further charged that "fraud is not to be lightly presumed. Every man is supposed to be honest until the contrary is shown"; and, after reviewing the evidence, instructed the jury that "the burden is upon the plaintiff to satisfy you by a fair preponderance of proof that those credits were given to Collins by the fraud or dishonesty of the cashier." To this part of the charge there was no exception, plaintiff in error relying upon its exceptions to a denial of its motion to direct a verdict. Inasmuch as the entries were conclusively shown to be false, and there was evidence tending to show that O'Brien must have known them to be false, it would have been error to take this question from the jury, and their finding upon the evidence under proper instructions is conclusive.

Various assignments of error remain to be considered.

1. It is contended that the receiver failed to give the notice re-

quired by the bond, which provides that "the company shall be notified in writing \* \* \* of any act on the part of the employé which may involve a loss for which the company is responsible hereunder, as soon as practicable after the occurrence of such act shall have come to the knowledge of the employer." This notice was given May 23, 1892. The evidence as to when knowledge of O'Brien's improper act was obtained was conflicting. So manifestly is there a conflict on this point that it would be a waste of time to review the evidence in detail. A perusal of the testimony of the receiver reveals it. The proposition contended for, that he is to be concluded by the dates given in his original bill of particulars, subsequently amended, or by his statements when first examined on deposition, is without merit. He manifestly testified solely from his recollection, and it is not surprising that there is a variance between the date stated by him at first and the one subsequently given after his attention had for months been directed to the subject. Conflicts of evidence as to questions of fact are to be determined by the jury, whether they arise upon the testimony of one witness or of two; and in this case there was other evidence tending strongly to support the conclusion which the jury evidently reached, that O'Brien's acts were discovered shortly before May 23, 1892, when the notice was sent. In fact, it is difficult to see how they could have reached any other conclusion. However much the receiver varied in his statements as to the date when he first learned of the falsity of O'Brien's entries he was consistently positive that he acquired his knowledge through the report of an expert, who it is conclusively shown was not employed until April, and who apparently did not himself discover O'Brien's improper acts until May. As there was a conflict of evidence on this point, the court properly left it to the jury to determine under instructions as to what would and what would not be reasonable promptness in giving the notice. Careful and exhaustive instructions were given on this branch of the case; they were not excepted to, save as noted in the next subdivision. The jury were charged that, after acquiring knowledge of the improper act, it was the receiver's "duty, not as soon as possible, to transmit information of it to the defendant, but to do it with reasonable promptness. He was not bound the first day, or the next, necessarily, to give notice, but he was to give notice within a reasonable time; and it is for you to say, upon a consideration of all the circumstances of the case, whether he did, within a reasonable time after acquiring such knowledge, send the letter of May 23d. It might be reasonable under one state of facts; it might be unreasonable under another. What might be very great diligence under one set of circumstances might be very dilatory under another. \* \* \* If \* \* \* discovery was made early in February, and notice was not given until July, that was not notice with reasonable promptness. \* \* \* If the fact was discovered early in February, and notice was not given until the latter part of May, that was not notice given with reasonable promptness. But if you come to the

conclusion that the discovery was not made until the middle or latter part of May, then, in view of the situation of the plaintiff, you may reasonably come to the conclusion that he exercised proper diligence in sending the notice. \* \* \* The burden of proof is with the plaintiff, and you must be satisfied by a fair preponderance of proof that he has fulfilled the terms of the condition [as to giving notice within a reasonable time].” To no portion of the charge as above quoted was there any exception taken. Plaintiff in error apparently contends that the question as to reasonableness of time should not have been left to the jury. The action of the trial judge in thus submitting it to them is sustained by authority. *O'Brien v. Insurance Co.*, 76 N. Y. 459. And see 19 Am. & Eng. Enc. Law, p. 642, where the results of many decisions are thus summarized:

“If the question as to what is a reasonable time is not resolved, expressly or impliedly, by the rule of law, or by the writing which is under consideration, so that the judge, in deciding the question, would have no legal ground, but merely his individual ideas, to go upon; and especially if, in addition, the question depends in the individual case upon peculiar, numerous, or complicated circumstances, the reasonableness of the time becomes a question for the jury, whose province it is, rather than that of the judge, to say, in view of all the facts of the case, whether or not the time in question is reasonable in the sense of being in accordance with the course of business and the ordinary transactions of life.”

There was no error, therefore, upon the conflict of evidence in this case, in leaving the question of reasonableness of time in giving notice to the jury.

After the charge, one of the jurors asked whether, “if they found out the fraud on the 2d day of March, and notified the company on the 23d of May, that would be, in law, a notice as soon as practicable.” To this the court replied: “No. I should charge, in regard to that, that that is a question for you to determine. It is a question of fact, and not a question of law.” To this defendant excepted, but, under the authorities above cited, the charge was sound.

2. Plaintiff in error duly excepted to a statement in the charge that “it is not sufficient to defeat the plaintiff’s action upon the policy that it be shown that the plaintiff may have had suspicions of dishonest conduct of the cashier.” The court charged, in the same connection, that:

“Defendant was entitled to notice in writing of any such act of the cashier which came to the knowledge of the plaintiff of a fraudulent or dishonest character as soon as practicable after the plaintiff acquired knowledge. \* \* \* It was plaintiff’s duty, under the policy, when it came to his knowledge,—when he was satisfied that the cashier had committed acts of dishonesty or fraud likely to involve loss to the defendant under the bond,—as soon as was practicable thereafter to give written notice to the defendant; \* \* \* and in considering this you are to inquire, first, when it was that the plaintiff became satisfied that the cashier had committed dishonest or fraudulent acts which might render the defendant liable under this policy. He may have had suspicions of irregularities; he may have had suspicions of fraud; but he was not bound to act until he had acquired knowledge of some specific fraudulent or dishonest act which might involve the defendant in liability for the misconduct.”

The exception is unsound. The charge carefully conforms to the requirement of the bond. "Knowledge" and "suspicious" are not synonymous terms. The bond calls for no notice of suspicions, but only of any act on the part of the employé which may involve loss as soon as practicable after the occurrence of such act shall come to the knowledge of the employer.

3. It is further contended that the claim or proof of loss which was mailed to the company June 24, 1892, was not served as soon as practicable after discovery. It is unnecessary to discuss this point. It involves reasonableness of time, and was properly left to the jury.

4. It is next contended that, if the date of discovery be taken as May 23, 1892, there can be no recovery under the bond, which provides that the company shall be liable for acts of fraud or dishonesty involving loss occurring during the continuance of this bond, "and discovered during said continuance, or within six months thereafter, and within six months from the death or dismissal or retirement of the employé from the service of the employer." It is insisted that because O'Brien ceased to act as cashier when the bank closed its doors on November 12, 1891, discovery more than six months after that date is fatal to plaintiff's case. There is no merit in this contention. O'Brien ceased to act as cashier on November 12, 1891, because the bank ceased on that day to do a banking business, and thereupon went into liquidation. The bond contemplates service other than as cashier. It insures fidelity on the part of the employé "in connection with the duties of the office or position hereinbefore referred to, or the duties to which, in the employer's service, he may be subsequently appointed." O'Brien was continued in service by the receiver until early in March, 1892, when he voluntarily resigned. He was not dismissed, nor did he retire from the service of his employer, the California National Bank, on November 12, 1891. That bank did not cease to exist when the bank examiner took charge of its affairs on November 12th, nor when the receiver qualified and took possession on December 29th. And the services rendered after that date were rendered to the bank none the less because its business affairs were directed and controlled by a receiver instead of by a board of directors.

5. It is further contended that there should be no recovery for these items of October 13th, because the proof of loss "did not pretend to show any loss on this item. It merely stated that false credits to this amount were given, but did not state that Collins ever drew out the money." The proof of loss sets out several other instances of false entries. As to the items referred to it states:

"That on the 13th and 14th days of October, 1891, said G. N. O'Brien, being the cashier of said bank, and as such cashier having charge and supervision of the books of said bank, made entries of the deposit tags, and caused the same to be entered by a bookkeeper in the books of the bank, of credits in favor of J. W. Collins of the sum of \$45,000, without the said Collins paying any consid-



eration therefor to said bank, and without being entitled to said credits, as he, the said O'Brien, then and there well knew."

After reference to other false entries, there follows:

"Affiant further says that neither of the above sums, nor any part thereof, have ever been returned or repaid to said bank."

The objection is hypercritical. The claim imports with reasonable plainness that the sum of \$45,000, falsely entered to the credit of Collins, was taken from the bank, for it is expressly stated that it has never been returned or repaid. It is difficult to conceive of a business man of such phenomenal mental obtuseness as to be misled by such a notice into the belief that the assured made no claim to have lost anything by the false entries of October 13th and 14th. Of a clause providing for proofs of loss much more specifically than does the bond in suit it was said in *Turley v. Insurance Co.*, 25 Wend. 375:

"This clause of the contract is to receive a reasonable interpretation. Its intent and substance, as derived from the language used, should be regarded. There is no more reason for claiming a strict literal compliance with its terms than in ordinary contracts. Full legal effect should always be given to it, for the purpose of guarding against fraud or imposition. Beyond this, we would be sacrificing substance to form; following words rather than ideas."

The requirement in the contract in suit calls only for "a written statement of such loss, certified by the duly-authorized officer or representative of the employer, and based upon the accounts of the employer." The statement of loss in evidence is in substantial compliance with this requirement.

6. The plaintiff in error contends that it was error to admit in evidence Collins' ledger account and the teller's book. The teller's book was kept by Gregg, the teller, who died before the trial, but contains entries by others. The only pages in this book which were put in evidence refer to September 22d, on which day it was contended that no money was paid into the bank for certificates of deposit, although on that day certificates were issued to Collins; and to May 2d, on which day it was contended that certificates were issued to Collins in excess of any money paid in for certificates. It was competent evidence, but not conclusive evidence, that money was not paid in, to show that upon the page where such payments should have been entered they did not appear, the course of business having been shown, and the summaries of transactions of each day into which all items entered, and by which the daily balance was struck, being shown to be in the handwriting of the deceased teller. The ledger account of Collins was kept by Brimhall, the bookkeeper. All the entries on both debit and credit sides were made by him, except two, made after the bank suspended, and with which we have no concern, since, as heretofore stated, Collins' ledger balance on that day was only \$11,420.90. Brimhall was called to the stand, and testified to the accuracy of all his entries. Those on the credit side were made from deposit tags. These tags were all put in evidence, and, since the plaintiff in error has not printed them,

nor called attention to any of them in argument, it must be presumed that examination of them showed that Brimhall's entries in the ledger agreed with them. Gregg, who acted both as paying and as receiving teller, died before the trial. In the regular course of business he was the one who first received the deposit tags, and, after examining them, and verifying the deposits accompanying them, placed the tags upon a spindle, whence they passed to the bookkeeper. If Gregg were alive, he should have been called to testify that he allowed no tag to pass beyond him without verifying it; and that, if he found it not to conform to the amount of money or checks which it claimed credit for, he corrected it. But, being dead, his evidence was not obtainable, and it is a well-settled rule of evidence that in such cases it will be presumed, in the absence of any evidence to the contrary, that the clerk properly discharged the duties of his office. The spindle puncture in the tags indicated to the bookkeeper that they had passed the teller, and under the application of the rule it must be held that the teller had found them correct, either by finding with them the money or checks they called for, or by seeing upon them, as was the case with the deposit tags of the \$44,500 in controversy, the declaration of the cashier that telegraphic dispatches entitled Collins to a credit. All the entries on the debit side of Collins' ledger account down to the day when the bank suspended, were made by Brimhall, the bookkeeper. He testified that he made them all from checks of Collins, which, of course, were subsequently returned to Collins. These checks, when before Brimhall, all bore the teller's stamp, showing that they had been paid by the bank. The bookkeeper had no personal knowledge whether they were paid or not, but the teller had, and the stamp affixed by the latter in the regular course of his business, he being dead, is as competent evidence of their payment as would be his own statement to that effect if he were living and in the witness chair. The authorities cited by the plaintiff in error deal with a very different state of affairs. In all of them the books were offered merely as "books of account," without independent proof of the accuracy of their contents. In the case at bar all the entries admitted from the ledger were proved by the evidence of the individual who made them from the original memoranda, supplemented by proof that such original memoranda were found to be correct, or were correctly made by the very individual who received the deposits, and who paid out the money on the checks. The objection to the admission of the ledger account of Collins on the ground that it was incompetent, and not sufficiently proved, is therefore unsound. And in view of the fact that such account shows that Collins drew out of the bank money amounting in the aggregate to more than stood to his credit on October 12th, plus all deposits subsequent to October 13th, the excess, \$33,079.10, coming out of the credits for \$44,500 given him October 13th on the false entries of O'Brien, the objection that such account was irrelevant and immaterial is simply frivolous.

7. It is further contended that the court erred in admitting evidence of similar acts of fraud and dishonesty perpetrated by O'Brien prior to the date of the bond. No claim was made against the surety company for any loss sustained by such frauds, but evidence as to them was relevant and material, as tending to show that the transaction of October 13th was not a mere oversight or negligence of O'Brien's, but was an intentional and dishonest act, one of many such, and part of a systematic scheme to divert the funds of the bank in Collins' hands. *Continental Ins. Co. v. Insurance Co. of Pennsylvania*, 2 C. C. A. 538, 51 Fed. 884. And on the same principle it was relevant and material to show that on October 13th Collins, who had an apparent balance to his credit of over \$90,000, was in reality, partly by reason of other false entries and other improper actions of the cashier, a debtor to the bank in a large amount.

8. It was not error to admit the paper Exhibit J 1, which was a statement of the account of Collins, as corrected by the expert accountant, showing that the bank claimed that when it suspended he owed it \$374,978.22. This document, which was inclosed in a letter from the receiver to the company, dated July 18, 1892, was sent in answer to a request made by the company in a letter of July 8th that it be furnished with statements on its regular printed forms of the claims against Collins and O'Brien, and also with "full information in regard to the shortages and credits of every kind whatever, whether on account of salary due, money paid, or assignments made by either of said persons to the California National Bank." It was clearly admissible as part of the correspondence, and the only objection made to its admission was on the ground that it was not the original, but a copy. The original was not produced by the defendant, to whom it had been sent, and the accuracy of the copy was sufficiently proved. The question of its weight as evidence, which plaintiff in error has argued here, is a very different one from that of its admissibility. But no such question is presented on this record. Plaintiff in error might have reserved the point by a request to instruct the jury as to what consideration they might properly give to the document; but he made no such request, and has no exception which presents the point.

9. It is further contended that the court erred in refusing to direct a verdict for the defendant on the ground that the bond had been procured by misrepresentation and concealment on the part of the bank. Plaintiff in error also excepted to so much of the charge as instructed the jury that there was nothing to that defense. There was evidence that prior to the execution of the bond O'Brien had, by acts of fraud and dishonesty, assisted Collins in obtaining false credits, and thus getting possession of money which rightfully belonged to the bank. At the time when O'Brien made application for the bond in suit, Collins also made application for a similar bond insuring his (Collins') honesty and fidelity, and obtained one for \$25,000. How it came about that

these two bonds were asked for,—whether it was a suggestion of Collins, or whether any by-law or resolution of the board of directors required security to be given,—does not appear. The bond in suit recites that the “employé [O’Brien] \* \* \* has applied to the American Surety Co. for the grant by it of this bond,” and defendant put in evidence the application on which it was granted. It is to be assumed, as the trial judge held, that the officers of the defendant relied upon the representations contained in the application. This application, which is filled up on a printed form furnished by the company, contains various statements of O’Brien personally, mainly in answer to questions. On one of its pages there also appears what is described as an “employer’s certificate.” No such certificate was required as a preliminary to the granting of the bond insuring Collins’ fidelity. And there is nothing to show that the bank, or any of its officers except Collins, had any information that a certificate by any one as to the good character of O’Brien was asked for by the surety company as a prerequisite to the issue of its policy of insurance, which does not, on its face, incorporate the application as a condition of the contract nor in any way refer to the same. The so-called “employer’s certificate” reads as follows:

“I have read the foregoing declarations and answers made by George N. O’Brien, and believe them to be true. He has been in the employ of this bank during three (3) years, and to the best of my knowledge has always performed his duties in a faithful and satisfactory manner. His accounts were last examined on the 28th day of March, 1891, and found correct in every respect. He is not, to my knowledge, at present in arrears or in default. I know nothing of his habits or antecedents affecting his title to general confidence, or why the bond he applies for should not be granted to him.

“Amount required, \$15,000.00. Bond to date from July 1, 1891.

“Dated at San Diego, the 10th day of July, 1891.

“J. W. Collins, Pt. Cal. Nat. Bk.

“On behalf of ——— —.”

It is contended that the knowledge which Collins had as to O’Brien’s dishonesty was the knowledge of the bank, and that his act in signing this certificate constituted a concealment or misrepresentation for which the bank is to be held responsible. Ordinarily, in transactions to which a corporation is a party, the knowledge of its president is imputed to the corporation, upon the theory that it is his duty to communicate such knowledge to the corporation, and that it must be presumed that such duty has been performed, and representations made by an agent in the course of transactions conducted on behalf of a principal and for its benefit are held to be the representations of the principal. There are, however, well-recognized qualifications of these propositions. In *The Distilled Spirits*, 11 Wall. 367, it was held that the presumption that an agent communicates his knowledge to his principal will not be entertained when it is not the agent’s duty to communicate such knowledge, nor when it would be unlawful for him to do so. In *Bank v. Cunningham*, 24 Pick. 276, it was held that the knowledge of a director is no proof of notice to a bank when he is himself a party to the contract, having an interest therein opposed to that of the corporation. See, also, *Davis*

Improved Wrought-Iron Wagon-Wheel Co. v. Davis Wrought-Iron Wagon Co., 20 Fed. 701, and cases there cited. That the liability of an innocent principal for the frauds and deceit of his agent causing damage to a third party is restricted to cases where the agent was acting within the scope of his authority has been repeatedly held. So, where a station agent authorized to issue bills of lading for freight received by a railroad company fraudulently combined with another person to issue bills of lading to him, no freight having been received, one who in good faith had advanced money on the faith of such bills was held not entitled to recover against the railroad company. *Friedlander v. Railway Co.*, 130 U. S. 416, 9 Sup. Ct. 570. It is unnecessary to multiply references, for in none of the cases cited on the brief of either side, nor in such as have come to the knowledge of this court in its investigation of the case at bar, are the facts sufficiently analogous to make the citation especially persuasive. It may be well to restate the facts of this case, thus limiting the application of this decision. The president of a national bank concocts a scheme to purloin its funds, and, finding it necessary in order to accomplish his purpose to secure the assistance of the cashier, induces him to enter into the plot. The abstraction of the bank's funds is accomplished by means of false entries on the books (which deceive the bank examiner), by means of the issue of false certificates of deposit, and by the payment of checks of the main conspirator, which are not thereafter charged against him. After these fraudulent practices have gone on for some time, it becomes necessary to file with the bank security for the fidelity of both parties to the scheme. The bank does not select the surety. The two employés, so far as appears, are free to choose whom they please, provided only that the surety be of sufficient ability to respond. Under these circumstances both the dishonest employés individually apply to the same person to become their surety, such person being a company, which in some instances requires a certificate of the good character of the employé to be given by the employer before it will consent to underwrite the honesty of such employé. In some instances it does not require such a certificate. In *Collins'* case it became his bondsman, with no certificate from any one but himself personally. The giving of certificates of good character of its employés is no part of the ordinary business of a bank. There is nothing to show that the president was ever authorized by the bank or the board of directors to act for the bank in making such a certificate, nor that the bank, either when the surety was applied to or when the bond executed by it was delivered to the bank, was informed that any such certificate was required. The authorities are not favorable to the assumption of any species of executive power by a bank president without direct authorization (*Morse, Banks* [2d Ed.] p. 143), but there are many acts which the president of a bank may do without express authority of the board of directors; in some cases because usage of the particular bank impliedly authorizes them, in other cases because such acts are fairly within the ordinary routine of his business as president. The making of statements, however, as to the honesty and fidelity of an employé, for the benefit of the employé, and to

enable the latter to obtain a bond insuring his fidelity on the strength of such representations, is no part of the ordinary routine business of a bank president, and there is nothing to show that by any usage of this particular bank such function was committed to its president. We have reached the conclusion, therefore, that plaintiff's right of action on the bond was not lost because its president, Collins, made to the defendant false representations as to the cashier's honesty. When two officers of a corporation have entered into a scheme to purloin the money of the corporation for the benefit of one of them, in pursuance of which scheme it becomes necessary to make false representations to a third person, ostensibly for the bank, but in reality to consummate said scheme, and for the benefit of the conspirators, and not in the line of ordinary routine business of such officers, and without express authority,—the corporation being ignorant of the fraud,—the officers are not, in thus consummating such theft, the agents of the corporation.

10. It is next assigned as error that the court did not charge the jury, as requested by defendant, that, "if O'Brien did what the plaintiff claims, it was a crime." The pleadings raise no such issue, nor was it a question at all necessary for the jury to pass upon. Defendant had insured against "any act of fraud or dishonesty," and whether any act of fraud or dishonesty proved to have been committed by O'Brien was also a criminal act was wholly immaterial. The verdict shows conclusively that upon the evidence they were satisfied that O'Brien had committed acts of fraud and dishonesty. It seems to be the theory of the plaintiff in error that if the jury had been informed that the acts which they found to have been committed were not only fraudulent and dishonest, but also criminal, they would have disagreed, or brought in a verdict for the defendant, presumably from some sentimental aversion to exposing O'Brien to the obloquy of a verdict which should find that he had committed acts which, if proved against him in a criminal prosecution, might subject him to punishment. If this would have been the result of charging as requested, the refusal was not only sound, but exhibited a wise forethought on the part of the trial judge. The case would have been decided, not upon the evidence, which, as the event proves, convinced the jury of O'Brien's fraud and dishonesty, but upon considerations outside of the evidence, and not legitimately before the jury.

The record presents 121 assignments of error. The brief of plaintiff in error presents its argument only upon 27 of them. We have examined the others, and as to them it is sufficient to say that they are either disposed of by what has been already written, or are not of sufficient importance to call for any more extended discussion in this opinion than they received in the brief. The judgment of the circuit court is affirmed.

## AMERICAN SURETY CO. v. PAULY.

(Circuit Court of Appeals, Second Circuit. February 20, 1896.)

No. 57.

## 1. FIDELITY INSURANCE—PROOFS OF LOSS.

Proofs of loss under a bond of suretyship insuring an employer against loss by dishonesty of an employé are mercantile documents, and are not to be tested by the same rules of interpretation as an indictment, or even a pleading. It is only required that they shall contain a brief and general statement of the facts with substantial accuracy, truthfully informing the insurer how the loss occurred, and not tending, either by what they contain or what they omit, to mislead the insurer.

## 2. SAME—PRIMA FACIE EVIDENCE OF LOSS.

Where such a bond of suretyship provides that certain statements and accounts "shall be prima facie evidence" of a loss, such expression is not necessarily confined to the consideration of a claim by the insurer, before suit; and it is not error to instruct the jury, on the trial of an action on such a bond, that the plaintiff has made out a prima facie case by offering in evidence the statements and accounts referred to.

**In Error to the Circuit Court of the United States for the Southern District of New York.**

This is a writ of error to review a judgment of the circuit court, Southern district of New York, for \$28,521.16, entered upon the verdict of a jury against the American Surety Company. The plaintiff below sued as receiver of the California National Bank of San Diego, Cal., to recover the amount of a bond for \$25,000, issued by the company, insuring the bank against any act of fraud or dishonesty committed by its president, one John W. Collins. The facts in the case are largely the same as in action No. 1 between the same parties to recover on a similar bond insuring the fidelity of O'Brien, the cashier, and in which the opinion of this court is handed down simultaneously with the following. 72 Fed. 470. Most of the proof taken in the one case was read in evidence in the other. It will be unnecessary, therefore, in this opinion to review the facts, which are fully stated in the opinion in the cashier's case; nor to repeat anything said therein as to assignments of error which are common to both cases. It will be sufficient to discuss only such points as are peculiar to the case at bar.

George A. Strong, for plaintiff in error.

Wm. Mitchell, for defendant in error.

Before LACOMBE and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts). 1. The first notification to the surety company in this case, as in the other, was sent May 23, 1892, and the proofs of loss transmitted June 24, 1892. There was a similar conflict of evidence as to the date when the receiver acquired knowledge of Collins' acts of fraud or dishonesty, and the question whether notice and proofs of loss were sent with reasonable promptness was left to the jury under a charge more favorable even to the defendant below than was the charge in the O'Brien Case. In view of the evidence and of the instructions given by the court, plaintiff may fairly be given the benefit of the presumption that the jury found discovery to have been made as late as "a few days before May 23, 1892." It is contended that this was more than six months

from the death, dismissal, or retirement of the employé. The receiver qualified and took possession December 29, 1891, and Collins died March 3, 1892. Plaintiff in error relies upon the fact that on November 12, 1891, the bank examiner took possession of the assets of the bank, which had suspended payment. That act, however, did not operate as a "dismissal or retirement of the employé from the service of the employer," which is the phraseology of the bond. Collins, on that date, suspended the performance of his ordinary functions, because the bank suspended the transaction of a banking business, but the bank still existed as a national bank corporation, and Collins was still its president. If at any time before the receiver took possession the parties interested in the bank had made good its deficit, and the bank examiner had restored the assets, no new appointment would have been necessary to put him in the service of his employer. The assignments of error covering this point are unsound.

2. It is next contended that the alleged loss was not set forth in the proof of claim. In this case, as in the other, several distinct acts of fraud, with consequent loss, were declared upon, but the court left to the jury only the transactions of October 13 and 14, 1891. What those were will be found fully stated in the opinion in the other case. So much of the proof of claim as refers to these transactions is as follows: In an affidavit of the receiver dated May 31, 1892, and inclosed in a letter making demand, are these paragraphs:

"That on the 13th day of October, 1891, he, the said J. W. Collins, as president of said bank, and upon the representation that he was acting in behalf of said California National Bank of San Diego, obtained a loan from the United States National Bank of New York of twenty-five thousand dollars upon a note of the California National Bank of San Diego, and by rediscounting the assets of said bank, and took and applied the said sum of \$25,000, then and there the assets of said bank, to his individual use, and embezzled said sum.

"That on the same day, to wit, on October 13, 1891, said J. W. Collins, while president of said bank, and acting as such president, and upon the representation that he was acting in behalf of the said bank, obtained from the Western National Bank of New York a loan of \$20,000 upon a note of said bank, made payable to himself, and collateralized with assets of said bank; and then and there, as such president, receiving said sum of \$20,000, and in behalf of the said California National Bank of San Diego, appropriated the same to his individual use, and embezzled the same. \* \* \* Affiant says that none of said sums of money so as aforesaid by said J. W. Collins abstracted and embezzled, nor any part thereof, were ever repaid or returned to said bank."

On the very day (May 31, 1892) this affidavit was sent from San Diego, the surety company wrote from New York, inclosing two claim blanks, and asking to have itemized thereon any claims the receiver might have to present under the bonds of Collins and of O'Brien. In reply thereto the receiver wrote, inclosing "two affidavits in regard to the embezzlement of the late J. W. Collins and George N. O'Brien, furnished after consultation with my legal adviser, as giving information fuller than I otherwise could do by using the blank sent me." Receipt of these two affidavits was duly acknowledged July 8, 1892, but most careful examination of the record fails to disclose them among the exhibits. The letter inclosing them was marked "Exhibit 28," but, singularly enough, these affidavits seem not to have been offered, or their



omission from the correspondence in any way accounted for. If they were here, it is possible that it would appear that the surety company was advised as to the nature of the transactions with a degree of explicitness sufficient to satisfy even the requirements of its own counsel in that regard, for reference to the opinion in the other case will show that the proof of claim under O'Brien's bond was not criticized for failure to accurately describe the transactions, but only because it did not, in defendant's opinion, expressly aver that loss ensued to the bank from such acts. An affidavit dated June 24, 1892, marked "Exhibit No. 1," was introduced as "Proof of loss June 24," and is probably one of these two affidavits. As to the transactions of October 13th and 14th, it is a duplicate of the affidavit of May 31st, already quoted from. Subsequently, and on July 18, 1892, plaintiff sent to defendant a statement of the account of Collins with the bank, with corrections of the erroneous and fraudulent entries on the books, showing the amount of his deficiency to be \$374,978.22. Correspondence between the parties ensued, extending over several weeks, the receiver offering to extend every facility to defendant's inspector in such examination as he might wish to make of the records of the bank, the company promising to send such inspector, and making no objection to the form of the proof of loss. The criticism now advanced is that the proof of loss was faulty, because it set forth a transaction different from the facts, and was calculated to mislead the defendant. Briefly, the objection is to the statement that Collins "appropriated to his individual use and embezzled" the two sums loaned to the California Bank by the United States National Bank and the Western National Bank, respectively. The evidence shows that the loans were made by crediting the California Bank on the books of the two New York banks with the amounts of the loans, and that such credits were subsequently exhausted by the payment of drafts of the California Bank. Therefore, as defendant contends, Collins did not "embezzle" the same. Technically, this is so; but the proofs of loss under a policy are not to be tested by the same rules as would be applied to an indictment, or even to a pleading. They are mercantile documents. All that can reasonably be required of such a "written statement of the loss" is that it shall be a brief and general statement of the facts expressed in the language of commerce, and, as thus expressed, shall truthfully inform the company how the loss occurred, giving the facts and the result with substantial accuracy. As the word is used in ordinary speech, Collins did "embezzle" \$24,500 and \$20,000. He so arranged his fraudulent scheme that when the credits given to the California Bank, on the security of its property pledged as collateral with the two New York banks, were converted into money by payment of the drafts of the California Bank against such credits, that money was diverted from the treasury of the latter bank into Collins' individual possession. He cheated the bank out of \$44,500, which he got ostensibly for said bank by improperly pledging its

assets in New York. The statement of loss might have stated the facts more fully,—might have shown the details of the process by which the proceeds of the pledge of the California Bank's property were forthwith so appropriated on its books that when they were subsequently drawn out of the New York banks they passed through the California Bank direct to Collins; but, even without such details, it states the loss resulting from Collins' dishonest and fraudulent acts broadly, and with substantial truthfulness. Unless documents such as these are to be construed closely, and the insured to be held rigidly to a measure of technical and legal accuracy in framing their phraseology not to be expected in mercantile transactions, the statement of loss submitted in this case was sufficient. And we know of no principle of law and of no authority which requires them to be construed otherwise than liberally, unless, perhaps, either because of what they contain or because of what they omit, the insurer is or may be misled to its prejudice. Defendant's counsel contends that the statement in this case was misleading, though there is no claim that the surety company was in fact misled. It is urged that upon receiving the statement the defendant company, if it had chosen to inquire as to the truth of the claim of loss, it would have ascertained from the New York banks that the loans had been made as asserted, but that the proceeds of such loans had been paid out, not to Collins individually, but to the California Bank on its own draft. This is so, but the conclusion sought to be drawn, viz. that "the surety therefore sees that the charge made in the proof of loss is absolutely false," is wholly unwarranted, for it might reasonably be true that the embezzlement took place in California. Defendant, therefore, was not entitled to a direction of the verdict in its favor on the ground that the alleged loss was not set forth in the claim, nor on the ground that either preliminary notice or proof of loss had not been served as required by the bond.

Very many other assignments of error are found in the record, but, as none of them are discussed in the brief of plaintiff in error (except some which are referred to in the opinion in the O'Brien Case), it will be unnecessary to rehearse them here. It is sufficient to say that they have been examined, and found to be unsound.

One point, however, which is not discussed upon the brief should be referred to.

3. The court charged the jury that the "plaintiff has established a prima facie case against the defendant, because he gave the written statement of loss, and subsequently transmitted to the defendant a copy of the account upon which it was based." To this, and to its repetition in other words, defendant duly excepted. This part of the charge was based upon a provision of the bond which reads as follows:

"It being understood that a written statement of such loss, certified by the duly-authorized officer or representative of the employer, and based upon the accounts of the employer, shall be prima facie evidence thereof."

It is contended that this does not mean that such statement shall be prima facie evidence in an action upon the bond; that "no such contingency was in the minds of the parties," and that it only refers to a consideration by the company of the question whether it will pay without suit; that it only indicates in what way the preliminary proof of a loss shall be made to the company. But neither the phraseology of the clause nor its collocation with the rest of the bond thus restricts its meaning. It is certainly open to the construction put upon it by the trial judge. Such construction is a most natural one. Nor is there anything extraordinary or startling in an agreement by the company that it will pay upon proof in a prescribed form being made to it, nor in its agreeing to accept such proof as prima facie sufficient to entitle the insured to a recovery in case of default. Conceding that it is also open to a construction which would confine it as plaintiff in error contends, it would be at least ambiguous; and it is elementary law that all obscurities and ambiguities in a policy of insurance are to be resolved against the underwriter, who has himself drafted the instrument. There was no error, therefore, in the charge in the particular complained of. The judgment of the circuit court is affirmed.

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**BERRY v. LAKE ERIE & W. R. CO.**

(Circuit Court, D. Indiana. February 27, 1896.)

No. 9,277.

**DAMAGES—AMOUNT—PERSONAL INJURIES.**

In an action by an infant of the age of seven years, brought by her next friend, against a railway company, to recover damages for personal injuries resulting in the loss of plaintiff's right leg below the knee, the jury gave plaintiff a verdict for \$1,100. There was no proof of any expense incurred, or pecuniary loss. *Held*, that the amount of the verdict, though less than the court would have approved, did not afford such evidence of bias, passion, prejudice, or mistake as to justify setting it aside as inadequate.

See decision on motion to strike out part of answer in 70 Fed. 679.

Duncan, Smith & Hornbrook and Conner & McIntosh, for plaintiff.  
W. E. Hackedorn, John B. Cockrum, and Miller, Winter & Elam, for defendant.

**BAKER**, District Judge. This was an action by Pearlie Berry, an infant of the age of seven years, by her next friend, Addie Berry, against the defendant, to recover damages for personal injuries resulting in the loss of her right leg below the knee. A trial was had, resulting in a verdict for her against the railroad company, assessing her damages at \$1,100. The plaintiff asks the court to grant a new trial, solely on the ground that the damages are inadequate. No exception was taken to any ruling of the court during the trial, nor did either party except to any portion of the instructions given by the court to the jury. The verdict of the jury settled—and, I think, cor-

rectly—that the injury arose wholly from the negligence of the defendant, without contributory fault on the part of the plaintiff.

When an action sounds in tort, for the recovery of unliquidated damages, to the admeasurement of which no fixed rule of law can be applied, the court ought not to set aside the verdict of a jury simply because the damages are, in its opinion, inadequate or excessive, unless it clearly appears that the verdict is so grossly inadequate or excessive as to afford evidence of bias, passion, or prejudice, or of mistake and oversight, in failing to take into consideration the proper elements of damage in assessing the amount of recovery. The present case does not seem to fall within this rule. A brief review of the cases cited and relied upon by the plaintiff will make this apparent.

It has been correctly said that:

“A verdict for a grossly inadequate amount stands upon no higher ground, in legal principle, nor in the rules of law or justice, than a verdict for an excessive or extravagant amount. It is doubtless true that instances of the former occur less frequently, because it is less frequently possible to make it clearly appear that the jury have grossly erred. But, when the case does plainly show such a result, justice as plainly forbids that the plaintiff should be denied what is his due as that the defendant should pay what he ought not to be charged.” *McDonald v. Walter*, 40 N. Y. 551, 554.

This case was an action brought by a vendor against a purchaser to recover damages for breach of contract in refusing to receive and pay for personal property sold, in which the jury returned a verdict for the plaintiff for a far less sum than the amount of damages he was entitled to recover, upon any construction of the evidence, if he had any cause of action whatever. It was held that the plaintiff was entitled to a new trial, on the ground that the verdict totally disregarded the evidence of the damages sustained. This was a case in which the plaintiff, if he had any cause of action, was entitled to recover as damages the difference between the contract price and the market price at the time and place fixed for the delivery of the property sold, and this rule of law was totally disregarded by the jury.

The case of *Robbins v. Railroad Co.*, 7 Bosw. 1, was an action to recover damages for personal injuries. The plaintiff was so much injured that he remained insensible through the day on which the accident happened, and was laid up for nearly five months, most of the time confined to the house. The jury returned a verdict for the plaintiff, assessing his damages at six cents. The court, in affirming the action of the trial court in granting a new trial, said of this verdict, “It is contrary to the clear and uncontradicted evidence, to the law of the case, and to the charge of the court in that behalf.” Such a verdict, for such serious injuries, was calculated to shock the moral sense, and, if permitted to stand, to bring reproach on the administration of justice.

The case of *Whitney v. City of Milwaukee*, 65 Wis. 409, 27 N. W. 39, was an action to recover damages for personal injuries sustained by reason of the unsafe and defective condition of a cross walk in the defendant city. The plaintiff was very much injured, and he suffered from the injury very much pain for a considerable time. He was compelled to carry his arm in a sling for two months, and was unable

to use his arm, as before the injury, in his business. The verdict of the jury was for the plaintiff, and they assessed his damages, all told, consisting of the cost of medical attendance and other expenses of cure, loss of time, and pain and suffering, at \$24.27. Having failed to recover \$50, the defendant was entitled to recover of the plaintiff the costs of the action, amounting to \$30.47; so that the result of the trial was that the plaintiff was \$6.20, besides his attorney's fee, worse off than before it took place. The court said this verdict, on its face, was perverse; that it was trifling with a case in court, and public justice, and was justly calculated to cast odium on the jury system.

The case of *Mariani v. Dougherty*, 46 Cal. 27, was an action to recover damages caused by the careless and reckless taking of the decedent's life, in which the jury returned a verdict of \$200 as a just and fair compensation for the damages sustained by the death of the plaintiff's intestate. The decedent was a house painter and paper hanger by trade, about 56 or 57 years of age, industrious and temperate. He found employment about three-fourths of the time, and made, when at work, from \$4 to \$7 per day. He had four sons and one daughter, all of whom had reached the age of majority, except one, and he was 10 or 11 years of age, living with and dependent upon his father for support. The court below granted a new trial because it seemed a mockery of justice to assess such an insignificant sum as a just and fair compensation, or for damages resulting from the reckless taking of a human life. The supreme court said, if the defendant was liable at all, the damages awarded were altogether disproportionate to the injury.

The case of *Bennett v. Hobro*, 72 Cal. 178, 13 Pac. 473, was an action to recover damages for injuries sustained by the plaintiff by falling through a trapdoor alleged to have been left open by the servants of the defendant. The evidence showed that the injuries sustained by the plaintiff were severe, resulting in long confinement, with a reasonable apprehension that they would permanently disable her. The jury found a verdict for the plaintiff, and assessed her damages at \$200. The trial court set the verdict aside as unreasonable and grossly inadequate. The supreme court, in affirming the decision of the court below, said, "Under such circumstances, the court may well have concluded that the sum awarded her was insignificant in proportion to the injury received."

The case of *Phillips v. Railway Co.*, 29 Eng. R. 177, was an action to recover damages for personal injuries sustained through the negligence of the defendant. The plaintiff was a physician in Grosvenor Square, London, who was making from his profession an income of between six and seven thousand pounds per annum at the time of his injury. He was an active, energetic man, in the prime of life, who was reduced to "a powerless helplessness, with every enjoyment of life destroyed, and with the prospect of a speedy death." The jury awarded him a verdict for £7,000. This verdict was set aside on the ground that the amount of damages given by the jury was so small as to show that they must have left out of consideration some of the cir-

cumstances which ought to have been taken into account. This ruling was affirmed in the court of appeal. The court of appeal placed stress upon the fact that the verdict gave no more than the loss of income for a single year. At the time of the trial more than a year had elapsed since the injury happened.

None of these cases furnish a warrant for granting a new trial in this case. The damages awarded are substantial, although less than the court thinks ought to have been given. From the youth of the plaintiff, there had been no loss from inability to labor. There was no proof of any expense incurred for medical or surgical attendance or care; and, aside from pain and suffering arising from the injury, her damages were entirely prospective, and incapable, in the nature of things, of any certain admeasurement. The case was tried fairly and dispassionately, and received the careful and patient consideration of the jury. While the court would have been better satisfied if a larger verdict had been returned, I feel, as Lord Denman once expressed himself, that a new trial on a mere difference of opinion between the court and jury as to the amount of recovery in an action of tort for unliquidated damages ought not to be granted. Something more must be disclosed to warrant interference, where substantial damages have been returned. Nothing more is shown in this case, and the motion for a new trial will therefore be overruled.

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In re SCHALLENBERGER.

(Circuit Court, N. D. California. December 9, 1895.)

1. **TARIFF LAWS—CONSTRUCTION—GENERAL PURPOSES.**

The general purpose of the so-called "McKinley Tariff Law" of October 1, 1890, to protect and foster American industries, is not to override a plain provision contained therein, which, in a particular instance, fails to carry out such purpose, or operates in contravention of it. The particular intent must prevail over the general intent.

2. **SAME—REIMPORTATION OF AMERICAN GOODS—ALLOWANCE OF DRAWBACK.**

In paragraph 493 of the act of 1890, providing for the free reimportation of certain American goods, among which are casks, bags, etc., the proviso that "this paragraph shall not apply to any article upon which an allowance of drawback has been made, the re-importation of which is hereby prohibited except upon payment of duties equal to the drawbacks allowed," applies to bags of jute burlap upon which drawbacks were allowed, notwithstanding that they are reimported filled with nondutiable merchandise, such as canary seed.

This was an appeal by L. E. Schallenger from a decision of the board of general appraisers affirming the action of the collector of the port of San Francisco in assessing a duty on certain reimported American bags upon which a drawback had been allowed.

Fox, Kellogg & Gray, for importers.  
Samuel Knight, Asst. U. S. Atty.

McKENNA, Circuit Judge (orally). The appellant made two importations of canary seed into the port of San Francisco, Cal., the seed being inclosed in double bags. The outer coverings of the seed

were certain returned bags, upon which an allowance of drawback had been made on their exportation, for the reason that they were jute burlaps, dutiable at 1½ cents per pound, under paragraph 364, Act 1890. They were assessed for duty, under paragraph 493, at an amount equal to the drawbacks allowed, less 1 per cent. thereof, by the collector, under instructions of the secretary of the treasury, and this ruling was affirmed by the board of general appraisers. The object of the appeal to this court is to review the decision of the board of general appraisers. Before the board of appraisers no proof was made that the bags were the ordinary and usual commercial coverings of canary seed. The omission, however, does not appear to have determined the decision of the board. In this court, on a reference for that purpose, testimony has been taken which, it is admitted, shows that the double covering was usual, and suitable for the transportation of the seed. The controversy turns upon the strict application of paragraph 493, which is as follows:

"Articles the growth, produce, and manufacture of the United States, when returned after having been exported, without having been advanced in value or improved in condition by any process of manufacture or other means; casks, barrels, carboys, bags, and other vessels of American manufacture exported filled with American products, or exported empty and returned filled with foreign products, including shooks when returned as barrels or boxes; also quicksilver flasks or bottles, of either domestic or foreign manufacture, which shall have been actually exported from the United States; but proof of the identity of such articles shall be made, under general regulations to be prescribed by the secretary of the treasury; and if any such articles are subject to internal tax at the time of exportation such tax shall be proved to have been paid before exportation and not refunded: provided, that this paragraph shall not apply to any article upon which an allowance of drawback has been made, the re-importation of which is hereby prohibited except upon payment of duties equal to the drawbacks allowed; or to any article manufactured in bonded-warehouse and exported under any provision of law: and provided further, that when manufactured tobacco which has been exported without payment of internal revenue tax shall be re-imported, it shall be retained in the custody of the collector of customs until internal revenue stamps in payment of the legal duties shall be placed thereon."

It is admitted by the district attorney that generally free goods make free coverings, but he claims that this does not apply to goods described in paragraph 493, the explicit language of which requires the imposition of a duty equal to the drawbacks which had been allowed. Appellant asserts contra:

"That neither the first proviso of nor anything contained in the said paragraph 493 has any application to this matter: (1) Because this proviso can only operate as a limitation upon the exemption from duty (if any there be already laid affecting a given case) afforded by the preceding portion of the paragraph, and cannot operate as a limitation upon exemption from duty afforded by reason of other and additional facts; or, in other words, this proviso is a subsidiary part of a paragraph, and the paragraph, taken altogether, including the proviso, and after giving the utmost force and effect that (under the true rules of construction is possible) can be given to the proviso, does not create a duty or obligation, but only gives an exemption if such duty or obligation already exists. (2) Because, even if the principle contended for under (1) is not sound, and even if it be true that the first proviso of this paragraph is to be taken as laying a duty, instead of merely limiting the extent of an exemption from such duty as in a given case

may be applicable by reason of other provisions of the tariff act, still the rule that free goods bring in free their ordinary, usual, and commercial coverings is not modified or affected by this proviso."

Any other interpretation, counsel urges, and strongly urges, militates against the policy of the act and the purpose of drawback, both of which, it is claimed, are encouragement to American industries, and will present the anomaly of bags made of foreign materials by foreign labor being admitted free as coverings, while bags made of foreign materials, by American labor, used for like purpose, are charged a duty. It may be admitted that one of the purposes of the McKinley act was protection to American industries, and that it sought to accomplish this purpose, both by duties upon imports and the allowance of drawbacks upon exports; but, considering the many things a tariff law must accommodate, it is not strange that a rigid, logical application of principle should not be made, and, because not made, it does not follow that plain provisions should be disregarded. The purpose of an act is, undoubtedly, the light by which its provisions are to be construed, but we may not assume that any provision is idle. It may be an exception to the general purpose, and the first presumption is that it means something. A particular intent will prevail over a general intent. Section 2 of the act provides as follows:

"On and after the 6th day of October, 1890, unless otherwise specially provided for in this act, the following articles when imported shall be exempt from duty: \* \* \* 493. \* \* \* Casks, barrels, carboys, bags, and other vessels of American manufacture exported filled with American products, or exported empty and returned filled with foreign products. \* \* \* Provided, that this paragraph shall not apply to any article upon which an allowance of drawback has been made, the re-importation of which is hereby prohibited except upon payment of duties equal to the drawbacks allowed. \* \* \*"

The appellant's bags are within the description of the paragraph. They were exported, and have been returned filled with foreign products. They also fulfill the condition of the proviso. An allowance of drawback had been made to them, and the prohibition of the proviso applies, unless it is prevented by other facts. The fact which it is claimed prevents it is that the bags are coverings for free goods, which are exempt by law as well as the goods. There is no explicit provision of law which declares that free goods make free coverings. If true at all, it is only as an inference from section 19 of the administrative act of 1890, which, after providing that the duty of imported merchandise subject to an ad valorem duty shall include the value of all cartons, cases, crates, boxes, sacks, and coverings of any kind, provides that, "if there be used for covering or holding imported merchandise whether dutiable, or free, any unusual article or form designated for use otherwise than in the bona fide transportation of such merchandise to the United States, additional duty shall be levied and collected upon such material or article at the rate to which the same would be subject if separately imported." It may be inferred from this that usual coverings are exempt from duty. Granting the inference, and if we construe the provision as universal, is there anything for paragraph 493 to operate on, as far as casks,



barrels, carboys, and sacks are concerned? If returned filled with foreign products, it must be as coverings suitable for such products. It would seem, therefore, this exemption from duty was unnecessary, as this was already done by section 19 of the administrative law; that is, a law of which free coverings on free goods is but a part, and that the only substantial part of paragraph 493 is the proviso which not only limits the exemption, but prohibits importation, except upon payment of duties equal to the drawback which had been allowed. This is not necessarily repugnant to the purposes of the act; but, if it is, it was competent for congress to make an arbitrary exception, and, if it intended to do so, it is not clear how language more apt to accomplish it could have been employed. The proviso contains another example of the same kind. It exempts from privilege of return or reimportation without duty articles manufactured in bonded warehouses, and exported under any provision of the law. The exception is more complete than in the case of sacks. On the latter the duty is fixed at the amount of drawback allowed. No duty, therefore, is put on the value given by American labor. On the former—that is, on articles manufactured in bonded warehouses—the duty shall be the same rate as if originally imported. Section 22. A duty, therefore, is put on the value given by American labor. This is a more repugnant exception to the general policy of the act than that of which appellant complains. The usual purpose of a proviso is to limit that which precedes it, but it may do more, and, however the intention of the lawmaker is expressed, it must prevail. If the proviso to paragraph 493 stopped with exempting from it articles upon which an allowance of drawback had been made, there would have been some reason for claiming it a limitation merely; but it goes further, and says “the reimportation of which is hereby prohibited, except upon payment of duties equal to the drawbacks allowed.” Language could not well be clearer or more positive. It forms a class of articles of those upon which drawbacks had been allowed. Thus construed, the paragraph and proviso have an intelligent purpose.

Appellant, in support of his claim, makes a distinction between the word “returned,” in the body of the paragraph, and the word “reimportation,” in the proviso. It is manifest, however, to accomplish the purpose of the paragraph, that they must be construed as having the same meaning. It follows from these views that the decision of the board of appraisers must be, and it is, affirmed.

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In re GARDNER et al.

(Circuit Court, N. D. California. December 16, 1895.)

**CUSTOMS DUTIES—CLASSIFICATION—BONES.**

Bones which have been crushed and screened must be regarded as “otherwise manufactured,” within the meaning of paragraph 511 of the act of 1890 (26 Stat. 604), and therefore are not admissible free of duty under that paragraph, but are subject to duty as “manufactures of bone,” under paragraph 460 (26 Stat. 602).

This was an appeal by Gardner & Thornley from a decision of the board of general appraisers affirming the action of the collector of the port of San Francisco in respect to the classification for duty of certain imported bones.

J. F. Evans and Charles A. Garter, for importers.

Samuel Knight, for the United States.

McKENNA, Circuit Judge (orally). This case comes on appeal from the decision of the board of appraisers affirming the action of the collector of the port of San Francisco, assessing duty against certain bones imported by Gardner & Thornley. The case involves the construction of paragraph 460 of the tariff act of 1890 (26 Stat. 602),—"McKinley Bill," so called,—and paragraph 511 of the same act, as to whether the bones imported are of the character claimed under paragraph 460 or of the character claimed under paragraph 511. Paragraph 460 is as follows:

"Manufacturers of bone, chip, grass, horn, India rubber, palm-leaf, straw, weeds, or whalebone, or of which these substances or either of them is the component material of chief value, not specially provided for in this act, 30 per cent. ad valorem."

Paragraph 511 is:

"Bones, crude, or not burned, calcined, ground, steamed, or otherwise manufactured, and bone-dust, or animal carbon, and bone ash, fit only for fertilizing purposes, are admitted free."

Gardner & Thornley claim that the bones are of the character described in paragraph 511, and not of the character described in 460. The collector of the port assessed duty against them under paragraph 460, to which the importers protested, and took an appeal.

The testimony is quite long, and of course it is impossible to review it. It is somewhat conflicting, at least as to whether the bones are, in the first place, crude bones. But, passing that, and assuming them to be crude bones, do they fulfill the other conditions? Are they bones not burned, not calcined, not steamed, not ground, and not otherwise manufactured? The testimony is again conflicting as to whether they are "ground." The importers claim that "ground" means pulverized. I hardly think that is true. One of the definitions of grind is to crush into small fragments. But, passing this also, are not the bones otherwise manufactured, in the sense of paragraph 511? The word "manufactured" seems to be given a definition by the paragraph different from the definition in *Hartranft v. Wiegmann*, 121 U. S. 609, 7 Sup. Ct. 1240. It appears to regard bones which are burned, calcined, or ground as manufactured. If so, the words "otherwise manufactured" would include those crushed and screened, and it is conceded that the bones in controversy are crushed and screened. Hence I am in the same situation that the board of appraisers were,—I am constrained, by the words of the statute, to concur with the collector.

There is one other proposition: Assuming the bones to be bone dust or animal carbon, the statute requires that they, in such con-

dition to be exempt from duty, must be fit only for fertilizing purposes. The best that may be said in favor of the claim that they are only so fit is that the evidence is conflicting. The claim is therefore not proved. But it is a fair inference from the evidence that they are fit for other purpose. The decision of the board of appraisers is therefore affirmed.

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JONATHAN MILLS MANUF'G CO. v. WHITEHURST et al.<sup>1</sup>

(Circuit Court of Appeals, Sixth Circuit. February 4, 1896.)

No. 331.

**1. ASSIGNMENT OF PATENTS—BONA FIDE PURCHASERS—NOTICE.**

Where an assignment of a patent contains recitals indicating a possible outstanding interest in another party, the assignee is chargeable with notice of every fact in reference to such interest which diligent and honest inquiry would have developed. A defect of title being brought to his knowledge, no inconvenience will excuse him from the utmost scrutiny.

**2. SAME—ASSIGNOR HOLDING AS TRUSTEE.**

A purchaser, who has reason to believe that the party offering a patent for sale holds it either as trustee or agent for a third person, cannot become a bona fide purchaser for value by relying on the statements of the suspected trustee or agent either as to his authority or as to his beneficial ownership. Inquiry must be made of some other person, who will have a motive to tell the truth in the interest of the cestui que trust or principal.

**3. RES JUDICATA—DECREE FOR ASSIGNMENT OF PATENT.**

A bill was brought to compel one S., an inventor of flour-milling apparatus, and others, to perform a contract requiring him to convey to complainant all the patents for flour milling which he should thereafter "obtain" or "procure," and also to annul certain alleged fraudulent assignments, made by him, of various patents, designated by name and number, and "all other letters patent relating to the manufacture" of certain described kinds of milling machinery which the complainant "then owned or controlled, or in which it then had any joint or other interest." The bill prayed a discovery by defendants of all patents or patent interests controlled or owned by the complainant, which, they claimed, passed by said fraudulent assignments, and a conveyance thereof to complainant. *Held*, that the decree properly included a patent, not specifically designated in the bill, which the said S. had obtained by assignment from another, and which was of the description of inventions in which the contract gave complainant a right, and that, consequently, the decree with reference to that patent was responsive to the issues made by the bill, and was conclusive against one who purchased from the defendant pending the suit. 65 Fed. 996, affirmed.

**Appeal from the Circuit Court of the United States for the Southern District of Ohio.**

The action in the court below was in equity to enjoin the infringement of a United States patent, No. 267,098, issued to Jonathan Mills, November 7, 1882, upon an application filed June 30, 1882, for an improvement in a device for bolting in flour mills, known as the "centrifugal bolt or reel." The bill averred that the complainant, by direct and mesne assignments, in writing, had become the sole and exclusive owner of the letters patent sued on. The bill was filed against M. C. Whitehurst, C. D. Whitehurst, and G. A. Whitehurst, and prayed an injunction, an accounting of profits, and damages. In the original answer, the defendants did not deny the sufficiency or validity

<sup>1</sup> Rehearing denied April 14, 1896.

of the assignments by which complainant traced its title from the original patentee. Subsequently, however, an amendment to the answer was filed, denying that the complainant was the sole and exclusive owner of the patent in suit. At the original hearing, the court below sustained the validity of the patent, and complainant's ownership of the same, and directed that a decree in accordance with this finding should be entered. 56 Fed. 589. Before the final decree was entered, a petition for rehearing was filed, on the ground of newly-discovered evidence showing that the complainant had not title to the patent. The court granted the rehearing (60 Fed. 81), and additional evidence was taken by both sides on this issue. It appeared from this evidence that, after Mills received his patent, on November 7, 1882, he assigned upon January 28, 1883, his patent to the Phoenix Foundry & Machine Works, of Terre Haute, Ind., and that this assignment was recorded June 21, 1884; that the Phoenix Foundry & Machine Works assigned the patent, December 18, 1883, to Myron W. Clark, and that the assignment was recorded June 21, 1884. This assignment was recited to be "in consideration of \$1,000 cash in hand, and for a note for \$1,000, due in six months, made by Jonathan Mills to the Phoenix Foundry & Machine Works." The assignment included several contracts, interests in patents, and applications, as well as the patent here in suit, together with a lot of personal property. The assignment contained this provision:

"The said Clark agrees to sell the said property, and to apply the proceeds—First, to the payment to said Mills of one thousand dollars; and, second, to the payment of the said notes made by said Mills; and, third, any balance shall be paid to said Mills. And it is not intended that any liability shall attach to the said Clark, except the accounting for moneys received from the sale of the above-mentioned properties, and the said Phoenix Foundry & Machine Works, in assigning said property, guarantees no value thereto."

Accompanying the assignment was this declaration of trust, which was also recorded:

"The property named in the above contract is held by Myron W. Clark as trustee for Jonathan Mills, and as security for the payment of one thousand dollars due him by said Jonathan Mills, which sum the said Mills hereby acknowledges as due and owing, and said Mills hereby authorizes said Clark to retain said sum from the proceeds of sale of same, which sale shall not be made for six months from the date hereof, without the consent of said Mills.

"[Signed]

Jonathan Mills.

"Myron W. Clark."

"I hereby consent to the substitution of Geo. T. Smith in place of Myron W. Clark in the above agreement, and hereby release and discharge said Myron W. Clark from all liability on account of the trust above created.

"Jonathan Mills."

Upon December 20, 1883, Myron W. Clark made an assignment to George T. Smith of all his right, title, and interest in the patent, and this was also recorded on June 21, 1884. On August 15, 1892, for the consideration of the sum of \$1 and other valuable considerations, George T. Smith assigned the patent to Charles Wardlow, and this assignment was duly recorded August 23, 1892. On the 16th day of August, 1892, Wardlow assigned the patent to the complainant, the Jonathan Mills Manufacturing Company, and this assignment was also recorded on the 23d of August, 1892. On July 1, 1891, there was recorded an assignment, undated, from Jonathan Mills, the original patentee of the patent, to the Jonathan Mills Manufacturing Company. In this writing of assignment occurs the following recital:

"And this assignment is in revocation, and made, for the further purpose than those herein above specified, to annul and set at naught a certain assignment by said Mills to Myron W. Clark, dated December 18, 1883, which said assignment was given as collateral security for a loan of one thousand dollars, and said patent now supposed to be held by the Smith Purifying Company, or its assigns; and provided, further, and this assignment gives full, absolute, and complete authority to the Jonathan Mills Manufacturing Company to secure, at its own expense, said patent."

At the rehearing (65 Fed. 996), the defendant introduced a certified copy of a decree in equity of the circuit court for the county of Wayne and the state of Michigan. The record was certified by William May, the registrar of the court, under the seal of the court. The decree was introduced to show that, at the time that George T. Smith made his assignment to Wardlow, in 1892, he had nothing but the naked legal title, and that the real equitable interest and ownership was in the George T. Smith Middlings Purifier Company, of all of which the complainant had notice. George T. Smith was a party to the Michigan decree, and the defendant introduced an assignment—dated June 7, 1893, executed by Eliza B. Smith, George T. Smith, and George W. Weadock, executor of the last will and testament of Charles H. Plummer,—of a number of patents and patent interests, including among others the patent in suit, to Rufus H. Emerson and Zenas C. Eldred, receivers of the George T. Smith Middlings Purifier Company, executed, as recited in the assignment, in accordance with, and in obedience to, the decree already referred to. This assignment was recorded June 16, 1893.

The complainant, for the purpose of attacking the validity and effect of the decree, introduced a certified copy of the bill, answers, and other proceedings of the court in the same cause, together with the decree, making the claim that, in so far as the decree found that George T. Smith acquired and held title to the Jonathan Mills patent, here in suit, in trust for the George T. Smith Middlings Purifier Company, and directing a conveyance or assignment by him to the receivers of that company, it was outside of the issues made by the pleadings in the cause, and was *coram non iudice*, and void. The record shows that the bill was filed August 18, 1880, by Rufus H. Emerson and Zenas C. Eldred, receivers of the George T. Smith Middlings Purifier Company, against Charles H. Plummer, Eliza B. Smith, George T. Smith, and the George T. Smith Middlings Purifier Company. The bill averred that the George T. Smith Middlings Purifier Company was a corporation, organized April 20, 1878, under the laws of Michigan, for the purpose of manufacturing middlings purifiers and other milling machinery relating to the new process milling, and to procure, use, and purchase improvements, inventions, and patents relating to that system of milling; that the original stockholders, of whom George T. Smith was one, by contract, in writing, in consideration of the sum of \$250,000, assigned and transferred to the George T. Smith Middlings Purifier Company certain named patents, and "all other inventions and improvements relating to milling and mill machinery for which said George T. Smith should thereafter obtain letters patent," whereby said George T. Smith Middlings Purifier Company became vested with the entire title to all said letters patent, and to all inventions and improvements covered thereby, together with the right to have assigned and transferred to it all other patents which said George T. Smith should thereafter procure for improvements in milling and mill machinery; that said contract was afterwards, on the 12th day of September, 1878, filed for record in the patent office of the United States, and duly recorded; that said George T. Smith was, or claimed to be, the inventor of a portion of, if not all of, the improvements embraced in all of said letters patent, and an expert in milling and mill machinery; that it was regarded by the parties to the contract as essential, in order to secure to said corporation the full benefit of said letters patent, to secure to it all letters patent which might thereafter be obtained by said George T. Smith for improvements affecting the business which it was incorporated to carry on, and the agreement that all such letters patent obtained by said George T. Smith should belong to said corporation was an important consideration in the making of said contract; that, by reason of said agreement, said George T. Smith Middlings Purifier Company became entitled to all letters patent obtained thereafter by said George T. Smith, and during the term of the existence included in the letters patent so assigned and transferred to said corporation or affecting or pertaining to the business which said corporation was organized to engage in and carry on; that Smith, after the making of the first contract named, obtained a number of patents, which are named in the bill,—some of them patents for inventions of his own, others which he obtained in connection with other patentees, and one other, issued to another person, and assigned to him; that, in addition to the letters pat-

ent of the United States so obtained by Smith, he had sundry applications pending in the United States patent office, at Washington, for flour bolts and improvements in milling and mill machinery, the number and particular description of which are now unknown to complainants; that, by virtue of the terms and provisions of the contract aforesaid, each and all of said patents, so obtained by said Smith in his own name, and all of his right and interest in said patents, obtained by him in connection with other persons, became, when obtained as aforesaid, in equity, the property and rights of said George T. Smith Middlings Purifier Company, and so continued until the assignment of said company, hereinafter mentioned; that said Smith, by virtue of said contract, took the legal title to said patents and patent interests in trust for said George T. Smith Middlings Purifier Company, its successors and assigns; that the purifier company, its successors, or assigns, or the complainants, were equitably entitled to have an assignment from Smith of each and all of said applications which he had pending in said patent office for patents or improvements on milling and mill machinery, when the same should be discovered, or proof made to this court; that the entire expense of obtaining all of said letters patent, and the filing and prosecution of said applications, as well as all expenses of every kind incurred in perfecting the inventions covered by said patents and applications, shop room, and labor, whether by hand or machinery, and all charges of every kind or description in connection therewith, had been borne and paid by said purifier company; that it was understood and intended by Smith, when said patents were obtained, and said application filed, that they were so obtained and filed in the interest of said company; that said company had used said patents as occasion required in the prosecution of its said business without any claim or pretense on the part of Smith that it had not a right to do so, or that he was entitled to any compensation therefor; that said Smith was, in the year 1883, elected president of the company, and had the control and management of its business until the 1st day of June, 1890; that he treated the affairs of said corporation very much as if its interests were identical with his own; that the purifier company became insolvent in 1890, and made a common-law assignment to the complainants for the benefit of the creditors; that, afterwards, the complainants were removed as assignees, and appointed receivers of all the lands, tenements, goods, and choses in action belonging to the purifier company; that, as such receivers, they became vested with all the rights and interests of the said company to all the contracts hereinbefore mentioned; that they had a right to demand and have an assignment from said George T. Smith of all the patents obtained by him, or in which he has an interest, as hereinbefore mentioned, and all applications for patents made by him which are now pending, as also hereinbefore stated; that said George T. Smith and Eliza B. Smith, his wife, pretended and claimed that said George T. Smith Middlings Purifier Company, by said George T. Smith, as president and treasurer thereof, on or about the 12th day of November, 1889, by an agreement in writing, in consideration of \$3,538.48, as therein expressed, did sell and transfer to said Eliza B. Smith all its right and interest to and for letters patent (then follow some 20 letters patent, by number; not, however, mentioning the patent in suit), and all other letters patent relating to the manufacture of middlings purifiers, centrifugal reels, interelevator reels, or roller reels, and any inventions made by said George T. Smith, which said company then owned or controlled, or in which it then had any joint or other interest; that Eliza B. Smith assigned all the patents and patent interests received under this agreement to Charles H. Plummer, who claimed, by virtue of such assignment, to own all the patents and patent interests legally and equitably owned or possessed by said George T. Smith Middlings Purifier Company and said Eliza B. Smith, or then in the name of said George T. Smith, as well applications as patents; that such claims and pretenses of said Plummer were wholly without foundation, and a fraud upon the just rights of the creditors of said George T. Smith Middlings Purifier Company; that said pretended transfer from said George T. Smith Middlings Purifier Company to said Eliza B. Smith was without consideration, and fraudulent and void as to the creditors of said George T. Smith Middlings Purifier Company, and the stockholders of said company, and was a fraudu-

lent scheme, on the part of the said George T. Smith and Eliza B. Smith, to cheat and defraud the creditors of said George T. Smith Middlings Purifier Company; that George T. Smith was not authorized by the board of directors of said corporation to make said contract; that Plummer had acquired his title to the patents and patent interests thus assigned to him with the full knowledge of the claims of complainants.

The prayer of the bill was that Plummer, Eliza B. Smith, and George T. Smith might make full answer, and set forth and discover any consideration that passed for the transfer of the patent and patent interests mentioned in the contract; that they specifically set forth all the patents or patent interests controlled or owned by the company which they claim passed by said fraudulent assignments, and that all such transfers and assignments be declared null and void; and said George T. Smith might be required to specifically perform the contract hereinbefore first mentioned, and set forth and transfer and assign to the purifier company all the patents theretofore mentioned as being in his name, or in which he has any interest, and all applications for patents pending as herein stated or to the complainants; that Smith might be further directed to discover what further or other applications for patents he had then, or at the date of the said assignment by said George T. Smith Middlings Purifier Company, pending in the patent office of the United States relating to milling or mill machinery, with the date of the filing of the same, and a description of the improvements thereby claimed, and, when so discovered, that he assign the same in accordance with the provision of said first contract; that he discover and set forth any further or other assignments, or attempted assignments, of patent interests, affecting the letters patent, applications, or patent interests hereinbefore mentioned, any or either of the same; and that all such contracts or assignments, when so discovered, that are in conflict with the provisions of the contract first aforesaid, and the contracts between said companies aforesaid, or in fraud of the creditors of said assignor, be adjudged and decreed null and void. Nowhere in the bill was the Mills patent (the one in controversy in this cause) mentioned by name or number, and it was not embraced within either the allegations or prayer of the bill, unless the general expressions of the bill were wide enough to include it.

Subpoena was issued, and personally served on George T. Smith and other defendants. After making a plea to the jurisdiction of the court, which was overruled by the court, each of the defendants filed an answer. The answer of Plummer was filed January 14, 1892. The answer of George T. and Eliza B. Smith appears also, by the record, to have been filed upon that date, but its contents are not disclosed in the record. A replication was filed to both answers, and notice to take proof in open court was filed, and the cause was heard in open court, and proof taken in accordance with the statute of Michigan, on the 21st day of September, 1892, and the decree was entered for the complainants May 10, 1893. The decree found that, among other patents held by Smith in trust for the Smith Middlings Purifier Company, was the Mills patent here sued on, and ordered Smith, his wife, and Plummer's executor to make an assignment of the same to the complainants, which was done, as already stated.

On the 15th day of August, 1892, George T. Smith, at the time he assigned the patent to Wardlow, made the following affidavit:

"State of Ohio, County of Franklin—ss.: George T. Smith, being first duly sworn, says that he has this day offered and agreed to sell, assign, and transfer to Charles Wardlow, in consideration of twelve hundred (\$1,200) dollars, a certain invention or improvement in centrifugal bolts, as set forth in letters patent of the United States, and in and to said letters patent, said letters patent being the same granted to Jonathan Mills, November 7, 1882, and numbered 267,098. That said invention or improvement and letters patent are the same heretofore conveyed by Jonathan Mills to the Phoenix Foundry Company, of Terre Haute, Ind., and by said Phoenix Foundry Company to Myron W. Clark, and which were, on or about the 20th day of December, 1883, sold, assigned, and transferred by said Myron W. Clark to said George T. Smith. And said affiant says that he has not made any prior

assignment, sale, or transfer of said invention or letters patent, nor has he granted any license which could affect his right, title, or interest in said invention or letters patent, and that said interest which said affiant has offered and agreed to sell to said Charles Wardlow is free from all prior assignment, grant, mortgage, license, or incumbrance whatsoever. And affiant further says that he has not done any act or deed which could in any manner whatsoever affect his right, title, or interest in and to said invention and letters patent, and that he does not know of anything which could in any manner affect the right, title, or interest in said invention and letters patent, which said affiant has offered to sell to said Charles Wardlow, save and except a certain assignment of said patent heretofore made by said Jonathan Mills to Jonathan Mills Manufacturing Company. Said affiant further says that he has never made any assignment in insolvency or bankruptcy. And said affiant says that this affidavit is made for the purpose of satisfying said Charles Wardlow and his assigns of the validity of the title of said affiant in and to said invention and letters patent. Geo. T. Smith."

"Sworn to before me and signed in my presence this 15th day of August, A. D. 1892.

["Seal.]

N. L. Helphrey,

"Notary Public, Franklin County, Ohio."

This affidavit was offered by the complainant to show Wardlow's good faith in the purchase of the patent. It was stipulated that Charles Wardlow would testify that, at the time of receiving the assignment from George T. Smith, he received the foregoing "warranty affidavit," and that said affidavit was executed in the presence of Wardlow on the day of its date, and was duly acknowledged before the notary whose seal and signature was thereto fixed. Wardlow was not otherwise used as a witness by complainant.

Taylor E. Brown, for appellant.

Geo. J. Murray, for appellees.

Before TAFT and LURTON, Circuit Judges, and HAMMOND, J.

TAFT, Circuit Judge (after stating the facts). We concur with the circuit court in the view that, by the recitals in the assignment of Jonathan Mills to the complainant, the Jonathan Mills Manufacturing Company, the latter was put upon inquiry as to the interest of the Smith Middlings Purifier Company and must be charged with notice of every fact with reference to the company's interest in the patent which diligent and honest inquiry would have developed. It is well settled that, when a purchaser cannot make out his title but through a conveyance which leads to a fact, he will be affected with notice of that fact. When a defect in title is brought to his knowledge, no inconvenience will excuse him from the utmost scrutiny. He is a voluntary purchaser, and, having notice of a fact which casts doubt upon the validity of his title, the rights of innocent persons are not to be prejudiced through his negligence. *Brush v. Ware*, 15 Pet. 93, 112, 114; *Oliver v. Piatt*, 3 How. 333, 410; *Cordova v. Hood*, 17 Wall. 1. As said by Mr. Justice Strong, speaking for the supreme court in the last-named case (page 8):

"Wherever inquiry is a duty, the party bound to make it is affected with knowledge of all which he would have discovered had he performed the duty. Means of knowledge, with the duty of using them, are, in equity, equivalent to knowledge itself."

The chain of title disclosed by the patent office records, from Jonathan Mills, the original patentee, to George T. Smith, indicated an outstanding equity of some kind in Mills, and an assignment



from Mills to the complainant was necessary to clear any title which it might acquire from Smith. The Mills assignment was, therefore, in the chain by which complainant must assert ownership, and it was charged with notice of the statement therein that the patent was supposed to be owned by the Smith Purifying Company. Indeed, his assignment was made directly to complainant, and authorized it to procure the patent from the company or its assigns. The company, therefore, necessarily, had actual as well as constructive notice of its contents. Now, it is true that the company referred to by Smith was the Smith Purifying Company, while the company which really owned the patent was the George T. Smith Middlings Purifier Company. We cannot suppose, however, that, in the trade, any mistake could have arisen from this difference. Complainant has not called its officers to testify as to what knowledge they had of the existence or nonexistence of a company by either name, or what efforts they made to identify the Smith Purifying Company with an existing company. Even Wardlow, complainant's agent in the purchase, has not been called to state what his knowledge or inquiry was in respect to the matter, although he is the person upon whom complainant relies as the innocent purchaser.

It is common knowledge that, in a manufacturing business of this character, the number of all the corporations engaged throughout the country is limited, and it is a matter of no great difficulty to ascertain the name of every one of them. Certainly, had complainant and Wardlow made inquiry, if they did not already know it, they would have learned that there was such a company as the George T. Smith Middlings Purifier Company in Michigan, and the slightest diligence would have led to inquiry of those who represented it (it was then in the hands of receivers) to learn whether it claimed any interest in the patent. Instead of this, Wardlow and complainant contented themselves with the execution by George T. Smith of the so-called "warranty affidavit." The affidavit, instead of aiding complainants' case, casts suspicion on it, especially when Wardlow is not called to give evidence of his purpose in taking it, or his good faith in the transaction. *Kirby v. Tallmadge*, 16 Sup. Ct. 349. Inquiry of Smith, from whom the purchase was to be made, certainly did not fill the measure of proper diligence; for he was necessarily interested to establish a clear title in himself. If the Smith Company had any interest in the patent, as Mills suggested, then it was apparent that George T. Smith, who held the legal title, was trustee for the company. It is well established that one who has reason to believe that another is offering property for sale, which he holds either as trustee or agent for a third person, cannot become a bona fide purchaser of the property for value by reliance on the statements of the suspected trustee or agent, either as to his authority, or as to his beneficial ownership of the thing sold. In such a case, inquiry must be made of some one other than the agent or trustee,—of some one who will have a motive to tell the truth, in the interest of the cestui que trust or principal. *Trust Co. v. Boynton* (decided by this court

at the present term) 71 Fed. 797. If, then, the purifier company was the equitable owner of the patent in controversy, we are fully justified in presuming, from the circumstances, that Wardlow and the complainant might easily have found it out from the receivers of the company, who were then in charge of its affairs and assets.

It remains to inquire whether the company was the real owner of the patent, as between itself and George T. Smith. The only evidence on this subject which defendant introduced was the decree of the circuit court of Wayne county, Mich., and Smith's assignment in obedience to it. Certainly, it cannot be denied that Wardlow and the complainant are privies to Smith, and are bound conclusively by any decree rendered against him, in reference to this patent, and in favor of the purifier company or its assigns, upon proceedings begun before they acquired title from Smith. This need not rest alone on the naked doctrine of lis pendens, but it grows out of the fact that Wardlow and complainant were charged with notice of the litigation, because diligent inquiry in respect to the title suggested by Mills' assignment would have made them actually aware of it. But it is said that the bill upon which the decree was founded did not embrace the Mills patent, and that, though the court had personal jurisdiction of the parties, it had no power to make a finding or order concerning something not submitted to its judicial cognizance by the pleadings; and this fact is also said to free complainant from the burden of notice that the patent here in suit was in controversy there, because it and its grantor acquired title after the pleadings were made up, and before hearing or decree. The general principle contended for by complainant, that a decree must be responsive to the issues made by the pleadings, need not be disputed. Its application and its limitations are clearly set forth by Mr. Justice Brewer in delivering the opinion of the court in *Reynolds v. Stockton*, 140 U. S. 263, 265, 11 Sup. Ct. 773. But the record of the Michigan suit presents no such difficulty.

In general terms, the bill was filed by the receivers of the purifier company to compel Smith to assign to the company all the patents and patent interests which he had agreed to assign to it by a contract made at the time of its organization, and also to compel a reconveyance to it of all its patents and patent interests which throught the fraud of Smith, as its president, and his wife, Eliza B. Smith, and one Plummer, had been conveyed, without consideration, first to Eliza B. Smith, and then by her to Plummer. The contract between Smith and the company required him to convey to it all the patents for flour milling which he should thereafter "obtain" or "procure." If, as the decree finds, Smith held title to the Mills patent in trust for the company, he must have procured it after the date of the contract, in 1878, because the patent was not applied for until 1882; and therefore the jurisdiction of the court was invoked to compel the assignment of this patent by Smith, in accordance with his contract. Smith was required by the bill to set forth, in connection with that contract, all patents in which he had an interest. But it is objected that the word "obtain" refers

only to such patents as Smith should obtain as inventor, and not to those he might obtain by assignment. Some of the language used in the decree might justify this limitation, but the word is used in another part of the bill to include, not only those obtained by him as inventor, but also as joint inventor with another, and also one obtained by him as assignee. In support of the decree, and the court's jurisdiction, an ambiguous description of the subject-matter should, it would seem, receive that construction which will sustain them both.

But the other aspect of the bill—that relating to the fraudulent assignments to Eliza B. Smith and to Plummer—very clearly embraces, by general language, the patent here in suit. The fraudulent assignment embraced, not only many patents by name and number, but also all other letters patent relating to the manufacture of middlings purifiers, centrifugal reels, interelevator reels, or roller mills and any inventions made by said George T. Smith, which said company then owned or controlled, or in which it had any joint or other interest. The last two relative clauses modify, not only Smith's inventions, but also the words "all other letters patent," etc., and therefore, by this assignment, passed to Eliza B. Smith any patent relating to centrifugal reels owned or controlled by the purifier company, or in which it had a joint or other interest. The patent in suit related to a centrifugal reel or bolt, and, as complainant had reason to believe from Mills' assignment, this company had the equitable title to it. The bill was filed to vest title in the receivers of the company of all the patents passing by the assignment to Eliza B. Smith and to Plummer. Hence, it was within the jurisdiction of the court, as limited by the four corners of the bill, to make a finding as to what passed by the fraudulent assignment and to order an assignment of the same to the receivers. The decree found that the Mills patent was one of these, because it found it to belong to the company, though in George T. Smith's name. Smith and his wife were required by the bill to discover and specifically set forth all the patents claimed by them to be included in the assignment made to Eliza B. Smith and by her to Plummer. The record does not show Smith's answer, and, if necessary, we should presume, in support of the validity of the decree, that the Mills patent was one of those discovered by George and Eliza B. Smith in their answer. But, whether it was so or not, the prayer for discovery in the bill gave the court jurisdiction to act with respect to any patent within the description of the prayer for discovery which the evidence disclosed, and to find that it belonged to the company, and to order its assignment to the receivers. We do not doubt that the decree with reference to the Mills patent is responsive to the issues made by the bill, and that it was *coram judice*.

Objection is made to the mode in which the Michigan decree was proven, because it was not certified in accordance with the act of congress, but only by certificate of the register of the court. It suffices to say that, however formidable this objection might have

been if seasonably made in the circuit court, it cannot prevail here when made for the first time. Not only did complainant not make any such objection in the court below, but it itself introduced a record of the same cause, with the same decree, certified in the same way, in order to show the pleadings which the defendant had not offered. As the Michigan decree and the assignment in accordance therewith carry all of George T. Smith's title to the receivers of the George T. Smith Middlings Purifier Company, the title of complainant to the patent sued on fails, and it becomes unnecessary to consider other questions raised as to the title, or those which have been presented on the merits of the patent and its infringement.

The decree of the circuit court is affirmed, with costs.

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CLEVELAND FAUCET CO. v. VULCAN BRASS CO.

(Circuit Court, N. D. Ohio, E. D. March 5, 1896.)

No. 5,439.

1. PATENTS—INFRINGEMENT SUITS—DEMURRER TO BILL—JUDICIAL NOTICE.

It seems that, where the question of the validity of the patent sued on is raised by demurrer to the bill, other patents referred to in the patent for the purpose of showing the extent and nature of the invention are not brought before the court, so as to require it to take judicial notice of what the inventions covered by those patents are, but that the court is restricted to what appears upon the face of the patent sued on, and that common knowledge in respect to the subject-matter which the well-informed public are presumed to possess.

2. SAME.

On demurrer to the bill for want of patentability, the court is not at liberty to apply any special or peculiar knowledge which it may possess, or the skill possessed by experts, but may apply only that knowledge which is possessed by ordinarily well informed people. *American Fibre-Chamois Co. v. Buckskin-Fibre Co.*, 72 Fed. 508, followed.

3. SAME—INVENTION—FORCE AND DRAIN FAUCETS.

In a combination constituting an alleged improvement in force and drain faucets, there is no invention in merely bending the piston rod of the air pump inward towards the faucet, so that both may be carried through the same opening in the casing.

4. SAME.

The Weatherhead patent, No. 353,723, for "improvements in force and drain faucets," held void on its face for want of patentable invention.

Banning & Banning, for complainants.

Webster, Angell & Cook and Hall & Fay, for respondents.

SEVERENS, District Judge. The complainants filed their bill in this case for the purpose of obtaining an injunction against the defendants, restricting them from their alleged infringement of patent No. 353,723, bearing date December 7, 1886, issued to Albert J. and Edward H. Weatherhead, for "improvements in force and drain faucets," and for further incidental relief.

The defendants demurred to the bill upon the grounds following:

"(1) That complainant hath not, in and by said bill, made or stated such a cause as entitles it to the relief prayed for.

"(2) That the patent in suit shows on its face that it is not for a new and useful invention, under the patent law.

"(3) That the subject-matter described in the specification shown in the drawings, and particularly pointed out in the claim, of the patent in suit, involved nothing that was not within the skill of the art.

"(4) That the means covered by the patent in suit were well known, within judicial knowledge,—in the described combination or in analogous combinations.

"(5) That the claim of the patent in suit describes a pure aggregation of elements, not a patentable combination."

It is necessary, in the first place, to ascertain what materials are before the court for decision. It is contended by the counsel for the defendants that by the references in the complainants' patent to several other patents by number, for the purpose of showing the extent and nature of the invention, viz.: No. 328,651, to Class & Weatherhead, dated October 20, 1885; No. 328,887, to Class, Weatherhead & Collins, dated October 20, 1885; No. 214,531; No. 337,210; and No. 339,295,—all those patents are brought into this, and require the court to take judicial notice of what the inventions covered by those patents, respectively, were; but I greatly doubt whether that contention is maintainable, and am inclined to hold that upon this demurrer the court is restricted to what appears upon the face of the patent in question, and that common knowledge in respect to the subject-matter which the public are presumed to possess, and that what the patents referred to show is merely a matter of evidence to be brought upon the record in the usual way, and, when thus exhibited, may effect a limitation upon the scope of the patent by restricting the invention. It is not necessary for me to go at large into the reasons for this conclusion, in view of the result which I reach upon other grounds.

Upon another question raised by the counsel for the defendants, as to the extent of the matters of which the court may take judicial notice in passing upon the validity of the patent in suit, I accept as authoritative the test laid down by Taft, circuit judge, in delivering the opinion of the court of appeals for this circuit in the cases of *American Fibre-Chamois Co. v. Buckskin-Fibre Co.* and numerous other defendants (cases decided in February last), 72 Fed. 508, that this court, in disposing of a case upon demurrer to a bill founded upon a patent, is not at liberty to apply any special or peculiar knowledge which the court may possess, or to apply to the patent the skill possessed by experts, but may only apply that knowledge which is possessed by ordinarily well informed people; but, nevertheless, acting under the limitations of both the rules above stated, I think that this demurrer must be sustained upon matters appearing on the face of the patent itself. This patent was referred to upon the argument, and no question is made upon the question of reference to that for the purpose of decision.

In the specifications for the patent, the inventors claim to "have invented certain new and useful improvements in force and drain

faucets," and they state, further, that the invention relates to force and drain faucets, and is an improvement on the constructions shown in certain previously named patents; and they further state that they were aware of certain other named patents for combinations of a faucet body, pump, cylinder, piston rod, and spigot, as in patent No. 337,210, and a combined beer pump and faucet to be used in connection with an ice box as in patent No. 339,295. It is clearly implied from the references in the specifications of this patent, taken in connection with its own construction and professed purposes, that the pump in previous constructions was used for forcing air into a beer barrel, and thereby forcing the beer out, and that the faucet was for the purpose of giving it way out. All this clearly shows that, prior to this invention, combined air pumps and pistons had been in use, for the same general purpose as that covered by the claim of the patent now under consideration. The claim is for a faucet constructed substantially as described, and bored simply for the passage of fluid, in combination with an air pump side by side with it, having a piston rod bent inward towards the faucet, and a lever to operate the rod, whereby the apparatus may be used in connection with a beer barrel, and placed inside of a casing having but a single opening for the passage of the faucet and piston rod, side by side. This is substantially all there is of the claim. The usefulness of the invention, so far as it can be gathered from the specifications and claims, appears to consist in the provision for having but a single opening in a casing for faucet and piston rod, that being accomplished by bending the piston rod so that that portion of it which passes through the casing shall run parallel with, and close by the side of, the faucet. It is to be observed, in passing, that while in some parts of the specifications the lever which actuates the piston rod also actuates the piston cock, yet this last function appears not to have been deemed material, and must be held not to be so, for the reasons: First, that in the form shown by figure 6 in illustration of the invention, and referred to in the specifications as one of the forms thereof, the lever has no connection with the faucet whatever, but is pivoted upon the casing; and, secondly, the claim itself simply covers a lever to operate the said rod, as one of its elements. *Busell Trimmer Co. v. Stevens*, 137 U. S. 423, 435, 11 Sup. Ct. 150, and *L. Schreiber & Sons Co. v. Grimm*, (lately decided in the circuit court of appeals for this circuit) 72 Fed. 671. Looking at the drawings, it is difficult to understand how the bringing of the piston rod down into close proximity to the faucet conduces in any way to effect the proposed object, viz. that of minimizing the opportunity for the passage of air through the casing. As shown, both are round, and it would seem that the airway would surely be as great with the two carried through in contact as it would be if separate apertures were made for each. But, waiving that, I am very clearly of the opinion that, if the opening in the casing could be lessened by bending the piston rod so as to carry it through the same open-

ing, there was no inventive genius displayed in doing it, and that it is nothing more than any mechanic, skilled in his business, and having the requirements before him, would have seen. The patentee does not claim for a bent piston rod, but only for a combination in which that is an element. It is indifferent whether the elements are new or old. Corn-Planter Patent, 23 Wall. 181, 224. This new combination of them is, as above stated, for the purpose of carrying them both through one opening in the casing.

Another position taken by counsel for the defendant is that, on reference to the form of construction shown by figure 6, the pump and the faucet are shown to be quite independent of each other, adapted to the performance of separate functions, and therefore constitute a mere aggregation. I do not decide this question, as I am able to decide the case upon the other ground.

Let an order be entered sustaining the demurrer, and dismissing the bill.

AMERICAN FIBRE-CHAMOIS CO. v. BUCKSKIN-FIBRE CO. et al.

Nos. 332 and 334.

SAME v. WILLIAMSON et al.

Nos. 333 and 335.

SAME v. MUELLER et al.

Nos. 336 and 337.

(Circuit Court of Appeals, Sixth Circuit. February 10, 1896.)

1. APPEAL—WAIVER OF ASSIGNMENTS OF ERROR.

Failure of counsel, either in his brief or oral argument, to allude to one or more of his assignments of error, is a waiver thereof.

2. PATENTS—INFRINGEMENT SUITS—DEMURRER TO BILL.

It is now well settled that the question of novelty or invention may be raised by demurrer to the bill; that in considering this question the court may take judicial notice of facts of common and general knowledge tending to show want of novelty or invention; and that it may refresh and strengthen its recollection of what facts were of common and general knowledge at the date of the application by reference to any printed source of general information known to the court to be reliable, and to have been published prior to the application. But the court must keep strictly within the field of common knowledge, taking care to distinguish and exclude matters within its own special knowledge; and, if it have any doubt whatever on the question of novelty or invention, it must overrule the demurrer.

3. SAME—MECHANICAL PROCESS.

A process of rendering wood-fibre paper soft and pliable, by moistening it with a thin water solution of gelatin, and then crumpling and pounding it, and finally drying and smoothing it, is not a mere mechanical process or aggregation of functions, within the doctrine of *Locomotive Works v. Medart*, 15 Sup. Ct. 745, 158 U. S. 68, but is a true process, within *Cochrane v. Deener*, 94 U. S. 780.

4. SAME—ANTICIPATION.

A patent which provides, as one step of a process, for moistening wood-fibre paper with a thin water solution of gelatin, is not so clearly anticipated by a patent which calls for the use of a "suitable size" for a similar purpose as to authorize a court to declare it invalid upon demurrer to the bill. 69 Fed. 247, reversed.

## 5. SAME—FIBRE CHAMOIS.

The McLauchlin patent, No. 511,789, *held* not so clearly wanting in novelty and invention, or so clearly anticipated, as to warrant the court in declaring it invalid on demurrer. *Held*, further, that the patent is not for a mere mechanical process, or aggregation of functions. 69 Fed. 247, reversed.

Appeals from the Circuit Court of the United States for the Eastern Division of the Northern District of Ohio.

These were six suits in equity brought by the American Fibre-Chamois Company,—two of them being against the Buckskin-Fibre Company and Hiram J. Halle, its president; two against Samuel Williamson (executor of the estate of Ralph R. Root, deceased), Lee McBride, and John M. McBride; and two against Peter G. Mueller, Charles E. Smith, and Thomas P. McMahon, partners doing business as the Cleveland Fibre-Interlining Company. In each case the bill was dismissed on demurrer for want of patentable novelty and invention (see 69 Fed. 247), and the complainant has appealed.

These are six suits in equity brought to enjoin the infringement of patent rights by the same complainant. Three of them (Nos. 332, 333, and 336) were brought against three different defendants to restrain the infringement of United States letters patent No. 511,789, issued to John C. McLauchlin January 2, 1894, for new and useful improvements for the manufacture of imitation dressed chamois buckskin from paper pulp in sheets. The defendants in each of these cases filed answers. No replications were filed by the complainant, and the defendants made motions to dismiss the bills on that account. Thereupon the complainant appeared, and moved to dismiss the bills without prejudice, on the ground that, having acquired another patent, it wished to include both in the same actions against the defendants, and proposed the dismissal without prejudice in order to unite the patents in a new bill. To this motion the defendants objected; asked leave to withdraw their answers, and to file demurrers to the original bills. This leave was granted to defendants. The demurrers were filed, and, after argument, were sustained by the court, on the ground that upon the specifications of the patents the court was able to declare, in view of the matters of common knowledge of which it could take judicial notice, that there was no patentable novelty or invention shown in either patent. Notwithstanding the action of the court in refusing to dismiss, the same complainant filed three new bills (Nos. 334, 335, and 337) for an injunction against the same defendants, respectively, in which it charged the defendants with the infringement of both the McLauchlin patent, and of a patent to T. Seymour Scott (No. 216,108), dated June 3, 1879, for an improvement in the manufacture of flexible paper, which the complainant had since acquired by assignment. To these bills demurrers were filed on the ground that both the McLauchlin and the Scott patents were void for want of patentable novelty. These demurrers were sustained, and decrees entered dismissing the bills. Appeals have been taken from all six decrees, and they have been heard as one case in this court.

The specification of the Scott patent, which was applied for February 8, 1879, was as follows: "The object of my invention is the production of a strong and waterproof flexible paper, adapted for use in the making of bed-covers, table and counter covers, wall hangings, floor coverings, and the like. Heretofore, when paper has been employed for such purposes, it has been made chiefly of rags, and has not had the requisite strength to withstand hard usage, and, not being strong and flexible, has been apt to crack and break in the creases. My invention designs to effectuate the making of a paper which shall be not only flexible, but also strong, and impervious to dampness. I take a paper composed of strong fibres, such as manilla, jute, linen, or the like, manufactured in the manner usual in the art, and of a quality capable of sustaining a tensile strain of not less than two hun-



dred pounds per inch in the direction of its length when made twelve square feet to the pound. While in the process of its manufacture, or after it has been made, I render this paper impervious to water by the application, in any desired manner, of suitable size. I then pass the paper so prepared through suitable breaking stamps or rollers, so as to render it limp or flexible; and this may be done either while the paper is yet in the paper machine, or in a separate machine adapted for the purpose. It sometimes becomes necessary to pass the paper several times through the breaking rolls, and sometimes in contrary directions. I then, when the uses to which it is desired to apply the product demand a very smooth surface, pass the paper, which has been rendered flexible as above described, through calender rolls, in order to smooth it. I have also discovered that oil-printed paper of the composition which I have mentioned may be passed in similar manner through breaking rolls, and rendered flexible. Having thus described my invention, I claim, and desire to secure by letters patent of the United States: (1) The process herein described of making flexible paper, which consists in passing manilla or kindred paper through breaking rolls, substantially as described. (2) The process herein described of making flexible paper, which consists in passing manilla or kindred paper through breaking rolls, and subsequently through calendering rolls, substantially as described. (3) As a new article of manufacture, strong, flexible paper, for wall hangings, covers, and the like, substantially as described."

The specifications in the McLauchlin patent, and the claims, are as follows: "The object of my invention is to produce a fabric composed of fibre matted and formed into sheets, but having superior softness and flexibility, and a surface free from abrasion or disintegration of the fibre, and closely resembling chamois or buckskin. My invention consists in an improved process of making such fabrics. I am well aware that sheets composed of matted fibre have heretofore been made pliable by rubbing or crushing between knobbed rolls, such sheets or fabrics being designed to be used in the place of textile fabrics, and I am aware that my invention is limited to improvements in this art. I have discovered that wood fibre, treated by the sulphite or chemical process, is peculiarly fitted, by reason of its softness, to be used in a fabric designed as a substitute for cloth, and requiring the softness and flexibility of that fabric. The objections found to exist in fabrics thus made out of this kind of fibre by any of the methods of manufacture heretofore known to me, I have found to be these: That the sheets made of such fibre will, when rubbed to reduce the stiffness of the sheets, abrade upon the surface, and show a fibrous appearance, and lose in large measure the strength, as well as smooth or solid surface. If, further, the sheet of fibre be rendered flexible by pounding or crushing in a dry condition, the wood fibres will break, and the fabric is thus weakened, and its appearance also impaired. If it be made flexible by passing between knobbed or fluted rollers, the fabric is stretched and pulled in places, and thus the fibres are broken, and both the strength and the appearance in this way also are impaired. I have discovered that if these sheets of wood fibre, made of proper thickness to suit the purpose of blankets, linings, and the like, for which such sheets have been heretofore designed or used, be subjected to pounding, in a dampened condition, the softening may be effected without rupture of the fibre, or abrasion of the surface. Therefore, in carrying out my invention, I use sheets made of wood fibre,—preferably, what is known as sulphite or chemical fibre. These sheets I moisten with a thin solution of gelatin, using preferably one part of the gelatin to twenty parts of water. When the sheets have been evenly and thoroughly moistened with this solution, I subject them, in a crumpled condition, and with proper changes of position, to pounding, by any convenient form of pounder, until the sheets are thoroughly softened. I then smooth the sheets,—preferably, by passing them between rollers,—and dry them. The smoothing and drying may be effected at the same time, by using heated rollers or surfaces. When so made, the sheets retain the unbroken and unabraded surface, and are flexible and soft, resembling chamois or dressed buckskin. The wood fibres, which, if dry would break and disintegrate under the pounding, readily bend when moist, and retain their integrity. The small percentage of

gelatin also materially serves to promote this action, but I do not limit myself to this ingredient. I claim: (1) The process herein described of reducing fibrous sheets to a soft and pliable condition, the same consisting in first moistening and then pounding said sheets while in a moist condition, substantially as described. (2) The process herein described of reducing fibrous sheets to a soft and pliable condition, the same consisting in first moistening the sheets with a solution of gelatin, and then pounding said sheets while in a moist condition."

M. B. Philipp and Lawrence Maxwell, Jr., for appellant.

M. D. Leggett, A. E. Lynch, and M. R. Waite, for appellees.

Before TAFT and LURTON, Circuit Judges, and HAMMOND, J.

TAFT, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

While the action of the court with respect to the Scott patent has been assigned for error, no argument pointing out the error of the court below in its decision thereon has been made, orally or on the brief. Where counsel for an appellant or a plaintiff in error files a brief and makes an oral argument, and does not allude in either to any of his assignments of error, he must be taken to have waived it. This court cannot be expected to examine the assignment of error, and find the reasons for reversal itself. The action of the court below, in so far as it sustained the demurrer to that part of the bill seeking to restrain an infringement of the Scott patent, must therefore be affirmed.

We have only to consider, therefore, the correctness of the court's ruling in sustaining the demurrer to the bills so far as they sought a remedy against the infringement of the McLaughlin patent. The rule is now well settled that a defendant to a patent infringement bill may raise the question on demurrer whether the alleged invention, as disclosed by the specifications of the patent, is devoid of patentable novelty or invention. *Richards v. Elevator Co.*, 158 U. S. 299, 15 Sup. Ct. 831; *West v. Rae*, 33 Fed. 45. It is also well settled that, in considering the question of the validity of a patent on its face, the court may take judicial notice of facts of common and general knowledge tending to show that the device or process patented is old, or lacking in invention, and that the court may refresh and strengthen its recollection and impression of what facts were of common and general knowledge at the time of the application for the patent by reference to any printed source of general information which is known to the court to be reliable, and to have been published prior to the application for the patent. *Brown v. Piper*, 91 U. S. 38. The presumption from the issuance of the patent is that it involves both novelty and invention. The effect of dismissing the bill upon demurrer is to deny to the complainant the right to adduce evidence to support that presumption. Therefore the court must be able, from the statements on the face of the patent, and from the common and general knowledge already referred to, to say that the want of novelty and invention is so palpable that it is impossible that evidence of any kind could show the fact to be otherwise. Hence

it must follow that, if the court has any doubt whatever with reference to the novelty or invention of that which is patented, it must overrule the demurrer, and give the complainant an opportunity, by proof, to support and justify the action of the patent office. This is the view which has been taken by the supreme court, and the most experienced patent judges upon the circuit. *New York Belting & Packing Co. v. New Jersey Car-Spring & Rubber Co.*, 137 U. S. 445, 11 Sup. Ct. 193; *Manufacturing Co. v. Adkins*, 36 Fed. 554; *Blessing v. Copper Works*, 34 Fed. 753; *Bottle-Seal Co. v. De La Vergne Bottle & Seal Co.*, 47 Fed. 59; *Industries Co. v. Grace*, 52 Fed. 124; *Goebel v. Supply Co.*, 55 Fed. 825; *Hanlon v. Primrose*, 56 Fed. 600; *Dick v. Well Co.*, 25 Fed. 105; *Kaolatype Co. v. Hoke*, 30 Fed. 444; *Coop v. Development Inst.*, 47 Fed. 899; *Krick v. Jansen*, 52 Fed. 823; *Manufacturing Co. v. Housman*, 58 Fed. 870; *Davock v. Railroad Co.*, 69 Fed. 468; *Henderson v. Tompkins*, 60 Fed. 758. Referring to his previous decision, Judge Blodgett said in the case of *Manufacturing Co. v. Adkins*, 36 Fed. 556:

"In *West v. Rae*, 33 Fed. 45, this court sustained a demurrer to a bill charging infringement of a patent on a device for protecting woolen blankets from insects by incasing them in paper bags, on the ground that, within the common knowledge, it was old to wrap or incase woollens in paper to protect them from dust or insects. At the time I announced the decision in that case, I stated that its effect might be to encourage counsel to demur to bills for infringement of patents in cases where they, from their special knowledge of the art, might be of opinion that the device covered by the patent was old. And my anticipations in that respect have been fully realized, as that decision has already produced in this court quite a bountiful crop of demurrers in this class of cases. But the court must meet each case as it arises, and, in sustaining demurrers like this, keep strictly within the field of common knowledge. The practical difficulty and danger is in defining where special knowledge leaves off, and common knowledge begins. The judge must always be careful to distinguish between his own special knowledge, and what he considers to be the knowledge of others, in the field or sphere where the device in question is used. But when the judge before whom rights are claimed by virtue of a patent can say, from his own observation and experience, that the patented device is, in principle and mode of operation, only an old and well-known device, in common use, he may act upon such knowledge. The case must, however, be so plain as to leave no room for doubt. Otherwise injustice may be done, and the right granted by the patent defeated, without a hearing upon the proofs. The judge must, on all such questions, vigilantly guard against acting upon expert or special knowledge of his own, instead of keeping strictly within the field of general or popular knowledge. While I do not intend to lay down a rule, I am free to say that I should not feel justified in holding a patent void for want of novelty, on common knowledge, unless I could cite instances of common use which would at once, on the suggestion being made, strike persons of usual intelligence as a complete answer to the claim of such patent."

In *Krick v. Jansen*, 52 Fed. 823, Judge Townsend said that a demurrer should not be sustained to a bill for infringement of a patent unless the want of patentable novelty was "palpably manifest."

Is it within common knowledge that the process described by *McLauchlin* in his specifications is old? We think not. In his specification, *McLauchlin* refers to the prior art, admits that the treatment of matted fibre for the purpose of using the same in place of cloth, and of giving it the flexibility necessary for that purpose,

by rubbing or crushing it between knobbed rollers, was old. But he points out that, by such processes as had theretofore been used, the surface of the fibre was abraded, and the material itself thereby lost, in a large measure, its strength. The process, for which Mc-Lauchlin sought a patent, was that of first moistening the sheets of matted fibre, and then pounding them in a dampened and crumpled condition. The moistening was to be done with a mixture of 20 parts water and 1 part gelatin. The question is whether it is a matter of common knowledge that the way to render wood-fibre paper soft and pliable, without injury to its strength or smoothness of surface, is to moisten it with a thin water solution of gelatin, to crumple it and pound it in a moistened condition, and then to dry and smooth it. It is, of course, generally known that the moistening of fibre of any kind will make it, for the time being, more flexible; but common knowledge would probably lead us to suppose that the moistening of such a material as paper, while it would for the time render it more flexible, would make its surface very much more subject to abrasion, and render the whole texture very liable to injury and destruction. Possibly a review of the art by an expert will show that to treat paper in a moistened condition by pounding or irregular pressure for the purpose of rendering it flexible without loss of strength was old, but such a process is not within our common knowledge. Certainly, to use Judge Blodgett's standard, we cannot cite instances of common use of this process or a similar process which would at once, on the suggestion being made, strike persons of usual intelligence as a complete answer to the claim of such patent. The court below referred to a leather machine for making leather more flexible by pounding. It seems to us that the very great difference between the character of leather and paper is enough to show that the use of a device with respect to one does not indicate its useful application to the other. Again, allusion is made by the learned judge, in his opinion, to an article in the Polytechnic Review, 1877 (volume 3, p. 40), in which the following statement is made of Japanese uses of paper.

"Paper is also often used as a substitute for cloth for umbrellas, rain coats, etc., and even for dress cloth. 'Shibu' and the 'Ye-no-abura' are the means employed for rendering the paper waterproof. This cloth is generally made of paper alone, by beating it to make it soft, and impregnating it with a gummy substance to make it more resistant to the action of water."

The learned judge also referred to the description of the making of paper cloth in Japan given in the second volume of the Encyclopedia of Chemistry, published in 1879 (page 534). That description is as follows:

"The mode in which paper cloth 'warranted to wash' is made in Japan is thus described: Take some of the paper called 'hosho,' or some of the best 'senka,' and dye it of the color required. Boil some of the roots called 'kon-niaku-no-dama,' with the skins on. Try them with the inner portion of a rice stalk. When it penetrates easily they are sufficiently boiled. Peel them, let the water run off, and then pound them into a paste. Spread this paste on either side of the paper, and let it dry in the sun till quite stiff. Then sprinkle water upon it till it is thoroughly damp, and leave it in that state for a night. The next morning roll it upon a bamboo of the thickness

of the shaft of an arrow, and force it with the hands from either end into a crimple in the centre. Unroll it, and repeat this process two or three times, rolling it from each side and corner of the paper. Then crimple it well in the hands, by rubbing it together till it becomes quite soft, and then sprinkle water on it again to damp it. Pull it out straight and smooth, fold it up, and pound it with a wooden mallet. It may then be put into water as much and as often as is desired, without sustaining injury, having become a strong and lasting material. Boxes, trays, and even saucepans, may be made of this cloth, and saucepans thus manufactured sustain no injury over a strong charcoal fire. Bags may be made of it, in which wine may be put, and heated by insertion in boiling water. Paper thus prepared may be used for papering windows, and, without being oiled, will withstand the rain."

It is well settled that, in taking judicial notice of matters of common knowledge, the court may refresh its recollection by reference to standard works. *Brown v. Piper*, 91 U. S. 38. In that case a patent had been issued for the process of freezing fish, and keeping them in a frozen state of preservation, in a close chamber, by means of a freezing chamber, having no contact with the preserving chamber. There the court took judicial notice of the fact that the ice-cream freezer, as a matter of common knowledge and use by the people throughout the country, was operated on substantially the same principles; and, having thus pointed out one well-known instance easily within the actual knowledge of the court, it referred to articles in the encyclopedia showing the preservative effect of cold,—a principle belonging to the general domain of knowledge and science. But in this case the learned judge at the circuit was not able to point, within his personal knowledge, to any process similar or analogous to that here patented. He was obliged to refer to descriptions of processes used in Japan, which we may reasonably suppose did not refresh his recollection with respect to the process there described. They were not instances of a process generally in vogue in the same or kindred arts well known to ordinary life. Indeed, it is very doubtful whether much light is thrown upon the Japanese processes, by the descriptions above given. It is also doubtful whether the paper "warranted to wash" is like the material produced by the complainant's process. It is by no means clear that the process described in the *Polytechnic Review* is one which involved the dampening of the paper, and the pounding of it in a dampened state. We are clearly of opinion that there was sufficient doubt about the novelty, utility, and invention of the complainant's process to require the overruling of the demurrer, and a hearing of these questions upon issues made by the answer and proof.

It is also contended that the process described is a mere mechanical process,—an aggregation of functions,—within the limitation announced by the supreme court, through Mr. Justice Brown, in the case of *Locomotive Works v. Medart*, 158 U. S. 68, 15 Sup. Ct. 745. In that case the patent was for an improved process in manufacturing belt pulleys, formed of a wrought metal rim and a separate center, usually a spider, and usually made of cast metal. The process of manufacture was set forth in detail, and consisted

of the following steps: (1) Centering the pulley center or spider; (2) grinding the ends of the arms concentrically with the axis of the pulley; (3) boring the center; (4) securing the rim to the spider; (5) grinding the face of the rim concentric with the axis of the pulley; (6) grinding or squaring the edges of the rim. It was held that, on the face of the specifications and claims, the patent was not for the mechanism employed, nor for the finished product of manufacture, but was, in effect, for a process of solely mechanical steps, and that a valid patent could not be granted for the mere operations of a piece of mechanism, or, what was the same thing, for the function or functions of a machine. We do not think that the present case comes within the principles announced. The treatment of paper in this instance is of a character to change its quality, giving it new and useful attributes. The moistening of it, and the treatment in a moistened condition, is more or less chemical in its character. In *Cochrane v. Deener*, 94 U. S. 780, which Mr. Justice Brown cites in *Locomotive Works v. Medart*, the patent was for a process in manufacturing flour, which consisted in passing the ground meal through a series of bolting reels, composed of cloth of progressively finer meshes, which passed the superfine flour, and retarded the escape of the finer and lighter impurities, and by which the superfine flour was separated, and the impurities were so eliminated as to produce superfine flour. It was held to be valid, and the patent was not limited to any special arrangement of machinery. In that case Mr. Justice Bradley said:

"A process is a mode of treatment of certain materials to produce a given result. It is an act, or a series of acts, performed upon the subject-matter to be transformed and reduced to a different state or thing. If new and useful, it is just as patentable as is a piece of machinery. In the language of the patent law, it is an art. The machinery pointed out as suitable to perform the process may or may not be new or patentable, whilst the process itself may be altogether new, and produce an entirely new result. The process requires that certain things should be done with certain substances, and in a certain order; but the tools to be used in doing this may be of secondary consequence."

It seems to us that the present case is clearly within that of *Cochrane v. Deener*, and even more nearly to be likened to a chemical process than was that.

The third objection made to the validity of the patent is one which can only be made in three of the cases appealed from, to wit, those in which the Seymour Scott patent was also made a part of the bill. It is said that the Seymour Scott patent so clearly anticipates the McLauchlin patent, on the face of the specifications, that the McLauchlin patent must be held to be bad. We do not think that, without evidence, it is clear that the material in the Scott patent is to be subjected to the breaking rollers while in a dampened condition, through this might be developed by proof of the process of paper making referred to in the Scott patent. There is nothing in the Scott patent with reference to the crumpling of the paper, or the pounding of it in its crumpled condition. The crumpling of the paper is not expressly made a part of the claim, but it is described as a part of the process, and, if an essential

part of the process, then it should be read into the claims. The specification in the Scott patent requires the paper to be subjected to "suitable size." That of the McLauchlin patent requires that the paper shall be moistened by a thin solution of gelatin,—preferably, 1 part in 20. What "suitable size" is in the Scott patent, and whether it would suggest the use of the thin solution of gelatin mentioned in the McLauchlin patent, are all questions upon which the court cannot now pass, without evidence of experts in paper making before it.

The decrees in these various cases dismissing the bill as to the McLauchlin patent will be reversed, with directions to overrule the demurrers and require answers; while the decrees, in so far as they dismiss the bills on the Scott patent, are affirmed. In view of the fact that this result shows that it was unnecessary for the complainant to bring second actions, the order as to costs will be that the costs of the appeals in the three cases (Nos. 332, 333, and 336) in which bills were filed on the McLauchlin patent alone will be taxed to the appellees, while in the three cases (Nos. 334, 335, and 337) in which the three cases were filed on both the Scott and the McLauchlin patents the costs will be taxed to the appellant; and it is so ordered.

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AMERICAN FIBRE-CHAMOIS CO. v. PORT HURON FIBRE-GARMENT  
MANUF'G CO. et al.<sup>1</sup>

(Circuit Court of Appeals, Sixth Circuit. February 10, 1896.)

No. 350.

1. PATENTS—CONSTRUCTION—FIBRE-CHAMOIS PAPER.

The McLauchlin patent No. 511,789, for an improved process for the manufacture of imitation dressed chamois buckskin from paper pulp in sheets, if valid at all, is limited by the prior state of the art, and by the language of the original specifications and of the patentee's prior Canadian patent, to the crumpling and pounding of the paper when moistened with a thin solution of gelatin, or other adhesive solution, and is not infringed by treating in a similar manner paper moistened merely with water.

2. SAME—MISCONDUCT OF PATENT OWNER.

The action of a patent owner in harassing purchasers with threats of litigation, when no possible ground of action exists against them, even if the patent is valid; in attempting to dismiss his bill, whereby defendant, in order to prevent it, is compelled to file a cross bill; and in delaying the taking of evidence until after defendant begins the taking of testimony,—is not such as commends the cause to a court of equity.

Appeal from the Circuit Court of the United States for the Southern Division of the Eastern District of Michigan.

This was an appeal from a decree dismissing a bill to enjoin the infringement of the same McLauchlin patent just considered in the last case. *American Fibre-Chamois Co. v. Buckskin-Fibre Co.*, 72 Fed. 508. In the present case, however, the issues were made, not by demurrer to the bill, but after full pleadings and proof. The process described in the McLauchlin specifications, as the patent was granted, are comprised in the following steps: First,

<sup>1</sup> Rehearing denied April 14, 1896.

moistening the sulphite fibre with a solution of gelatin, 20 parts water to 1 of gelatin; second, crumpling the fibre; third, pounding the same in changed positions; and, fourth, smoothing and drying the moist, crumpled, and pounded sheets. The patentee says: "The wood fibres, which, if dry, would break and disintegrate under pounding, readily bend when moist, and retain their integrity. The small percentage of gelatin also materially serves to promote this action, but I do not limit myself to this ingredient." The first claim is for the process of "first moistening and then pounding said sheets while in a moist condition, substantially as described." The second is for "first moistening the sheets with a solution of gelatin, and then pounding said sheets while in a moist condition." McLauchlin took out a patent in Canada in 1890. In that his description of the process was as follows: "The sulphite fibre or sheet \* \* \* is dampened with gelatin (or similar adhesive) solution, to prevent disintegration of the fibre, and then beaten with a suitable pounding instrument or machine to soften the material by breaking down or crushing the harshness formerly existing, and subsequently the pounded fabric may be smoothed between heated rollers to finish and dry the material." The first claim was for pounding the fibre sheet in a damp state, saturated with liquid gelatin; and the second was for dampening the sheet with liquid gelatin, then crushing the fibre by pounding, and finally passing the sheet between heated rollers. This was also the form of the original application and claims filed in the United States patent office October 12, 1891. On the 8th of April, 1892, the patentee was required to state the strength of the gelatin solution. This was accordingly stated, but the application was nevertheless rejected. In his letter to the commissioner asking a reconsideration, McLauchlin said that the essence of his process was embraced in "two steps, and no more, and those steps are—First, the saturation by the liquid gelatin; and, second, the pounding while in a damp condition." A second rejection followed. Finally, on May 23, 1893, the application as filed was all stricken out, and specifications and claims like those in the patent as issued were inserted, and the patent was granted January 2, 1894. The R. C. Mudge Paper-Clothing Company began in 1889 to make paper garments. The material was sulphite fibre softened and made pliable by hand rubbing. Subsequently sets of corrugated rollers, with the corrugations lengthwise of the roller, were used. The sulphite fibre was passed once through these rollers in the damp condition received from the manufacturer, and then it was subjected to rubbing. The business was not successful, and the property, including unsold stock of the company, was sold under a mortgage. The Port Huron Paper-Clothing Company in 1890 succeeded to the unsold stock and business of the Mudge Company. McLauchlin had been employed as a salesman by the Mudge Company, and was again employed by its successor. Complainant's evidence tends to show that, after this company had been some little time in the business, McLauchlin, in July, 1890, suggested the erection of some pounding machines in which the sulphite fibre, in a damp and crumpled condition, was subjected to a spring-controlled pounding. No gelatin was used in the dampening. McLauchlin shortly afterwards left the employ of this company. This second venture also proved a failure. The Port Huron Paper-Clothing Company some time thereafter leased its property and good will to the defendant company, which continues to use the old pounding machines, and has built 12 more. The defendant also makes the same product by running the moist fibre, as it comes from the manufacturer and folded a dozen times, between corrugated rollers held together by a spring. It does not use gelatin in any form to dampen the sulphite fibre. In the fall of 1894 the style in ladies' dresses required full, or balloon, sleeves, and the material made by complainant and defendant was well adapted as a lining to give the sleeve the desired form. At the same time hair cloth, for which this material seems to furnish a very fair substitute for use as skirt and dress lining, rose greatly in price. The complainant company in 1894, for the first time, put its product on the market. It was sold in 10-yard sheets, done up in the usual sheeting bundle. Prior to this the material had only been sold by the Mudge Company and its successors in cut and sewed garments. Defendant at once adopted the same



form of the sheeting package. The demand has exceeded the supply, and the consumption has been more than 30,000 yards daily. The circuit court dismissed the bill on the ground that the patent was for a process of pounding crumpled paper dampened in a gelatin solution, and the process of the defendant did not involve the use of gelatin, or any similar solution, to moisten the paper.

M. B. Philipp and M. H. Phelps, for appellant.  
Geo. H. Lothrop, for appellees.

Before TAFT and LURTON, Circuit Judges, and HAMMOND, J.

TAFT, Circuit Judge, after stating the facts, delivered the opinion of the court.

McLauchlin's original application in Canada and in the United States mentioned but two steps. One was the dampening with gelatin, or similar adhesive solution, and the other was the pounding to crush the fibre. No mention was made of crumpling. Not until May 23, 1893, did the patentee describe crumpling as one step in his process. The witnesses for complainant all say that, with the crumpling step omitted, the process would be a failure. Now, it is conceded that in 1890 the Port Huron Paper-Clothing Company was publicly using, with McLauchlin's knowledge and consent, a process of pounding moist, crumpled, fibre sheets, and the same process now used by defendant. Unless, therefore, the crumpling was in some way included in the process described in the original specification, there was danger, under the decisions in *Globe Nail Co. v. Superior Nail Co.*, 27 Fed. 450, 454, and *Kittle v. Hall*, 29 Fed. 513, that the application for the process patented must be treated as filed May 23, 1893, and more than two years after the process as patented (if that includes dampening with water only) had been in public use in this country, and that thus the patent would be avoided. To obviate this danger the appellant makes the following admission in the brief of its counsel:

"That it was known in the art that the manipulations involved in the crumpling of paper, and pounding it in a crumpled condition, had a tendency to soften it, is not denied by the appellant; but, on the contrary, it appears that such is the fact, not only from the testimony of Prof. Main, but from that of Mr. Julius Hess, at one time a paper manufacturer, and manager of the Michigan Sulphite-Fibre Company, at Port Huron. Mr. Hess described the effect of pounding paper when it is crumpled by stating that it loosens the interior fibres; that this loosening of the interior fibres is accompanied by the separation of the skins of the paper; that because of this loosening, which remains after the treatment, the paper is rendered flexible. He also says that the effect of such manipulations upon paper has been familiar to him ever since he went into the paper business; that is, he had this knowledge from his general observation of the action of paper under various manipulations at his factory. This was, however, with this witness, as with other paper manufacturers, merely theoretical knowledge, which had never been put to useful application. He did not know prior to the McLauchlin invention that moistened paper could be pounded in a crumpled condition, and thus be rendered soft and pliable, without materially lessening its strength, and that knowledge was not within the ordinary skill of a paper manufacturer prior to the McLauchlin patent."

The validity of the patent is thus rested on the novelty of dampening the fibre before its treatment. The question, therefore, is whether

it was known to the art that the moistening of the fibre would facilitate and aid in the softening of paper by crumpling and pounding, without injury. We think the patents in this record, the evidence, and the concessions of counsel at the argument, show clearly that it had been known, prior to McLauchlin's conception of his process, which he fixes as in 1889, that paper might, without injury, be crinkled or crumpled in a softening process while in a moistened state, and that the dampness aided the process. Thus, it appears without contradiction in this record that the Mudge Company, as one step in its process, passed paper moistened with water through corrugated rollers, and that the result was more satisfactory when the paper was moist than when it was dry. The Seymour Scott patent, of June, 1879, was for the product of a process by which heavy paper was to be passed through suitable breaking stamps or rollers, so as to render it limp and flexible, while the paper was yet in the paper machine. Now, it appears by admission of counsel at the hearing and from the circumstances disclosed in the record of Mudge's experiments, that paper in the paper machine is always moist, so that the Scott patent contained the suggestion of that which is claimed to be the novelty of McLauchlin's patent. It is difficult to see why, if moisture aided the softening process without destroying the fibre when subjected to the crushing of corrugated rollers, it was not obvious that the same result would follow in the use of moistened paper when subjected to pounding and crumpling; for the effect of the latter on the surface of the paper was certainly not more likely to be violent and injurious than that of the former, if we credit the statements of complainant's witnesses as to the breaking and straining of the paper's surface caused by corrugated rollers. It thus follows that, if the patent in suit includes a process of pounding crumpled paper dampened with water only, it is void for want of novelty. In order, therefore, to give the patent any validity, it is necessary to retain in the process it describes the use of gelatin, or other adhesive solution, and we concur with the court below in holding that the patent and its claims cover only a process in which the paper is dampened with such a solution. This was the process, as applied for. The process, as patented, describes the use of a gelatin solution only; but the specification, after a reference to the effect of the small percentage of gelatin, contains the words, "but I do not limit myself to this ingredient." We think these words, in view of the language of the original application and of the Canadian patent, must be construed to be the equivalent of the words of enlargement used therein, i. e. "other adhesive solution." The first claim is for moistening and pounding "substantially as described." The second is for moistening with a solution of gelatin, and pounding. The first claim includes moistening with any adhesive solution. The second is confined to a gelatin solution. As the defendant does not use gelatin, or any adhesive solution, it does not infringe. We have no hesitation in thus construing this patent strictly, both because it is necessary to sustain the patent at all, and also because we think the patent has

little merit, in view of common knowledge and the prior art. We do not discover, in spite of the considerable evidence in the record of its existence, that great difference in character between the old Mudge Company's product and that of complainant. We think the sudden and peculiar demand for some material of this kind in the sheet form in which it was put upon the market in 1894 explains its great sale, rather than any marked improvement in its mode of manufacture. Nothing herein is intended to decide that the patent, as construed above, is valid. That question does not here arise. All we decide is that, unless it is construed as above, it is not valid.

The conduct of the complainant in harassing purchasers of the product of this process with threats of litigation, when no possible ground for an action existed against them, whether the patent be valid or not (*Goodyear v. Railroad Co.*, Fed. Cas. No. 5,563; *Boyd v. McAlpin*, Id. 1,748; *Brown v. District of Columbia*, 3 Mackey, 502; 3 Rob. Pat. 927), savors of an attempt to use the process of the courts to win customers by unfair means, and thus to reap a harvest that must be of limited duration. It does not indicate that confidence in the validity of the patent which presses to a full investigation of rights, and a comprehensive and decisive conclusion. In the case at bar, complainant attempted to dismiss its bill after the cause was at issue. In order to prevent this, and secure a hearing and decision of the case, defendant was compelled to file a cross bill. Complainant took no evidence until after defendant had begun the taking of its evidence. Such a course certainly does not commend the cause of a suitor to a court of equity. The decree of the circuit court dismissing the bill is affirmed, with costs.

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HEATON PENINSULAR BUTTON-FASTENER CO. v. SCHLOCHTER-MEYER.

(Circuit Court of Appeals, Sixth Circuit. February 10, 1896.)

No. 359.

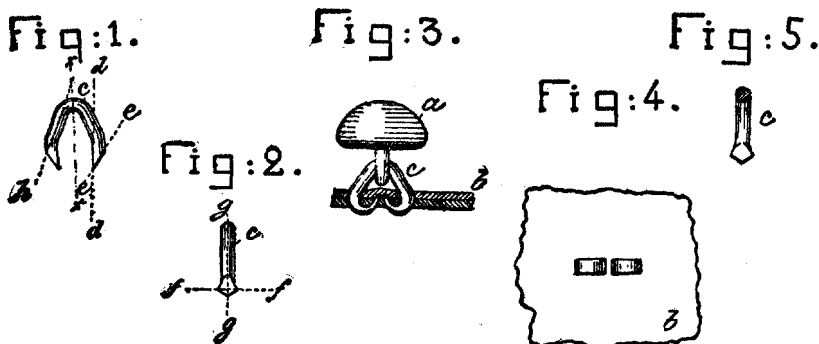
PATENTS—VALIDITY—BUTTON-FASTENING STAPLES.

The Vinton and the Prentice patents, Nos. 324,053 and 451,070, respectively, both for improvements in button-fastening staples, *held* void on demurrer for want of a patentable invention, apparent on the face of the specifications. 69 Fed. 592, affirmed.

Appeal from the Circuit Court of the United States for the Western Division of the Southern District of Ohio.

This was a suit to restrain the infringement of two patents, one United States letters patent (324,053), issued to John H. Vinton for a new and useful improvement in button-fastening staples, and the other United States letters patent (No. 451,070), issued April 28, 1891, to George W. Prentice, also for an improvement in button-fastening staples. The bill averred that the two patents had been duly assigned to the complainant. A demurrer was filed to the bill on the ground that both patents were void for want of patentable novelty. The court below sustained the demurrer on the ground that it could determine from common knowledge and the specifications of each patent that the device shown therein for which patents had issued did

not involve any patentable novelty or invention. The court accordingly dismissed the bill, and from this order the complainant has appealed. The drawings, specifications, and claims of the Vinton patent are as follows:



"Be it known that I, John H. Vinton, of Boston, county of Suffolk, state of Massachusetts, have invented an improvement in button-fastening staples for boot and shoe work, of which the following description, in connection with the accompanying drawings, is a specification, like letters on the drawings representing like parts:

"Staple-like fastenings have heretofore been made from round wire which is cut diagonally to form each staple length, the direction of the single cut being such as to leave a point, one surface of which is inclined and the other straight, the beveled part being that formed by cutting the wire diagonally, while the straight part is the original body of the wire. In the manufacture of staples wherein the wire is cut diagonally entirely across it to form points the said points in some staples have been left in line with the outer sides of the legs of the staple, to thus compel both legs to spread outwardly as the staple is clinched, and in other staples both points have been left at the inner side of the legs, to compel them to clinch inwardly; but in both these plans one side of the point has been left of the same convexity as the main part of the staple leg, as obviously must be the case as the result of making a clean cut through a cylindrical body at an angle to its longitudinal center. A point such as represented, beveled from one side of the wire entirely to its other side, is apt to run sidewise; and the clinching point, to be effective, has to be of considerable length. I have aimed to produce a staple with a clinching point which shall be as short as possible, and which will most readily cut its way through the material, and which, when clinched, will present a broad holding surface, not liable to be felt by the foot. As the result of my experiments I have produced a V-shaped point, the apex of which is located at one side of the center line of the leg of the staple, and preferably the said V-shaped point is made on a staple having slightly incurved legs, one side of the V-shaped point starting from the inner side of the staple leg, and the other from the outer side thereof. The V-shaped point is pressed, swaged, or flattened, and thus made broader than the diameter of the wire from which the staple is produced, the said point thus made thin readily cutting, as it were, a slit, into which the round leg of the staple follows; the broadened end, when clinched and curled against or turned into the material, effectually preventing the staple from being drawn out therefrom, and, being thin, the said point does not leave a projection uncomfortable to the foot. In my improved staple the cutting edge of the spread V-shaped point stands substantially at right angles to a line drawn through the head of the staple and its two legs; or, in other words, the broad faces of the V-shaped points on opposite legs of the staple are substantially parallel. Fig. 1, in side elevation, on an enlarged scale, represents one of my improved fasteners or staples; Fig. 2, a side elevation of Fig. 1. Fig. 3 represents a button secured to material by a fastener; Fig. 4, an under-side view of Fig. 3; and Fig. 5 a section of Fig. 1 in the dotted

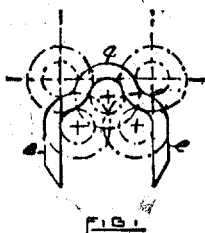
line, x x. In the drawings, a represents a button to be attached to material, b, which may be part of a boot, shoe, or other article. The staple, c, has two legs, and the end of each leg is beveled from both the inside and from the outside of the staple in the lines, d d, e e, thus making a V-shaped point, which, by pressure, is thinned and spread or made broad, as shown in Figs. 2 and 5, leaving a thin cutting edge, the beveled and flattened surface of which is longer in the line, f f, than the diameter of the wire of which the staple is made, and the direction of the length of the edge of the point is substantially at right angles (see Fig. 2) to a line, g g, drawn through the head of the staple, and intersecting its legs. The broadened V-shaped point is offset to occupy a position out of the line, h, which is the center line of the leg of the staple, to thus compel it to always clinch or turn in the desired direction; and when clinched (see Figs. 3 and 4) the V-shaped point re-enters the material at its under side, leaving a broad, flat, thin surface at the inner side of the shoe. The outline or general shape or curve of the legs of the staple before driving will preferably be substantially as in United States patent No. 312,986, to which reference may be had; that staple having preliminary bends to insure the bending of the staples at a uniform distance from the heads or crowns thereof, to thus leave a uniform length of loop above the material for the free play of the shank or eye of the button.

"I claim: (1) As an article of manufacture, a button-fastening staple, composed of wire, the legs of which are provided with V-shaped points broader than the diameter of the wire from which the staple is made, the cutting edges of both of said points being substantially at right angles to the length of the staple head, substantially as described. (2) A staple fastener for leather work, it having V-shaped points spread wider than the diameter of the wire, and set at one side of the center of the wire forming the legs above the point, to thus compel the staple to clinch uniformly in the desired direction, substantially as described.

"In testimony thereof, I have signed my name to this specification in the presence of two subscribing witnesses.

John H. Vinton."

The Prentice drawings, specifications, and claims were as follows:



"Be it known that I, George W. Prentice, a citizen of the United States, residing at Providence, in the county of Providence, and state of Rhode Island, have invented certain new and useful improvements in button fasteners; and I do declare the following to be a full, clear, and exact description of the invention, such as will enable others skilled in the art to which it appertains to make and use the same, reference being had to the accompanying drawings, and to the letters of reference marked thereon, which form a part of this specification:

"In the production of this invention or improvement in button fasteners formed from wire I have had a threefold object in view, namely: First, to provide for the centering of the button-eye shank in a curvilinear top or crown, to get equal strain upon the legs of the fastener; second, to provide two substantially parallel legs in connection with the body portion of the fastener to obtain directness of thrust of said legs into the material and maximum grasp of material thereby; and, third, in connection with said two objects, to provide the crown or top of the fastener with diverging side portions of peculiar construction, which, in connection with the legs, will, when the fastener

is clinched to the material, firmly clamp the material (within the grasp or reach of the clinched legs) between said legs and said side portions, whereby a broad, flattened securing base is provided for the crown or top to securely hold the button in place, and likewise to prevent the staple in use from turning in the material in such manner as to bring practically one leg or the other in the form of a hook on the upper or face side of the material, which objection has heretofore been common and serious to some forms of wire button fasteners, which, owing to their construction, did not provide for the clamping of the material between the prongs and the diverging side portions.

"Fig. 1 shows in elevation an outline or skeleton of a fastener embodying my invention, and also indicating in dotted lines a number of circles to point out more clearly the contrasted curves of the side portions and the arc-shaped top or crown; Fig. 2 is a similar elevation of my improved fastener ready for use; and Fig. 3 is an elevation of my improved fastener having a button strung upon it, and with its legs clinched to material, the material being shown in section. My improved fastener comprises a main or body portion and an attaching portion made from wire, the body portion consisting of an arc-shaped crown or top, a, and two side portions, b, which diverge from the crown, a, and each of which is composed of two contrasting curves or arcs, c, c', the whole forming a curvilinear body portion, the contour of the inner wall of which follows the contour of the outer wall thereof, each curve, c or c', on the inner side of said body portion, being concentric with the corresponding curve, c or c', respectively, on the outer surface or wall thereof. This body portion is provided with a leg or prong, e, projecting from each termination thereof, the said legs being substantially straight, and parallel with each other. By this construction, it will be observed by inspection of the drawings, bearing shoulders, f, are provided at the points where the legs, e, join the body portion to limit the penetration of said prongs, and to clearly define the body portion from the attaching portion of the fastener; and, further, by shaping the diverging side portions to provide contrasting curves or arcs, c, c', a portion of the inner walls of said portions will, when the legs, e, are clinched, as indicated in Fig. 3, bear upon the upper side or face of the material while said legs engage the underside thereof, so that the material within the grasp or reach of the bent or clinched legs is clamped between said legs and side portions, and the fastener securely held in given position in the material to provide, in effect, a broad, firm base for the crown top, a, whereby strain exerted on the button, x, will be equally distributed throughout the fastener on each side of the button eye, and, secondly, the fastener will be prevented from turning in the material when in use. Likewise it will be observed that, by reason of the side portions being formed of contrasting curves or arcs, c, c', the button-eye wire is, in effect, confined on three sides by the fastener itself to prevent lateral play thereof, while at the same time that portion of the fastener exposed on the face side of the material presents a neat and compact appearance.

"I claim a one-piece metallic button fastener, substantially uniform in size throughout, consisting, essentially, of an arc-shaped crown or top and two curvilinear side portions diverging from said crown or top, the whole forming a body portion the curvilinear contour of the inner wall of which follows substantially the curvilinear contour of the outer wall thereof, or is parallel therewith, and an attaching portion, consisting of two prongs or legs substantially parallel with each other, and depending from the extremities of the body portion, the junction of the legs with the body portion forming corners or bearing shoulders to define said body portion and to limit the penetration of the legs of the fastener into the material to which it is to be attached, substantially as described.

"In testimony whereof I affix my signature in the presence of two witnesses.  
Geo. W. Prentice."

Otis B. Roberts, for appellant.

Arthur C. Dennison, for appellees.

Before TAFT and LURTON, Circuit Judges, and HAMMOND, J.

TAFT, Circuit Judge (after stating the facts). We have already discussed in the case of *American Fibre-Chamois Co. v. Buckskin-Fibre Co.* (decided at this term) 72 Fed. 508, the principles that should govern the court in a question of patentable novelty on demurrer, and it is not necessary to extend that discussion. The Vinton patent admits that the outline or general shape or curve of the legs of the staples before driving was old. With that hypothesis which the court was certainly entitled to proceed upon, we fully approve the following language of the learned judge in delivering the opinion of the court below:

"Vinton's improvement consisted in making a V-shaped point, the apex of which is located at one side of the center line of the leg of the staple, and which is pressed, swaged, or flattened, and thus made broader than the diameter of the wire from which the staple is produced. That is the only possible novelty in the Vinton patent. The setting of the points at one side of the center line of the leg of the staple, and the making of the staple with slightly in-curved legs, so that it will clinch in the desired direction, are \* \* \* admitted to be old by the Vinton specification. Making the cutting edge of the staple points at right angles to the length of the staple head was a matter involving nothing more than ordinary mechanical skill. Now, it is a matter of common knowledge that if a round wire is pointed by being pressed or swaged or flattened upon two sides the diameter of the point will be and must be greater than the diameter of the wire. The making of such broadened points upon nails and staples was a matter of common knowledge years before the date of Vinton's patent. The old cut nail was made in this form for the very purpose mentioned in the patent, that the broad, flattened point might cut a slit in the wood through which the shank would enter, and thereby prevent splitting the wood. So it was with common nails and staples. With reference to the patentability of such an improvement the case of *Double-Pointed Tack Co. v. Two Rivers Manuf'g Co.*, 109 U. S. 117, 3 Sup. Ct. 105, is cited and is pertinent.

"The Prentice patent is for a button fastener differing from the Vinton \* \* \* fastener only in trifling particulars. Prentice took almost the exact form of the Vinton staple with the beveled ends, made a slightly different angle between the body of the legs, so as to make the crown portion with a double reverse curve instead of a single curve. Prentice provided his staple with a sort of supplementary crown, leaving shoulders against which the legs might be clinched. The old paper staple in common use long before Prentice's patent had a flat top against which the legs clinched, the top and the legs lying parallel after the clinching operation was finished. If such a staple was required to hold the eye of a button or any similar object, a portion of the crown must be raised so as not to bind against the paper or cloth or leather, and, the necessity being apparent, mechanical ingenuity was all that was involved in the requisite change of form. The complainant's patents are invalid upon their face for want of invention." 69 Fed. 592.

It will be observed that the learned judge in the court below was able to point out instances of similar devices within his personal observation of a kind necessarily within common knowledge. Herein is the distinction between this case and the *Fibre-Chamois Cases* (just decided) 72 Fed. 508, 516. The specifications and claims of the Prentice patent are somewhat complicated and verbose in describing a very simple mechanism. The decree of the court below is affirmed at the cost of the appellant.

## RICHARDSON et al. v. CAMPBELL et al.

(Circuit Court, W. D. Pennsylvania. January 27, 1896.)

## 1. PRIORITY OF INVENTION—BURDEN OF PROOF.

The defense of priority of invention by one obtaining a patent upon an application filed subsequent to the application for complainants' patent must be supported by evidence which is clear, and free from reasonable doubt.

## 2. SAME—EVIDENCE—FILE WRAPPER.

By way of defense to an infringement suit, priority of invention was alleged on the part of an inventor who secured a patent upon an application filed after the application for complainants' patent. The inventor in whom priority was alleged testified that he made the invention at a certain period long anterior to his application. In rebuttal, complainants put in evidence the file wrapper of this patent, and its contents, including certain depositions in interference proceedings, which fixed a later date as the date of the invention. *Held* that, by introducing the file wrapper, complainants did not make these depositions evidence generally in the case.

## 3. SAME—GARMENT HOOK.

The De Long patent, No. 462,473, for a garment hook, construed, and *held* valid and infringed.

This was a suit in equity by Richardson and others against Campbell & Smith for alleged infringement of a patent for a garment hook.

—Strawbridge & Taylor and Bradbury Bedell (Frederick P. Fish, Jos. C. Fraley, and John G. Johnson, of counsel), for complainants.  
Allan Webster and William L. Pierce, for defendants.

ACHESON, Circuit Judge. The defendants are charged with the infringement of the first claim of letters patent No. 462,473, dated November 3, 1891, and granted to Agnes A. C. Richardson, Jane E. De Long, and Ida De Long, assignees of the inventor, Frank E. De Long, upon an application filed April 2, 1891. This claim is as follows:

"(1) A garment hook consisting of a shank, a hook proper, and a tongue, continuous of each other; said tongue being looped, and normally closing the space between the shank and hook proper, and having its free end returned to the rear of the shank,—substantially as described."

The inventor states the object of the invention thus:

"My invention consists of a garment hook of the order of those known in the class of hooks and eyes; the same being constructed of front and back portions and the jaw, which projects from a central part, so as to close the hook for preventing improper disconnection of the eye."

We do not understand the defendants to insist that the hook in question lacks patentability. Indeed, such a defense would be inconsistent with the defendants' position with respect to the Brosnan patent, No. 501,320, under which they claim to manufacture. Moreover, the presumption of patentability arising from the grant of the patent in suit has not been rebutted. On the contrary, there is affirmative proof, coming as well from the side of the defendants



as from that of the plaintiffs, to show that the De Long hook, here involved, is patentably new and useful.

Two defenses only have been pressed, namely—First, noninfringement; and, second, that Cornelius J. Brosnan, to whom were issued letters patent No. 501,320, dated July 11, 1893, and granted upon an application filed August 28, 1891, was the prior inventor of a hook embodying the invention here in controversy. These defenses we will now consider, taking up, however, first, the question of priority of invention as between De Long and Brosnan.

Now, the De Long patent, in suit, is earlier than the Brosnan patent, both as regards the date of application and the date of issue. Upon the question of priority of invention, then, we start with a strong presumption in favor of De Long. To overthrow that presumption, not only is the burden of proof upon the defendants, but the evidence to support the defense must be clear, and free from reasonable doubt. *Cantrell v. Wallick*, 35 O. G. 871, 117 U. S. 689, 695, and 6 Sup. Ct. 670; *Barbed-Wire Patent*, 143 U. S. 275, 284, and 12 Sup. Ct. 443, 450. Bearing in mind this rule, we turn to the evidence. The defendants called and examined Cornelius J. Brosnan, to show that he devised and made the hook described in his above-recited patent a few days after December 23, 1887, and a number of witnesses called by the defendants have testified in corroboration of Brosnan. These witnesses, respectively, state that a specimen of the hook was shown to them in the early part of the year 1888 by Brosnan, or by one Wilkins, to whom it is alleged Brosnan had given several of the hooks. Most of these witnesses, however, saw the hook casually, and only for a few moments. All of them testified six or seven years after the event. According to Brosnan's story, he made at that time five hooks only. Not one of these hooks has been produced. None of them were preserved. It would seem that all these hooks were considerably larger than those commonly used. It is not shown that any one of them was ever practically tested upon a garment. The defendants have not produced any hook of the kind here in question, made by Brosnan prior to the date of the application for his patent, No. 501,320. It is part of the defendants' case that immediately upon the making of this hook, in December, 1887, Brosnan recognized its utility and patentability. He had substantial pecuniary means at that time. Yet, as we have seen, his application for a patent for this hook was not made until August 28, 1891. In the meantime, on March 29, 1890, Brosnan applied for a patent for a garment hook made of sheet metal, and on May 14, 1890, the patent was allowed. Brosnan admits that in the year 1888 he made a sheet-metal hook, which, he states, he afterwards modified. Now, on June 17, 1890, Brosnan wrote a letter to the Penn Button Company, composed of the plaintiffs, inclosing a sample of his sheet-metal hook, which sample is an exhibit in this case. That letter, we think, has great significance, and we here quote it at length:

"New York, June 17, 1890.

"Dear Sirs: Inclosed find sample of our new Hook & Eye which is a rough sample. We ar now getting ready for market, but as you have a safty and

now in market perhaps I could make some arrangements with you in pushing mine or sell the same it is for sale.

"Yours truly,

C. J. Brosnan,  
"Springfield, Mass.

"Our patent is allowed and will be issued soon.

C. J. B."

It is very certain that the new "Hook & Eye" here spoken of, and offered for sale by Brosnan, and which, he states, "we are now getting ready for market," was his sheet-metal hook. In the face of this letter, then, can it be credited that Brosnan had previously perfected the wire hook, for which he subsequently sought and obtained a patent?

Again, as part of their rebuttal case, the plaintiffs put in evidence the file wrapper and its contents in interference proceedings in the patent office upon Brosnan's application for letters patent No. 501,320. There Brosnan was put in interference with three other different applicants, and he filed three successive preliminary statements, dated and sworn to, respectively, on March 4, 1892, on January 2, 1893, and on May 15, 1893. In each of these preliminary statements Brosnan swore "that he conceived of the invention involved in this interference between December 1, 1889, and the last of April, 1890." In the first of these interferences, Brosnan's deposition was taken on August 2, 1892; and in that deposition he testified that he "conceived" of the invention between December 1, 1889, and the last of April, 1890, and that his "best knowledge of the date is that it was the latter part of that period." He further testified that his attention was first directed to the subject of garment hooks having the tongue or bill normally closed some time in 1889; that on March 29, 1890, he filed an application for a patent for a sheet-metal hook having a closing member under the bill; and that a patent therefor was allowed May 14, 1890, but that he never had the patent issued. And, being asked why not, he answered:

"In the meantime I found that this wire hook, such as in this interference, was going to be so much better, that I gave up the idea of the sheet metal, and turned my intention entirely to the wire hook."

Taking Brosnan's explanation for not taking out his allowed patent, in connection with his above-quoted letter of June 17, 1890, is it not perfectly clear that at the date of that letter he had not yet produced the wire hook, the subject of his application of August 28, 1891? It is quite impossible to reconcile Brosnan's testimony, and the testimony of his witnesses, in this case, with his sworn statements and testimony in the interference proceedings. Nor is it a satisfactory explanation of the discrepancies that Brosnan's memory was at fault with respect to the date of his invention, until he was set right by the better recollection of his witnesses. The testimony of some of the defendants' witnesses is open to serious suspicion. As a whole, it is unsatisfactory and unreliable. In the important matter of dates, the witnesses really speak from mere recollection, for the several collateral events to which they respectively refer have no natural connection with the main fact of which they speak. If the witnesses saw any hook in the year 1888, we are convinced

that it was the sheet-metal hook which Brosnan states he devised in that year. The testimony of the witnesses might thus be rationally explained consistently with their truthfulness. Just here it is worthy of note that on June 4, 1892, Brosnan wrote a letter to the plaintiffs, stating that he had an application for a patent for a hook pending, and inclosing a sample thereof, and offering to sell his invention. The opening sentence of that letter is in these words:

"You will find inclosed sample of Hook & Eye which I have applied for patent about a year ago, and if you recollect I mailed you one about two years ago and offered it to you."

If this letter was penned in good faith, it is manifest that Brosnan himself was confounding his two hooks; for, undoubtedly, what he had previously mailed to the plaintiffs was a sample of his sheet-metal hook.

The defendants, it will be perceived, deliberately took the position that the date of Brosnan's invention was in December, 1887; and, in making defense, all their proofs were in support of that proposition. They did not examine any of the three witnesses who had testified in behalf of Brosnan in the interference proceedings in support of the then alleged date of his invention, namely, the spring of 1890. The suggestion that by offering the contents of the file wrapper the plaintiffs made the depositions of Brosnan's witnesses, contained therein, evidence generally here, cannot be accepted. Those depositions were not specifically offered at all, and, clearly, the only legitimate purpose of the offer of the contents of the file wrapper was to contradict Brosnan, and discredit the testimony of his witnesses, as to alleged transactions in 1888. *Clow v. Baker*, 36 Fed. 692; *Stonemetz, etc., Co. v. Brown Folding Mach. Co.*, 64 O. G. 1135, 57 Fed. 601, 604. Nevertheless, upon the false assumption that the plaintiffs had made these depositions part of their case generally, the defendants called the three interference witnesses in surrebuttal, and, under objections, interrogated them with respect to their depositions. The evidence thus introduced was not surrebuttal, and the objections thereto were well taken. If it could be regarded as properly in the record, it would not help the defendants' case. The answers of these three witnesses, throughout their so-called surrebuttal examination, impress us as unsatisfactory.

We do not deem it necessary to determine whether or not the plaintiffs have succeeded in carrying the date of De Long's invention back of the date of his application, viz. April 2, 1891; for, assuming this to be the true date of his invention, still, in our judgment, upon the question of priority, the decision must be in favor of the plaintiffs, under all the proofs.

We now pass to the consideration of the defense of noninfringement. The solution of the question of infringement depends upon the construction to be given to the first claim of the patent in suit. The patent drawing shows a third securing eye, which is particularly mentioned in the specification, and is specifically called for in both the second and third claims of the patent as a component of the device therein claimed. It may be assumed that this was the

inventor's preferred form. The third eye, however, is not essential for the desired purpose, and it is not called for in and by the first claim. Therefore we do not feel at liberty to import this feature into that claim. To do that would be materially to change the patent as granted and accepted.

In the described hook of the plaintiffs' patent, the tongue wire runs out straight, and returns humped; whereas, in the defendants' hook, it runs out humped, and comes back straight. In other words, the defendants have reversed the positions of the straight and curved portions of De Long's loop. No different result is thereby secured, and the defendants' loop, as thus formed, is literally within the terms of the claim, "said tongue being looped, and normally closing the space between the shank and hook proper." Certainly, this purely formal change does not avoid infringement. *Devlin v. Paynter*, 69 O. G. 1365, 12 C. C. A. 188, 64 Fed. 398.

To sustain this defense, however, most stress is laid upon the words, "and having its free end returned to the rear of the shank." The defendants insist that, under this language, "the free end of the tongue wire must be carried back behind the securing eyes." To adopt this construction, the claim must be read as if it called for the return of the free end of the tongue wire to the far end of the shank, or its extreme rear; but the claim does not specify the extreme rear of the shank, and there is no warrant for introducing that qualifying word into the claim. It is not necessary to carry the free end of the tongue wire back to the extreme rear of the shank in order to accomplish the beneficial object of the invention. The construction thus contended for is not only uncalled for by the words of the claim, but it would render the claim entirely valueless; for, to escape infringement, it would only be necessary to stop the rearward return of the free end of the tongue wire at any point short of the extreme rear end of the shank. We are not able to adopt this narrow and destructive construction of the claim, and, rejecting it, we must hold the defendants' hook to be an infringement of the first claim of the patent. It will be perceived that this conclusion by no means involves the broadening of the claim. We do not depart from the fair sense of the terms employed. We conform to the rule authoritatively prescribed in *Klein v. Russell*, 19 Wall. 433, 466, where it is said:

"The court should proceed in a liberal spirit, so as to sustain the patent and the construction claimed by the patentee himself, if this can be done consistently with the language which he has employed."

Let a decree be drawn in favor of the plaintiffs.

v.72F.no.4—34

THOMSON-HOUSTON ELECTRIC CO. v. WESTERN ELECTRIC CO. et al.  
(Circuit Court of Appeals, Seventh Circuit. March 5, 1896.)

No. 232.

1. PATENTS—TWO PATENTS FOR SAME INVENTION.

In view of the fact that Rev. St. § 4888, requires the application to contain a written description of the invention, "in such full, clear, concise, and exact terms as to enable any person skilled in the art \* \* \* to make and use the same," it follows that, in determining whether the invention described in one patent differs from that described in another, the investigation is not limited to a mere reading of the specifications and claims, but evidence may be heard—and, in a difficult case, ought to be heard—concerning the construction and actual operation of the machines, respectively.

2. SAME—DYNAMO-ELECTRIC MACHINES.

The Thomson-Houston patent, No. 238,315, for an improvement in the regulation of currents developed by dynamo-electric machines, and consisting of devices whereby the brushes on the commutator are automatically shifted so as to control variations of the current resulting from variations in the number of lamps depending thereon, is void because of anticipation by patent No. 223,659, to the same parties, for a device for the automatic adjustment of the brushes to prevent sparking and other irregularities. 16 C. C. A. 642, 70 Fed. 69, reaffirmed.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

This was a suit in equity by the Thomson-Houston Electric Company against the Western Electric Company and Enos M. Barton for alleged infringement of letters patent No. 238,315, issued March 1, 1881, to Elihu Thomson and Edwin J. Houston, for a current regulator for dynamo-electric machines. This court heretofore (16 C. C. A. 642, 70 Fed. 69) affirmed a decree of the circuit court (65 Fed. 615) declaring the patent void because of anticipation by letters patent No. 223,659, granted to the same parties January 20, 1880. A petition for a rehearing is now denied.

Frederick P. Fish, Robert S. Taylor, Charles R. Offield, Henry S. Towle, Charles C. Linthicum, and Geo. R. Blodgett, for appellant.

George P. Barton and Charles A. Brown, for appellees.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge. The objections made to the opinion of the court in this case will be considered briefly, though some of them can be of but little importance, because directed to matters which were expressly waived when the ten propositions of counsel for appellant were assumed to be true. The essential question is whether, on that assumption, a consistent and proper conclusion was reached. The statement in the opinion that the second patent does not specify "in just what feature of the construction or of the mode of use the novelty and utility entitled to be called invention were supposed by the patentees to be found," has been misapprehended. No reference to the requirements of section 4888 of the Revised Statutes was intended. In the first paragraph of the statement of the case by the court it had been said that the controversy turns mainly upon a comparison of the patent in suit with the

earlier letters, No. 223,659; and in order to make that comparison the court was seeking an exact and undisputed statement of the "improved construction and mode of use of the apparatus employed in patent No. 223,659," in which the patentees supposed their second invention to consist, and, not finding what was desired in the specification of the patent, quoted from the brief of counsel the statements which they had found it convenient, if not necessary, to make in aid of their discussion of the question, which the court, as best it could, was endeavoring first to state, and then to solve. There had been no suggestion that the claims of the second patent did not meet the requirements of the statute, and it was not in the thought of the court to question their validity on that ground.

It is now contended that in comparing the two patents only the face of the letters, and not the evidence concerning the construction and operation of devices made in alleged exemplification of the patented devices, should be considered. Accordingly, the suggestion in our opinion concerning the first patent, that "it does not seem to follow, necessarily, that no current was intended to pass through the controller magnet, A, except current resulting from the difference of potential between successive segments at the moment when the forward one passes from under the main brush," is denied; and quotations are made of parts of the specification, and of the first, fifth, and seventh claims of the patent, to show that "in every part of the patent, from beginning to end," "the patentees have affirmed, over and over, by argument and by inference, that the current which flows in the accessory circuit is that due to the difference of potential between the successive segments as they pass from under the main brush," and so it is assumed to be unquestionable "that patent No. 223,659 describes on its face an apparatus in which an accessory collector takes up the current due to difference between the potential of the leaving segment and the one under the main brush, but no other," and that "the two patents describe devices which differ palpably in their mechanism, and in the principles and modes of operation attributed to them in the patents." The clause, "attributed to them in the patents," is italicized in the briefs, and, as stated, means that it must be determined whether the two patents cover different devices and inventions by a mere reading of the specifications and claims, unaided by the proofs, however satisfactory, of the actual operation of devices constructed in illustration of either patent; or, as it is elsewhere expressed, the intention is "to hold the discussion where it belongs,—to the patents as they read." To this mode of discussion section 4888 is pertinent. It requires that an application for a patent (not the claim) shall contain a written description of the supposed invention, and of the manner of constructing and using it, "in such full, clear, concise and exact terms as to enable any person skilled in the art \* \* \* to make and use the same"; and it follows that, in determining whether the invention described in one patent differs from that

described in another, evidence may be heard—and, in a difficult case, manifestly ought to be heard—concerning the construction and actual operation of each. Specifications and claims are necessary, but inventions consist in things, not in words. To quote from the petition upon another point, “In the construction of a patent, it is not the personal intent or understanding of the patentee, but the actual facts regarding the invention, that are material.” This is equally true when two patents are being construed and compared for the purpose of determining whether the devices are essentially different. It may be conceded to have been the clear intention of the patentees, by their first letters, to cover an apparatus in which an accessory collector takes up the current due solely to difference of potential between the leaving segment and the one under the main brush. They may have understood that to be the chief, and possibly the only valid, feature of invention. But it is at the same time evident that the claims are not all so limited, and, unless there is something in the prior art of which proof has not been made, the patent ought not to be so restricted. It is conceded that “in the second, third, and fourth claims the accessory collector and controller magnet are included as parts of the combination, without any express limitation as to the origin of the current which flows through them.” Indeed, it is clear, as shown by questions 39 and 40 and the answers thereto, set out in the statement of the case [16 C. C. A. 642, 70 Fed. 83], that there may “always be found flowing in the accessory circuit some current other than that due wholly to the difference of potential between the adjacent segments”; and though it is plain that, if that current should not be sufficient to overcome the retractile spring which opposes the magnet of the combination, the effective operation of the apparatus would depend upon the varying current produced by the varying difference of potential between adjacent segments, it is also clear, as stated in our opinion, after quoting from the specification, that “it does not seem to follow necessarily that no current was intended to pass through the controller magnet, A, except current resulting from the difference of potential between successive segments.” None of the claims are, in specific terms, so limited, and some of them cannot fairly be so construed. Certainly a charge of infringement of that patent could not have been escaped by showing that a device made in all other respects in conformity with the specification was so proportioned that there might always be found flowing in the accessory circuit some current other than that due to the difference of potential between adjacent segments,—a fact which it is shown could be determined only by the employment of suitable tests upon each apparatus. It may be added, as a deduction from what has been said, that if the current in the accessory circuit, which results from the difference of potential of the brushes when touching a single segment, is barely insufficient to overcome the spring opposed to the magnet, A, a change in the external circuit, causing an increase in the main current, would cause a corresponding in-

crease of the supposed current in the accessory circuit sufficient to overcome the spring, independently of "the electrical condition of the segments of the commutator at the moment of leaving the collectors;" and, this being so, the apparatus, in a measure at least, or theoretically, is responsive to changes in the main current, as well as to the varying differences of potential between segments, and, when actually so, is to be regarded, according to the contention of appellant, as an exemplification of the second, rather than of the first, patent. But could it be insisted that an apparatus of that character, if made during the life of the first patent, either before or after the issue of the second, would not have been an infringement of the first? We think not. On the contrary, the statement may be repeated, with added emphasis, "that in respect to the question of invention the omission of the accessory brush is of no significance," since its presence or absence does not affect essentially the mode of operation, nor determine whether a particular apparatus exemplifies one patent or the other.

But it is said that "such a doctrine would destroy all the electrical patents in existence," and, to illustrate the assertion, reference is made to the telephone of Reis, which was capable of transmitting music, and to those of Bell and Blake, which were the first to transmit articulate speech. The devices of the different patents, doubtless, are much alike in appearance and construction, and in the mode or principle of operation; but it is enough to observe here that they produce distinctly different results, which are perceived and understood without the employment of any tests other than the practical use of the devices in the manner and for the purposes for which they were respectively designed and patented,—a test which is certainly not unfair or illogical. It may be conceded, as asserted, that the differences of operation could be brought about by mechanical changes so minute that the most expert telephonist in the world, taking an instrument at random out of the line, could not tell, by mere inspection of it, whether it would be a Reis or a Blake in operation and result; but a mere hearing would be enough. So, too, in respect to the Edison incandescent lamp, and the old form of lamp known as the "Konn Lamp," whatever the possibilities of converting one into the other by gradual and hardly perceptible changes, it is evident, on the statements and explanation of counsel, that the difference between the lamps, both in construction and in operation, is clear enough to distinguish one from the other. By way of further illustration, it is said that "there is a cabinet in the Agassiz Museum, at Cambridge, containing a row of mounted skeletons, beginning at one end with a monkey, and ending at the other with a Caucasian. The difference between the extremes is wide enough, but the two half-way chaps look like brothers." But they are not brothers. By neither man nor monkey has a live one of either kind ever been mistaken for the other, and in skeleton, with all



the zeal of the Darwinians to find the missing link, they remain, to the experts, easily distinguishable, and can only be said to resemble. In the light of present knowledge, the Caucasian, as an invention, is not anticipated by the Simian.

It was understood to be admitted at the hearing, and, if not admitted, was sufficiently proved, as stated in the opinion, "that upon all dynamos which existed when the patents were issued the two devices were interchangeable, so that, when the brushes were so moved as to prevent spark, they established and maintained constant current." But it is not material to the argument whether the statement is strictly accurate or not. It remains true that, upon dynamos of uniform field, each device prevents spark, and maintains constant current, while upon dynamos of irregular field neither device can be successfully employed unless provision is made for a variable spread of the commutator brushes. With that provision it is agreed that the device of the second patent is effective for both purposes, and, though questioned by counsel (hesitatingly), we are convinced that the same is true of the device of the first patent.

The statement that "if, instead of being in the accessory current, the [controller] magnet be transferred to the main current, or a shunted portion thereof, exactly the same kinds of operation, effected in the same way and by like adjustments, must go on," is criticised and disputed, but not upon grounds which are new and unconsidered, or which seem to us to affect the essential truth of the proposition. Identity of operation and of adjustments, it is to be observed, is not alleged, and of the differences insisted upon our views are sufficiently developed in the original opinion.

It is said that the course of the case and the opinion of the court have developed an importance, not apprehended in the beginning, to the question whether it was known, "prior to the discovery of the fact by Thomson and Houston, that the current of a dynamo could be maintained at a constant value, under variations of load, by movement of the brushes"; and, assuming that the court was misled in that respect, counsel have restated, and elaborated at great length, their discussion of the difference between shifting the brushes to change the current, and shifting them to maintain constancy of current, in the outer circuit. The question is confessedly a collateral one only, and, without attempting to restate or summarize what has been said about it, we are content to say simply that when the opinion in the case was written the court had the same understanding as now of the respective views of counsel in regard to it.

The objections made to the last sentence of our opinion are answered already. If the current regulator was not covered and protected by the first patent, it is because the claims are too narrow to cover the entire invention shown; but, on the proofs in the record, we think it clear that some of the claims are entitled to a construction broad enough to cover the supposed in-

vention of the second patent. It would certainly be unreasonable to say that infringement of the first patent could have been avoided by proportioning the parts of the device, whether done intentionally or accidentally, so as to admit of the passage of an effective part of the main current through the accessory circuit; and yet, as counsel for the appellant have been constrained to contend, when so adjusted the device is covered by the second patent. In other words, at least one form of construction of the first device exemplifies the second. It is therefore beyond dispute, as originally stated, that to uphold the second patent would be "an unwarrantable prolongation of the just monopoly conferred by the first patent." The petition is denied.

After the original opinion was pronounced, there was inserted in it by mistake the following words, which are to be disregarded, namely: "The current through the accessory brush, it seems to be agreed (C. Q. 97, and answer, *supra*), 'passes through a variation from a maximum to a minimum between the time of its first contact with each segment and its separation from that segment.'" And see 16 C. C. A. 642, 670, at bottom of page, and 70 Fed. 69, 98, at top of page.

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THE POTOMAC.

NIAGARA FALLS PAPER CO. v. CROCKETT et al.

(Circuit Court of Appeals, Second Circuit. February 18, 1896.)

**SEAMEN—EXTRA WAGES.**

Seamen are not entitled to extra wages for services rendered in unloading cargo in a harbor of refuge, in order to free the vessel from water; and a promise by the master to pay extra compensation upon their refusal to work without it, is void. 66 Fed. 348, reversed.

Appeal from the District Court of the United States for the Northern District of New York.

This was a libel by James Crouckett and James Hanley against the barge Potomac (Niagara Falls Paper Company, claimant), to recover extra wages. The district court made a decree in favor of libelants (66 Fed. 348), and the claimant appealed.

George Clinton, for appellant.

Urban C. Bell, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. The libelants shipped, in September, 1894, on board the barge Potomac, one as mate and the other as seaman, and each upon wages by the month. The barge left Buffalo in September, bound for Parry Sound, in Canada. On her return trip, she was laden with lumber below and on deck, consigned to Tonawanda, N. Y., and left Parry Sound on the morning

of September 23d, in tow of the tug *Seguine*. The next morning she encountered a violent gale, and, after passing Cove Island light, the towline parted, the barge drifted, shipped heavy seas, became waterlogged, lost part of her deck load, dropped anchor in the night near Flower Pot Island, and stayed there till morning, when the tug came and towed her to a small harbor in Canada called "Tubmerry," between one and two miles from the larger Tubmerry port. The vessel was tied up near the lighthouse, where there was a hamlet of 8 families containing about 75 people. In order to free the barge from water, it was necessary to remove the lumber from the deck, put on steam pumps, box them in, and afterwards reload the cargo. The captain hired men from the shore to assist in this work, but the sailors exacted extra compensation before they would touch the cargo for the purpose of unloading, and demanded and received from the captain a promise to pay extra wages of 30 cents per hour. The barge was placed in proper condition, and was towed to Tonawanda. The extra compensation of each of the libelants amounted to \$10.50. The owners paid the extra amount to all the sailors except the two libelants. There was no apparent reason for this discrimination. To recover the extra wages this libel was brought.

The district judge, in deciding in favor of the libelants, was undoubtedly influenced by the seeming unfairness of the claimants in paying a part only of the men in accordance with the promise of the captain. He furthermore says:

"If I thought that a decree for the libelants involved a departure from the old and salutary rule that seamen must not expect extra compensation for services rendered in their capacity as seamen, no matter how arduous or meritorious they may be, I should dismiss the libel. It would lead to gross insubordination, and increase the difficulties and dangers of navigation immeasurably, if the court should sanction the idea that a seaman may refuse to obey the master's order on the ground that the work he is directed to perform is 'extra,' and entitled him to additional compensation."

He thought that the facts took the case out of the general rule, because the *Potomac* was in port at the time in question, and says:

"The work was partly on the vessel and partly on shore, and consisted in unloading and reloading a part of her cargo."

No question is made as to the general rule which the district judge stated, or that seamen are bound, without extra compensation, to render extra labor and services to save the vessel and cargo in case of wreck or impending calamity, and that a contract for extra pay, "made when the ship is in distress, or obtained by any unfair practices or advantage taken by the seamen, is wholly void." *Curt. Merch. Seam.* 28. In this case the barge had become disabled, and was taken to a harbor of refuge, so as to be enabled to prosecute her voyage. She was compelled by stress of weather to stop at Tubmerry, in order to gain ability to go to her place of destination. We think that the district judge was in error in considering that, at the time in question, the barge was in port. She was neither in her port of destination, nor in a port where the

voyage was at an end. She was in a temporary harbor of refuge, where the duties of seamen in relation to the care of her cargo and the safety of the vessel still continued. The unloading of the vessel was necessary, in order to enable her to be freed from water, and to complete her trip and earn her freight; and in her distress this service was a part of the sailors' duty. It follows that the contract was void.

The decree of the district court is reversed, without costs, and the cause is remanded to the district court, with instructions to dismiss the libel, without costs.

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THE BATTLER.

NEALL v. SCHRADER.

(Circuit Court of Appeals, Third Circuit. February 18, 1896.)

1. TOWAGE—UNSAFE ANCHORAGE—CUSTOM USAGE.

The Brown anchorage, in Delaware Bay, *held*, on the evidence, and especially in view of the fact that vessels of all kinds, including barges, habitually anchor there when weather-bound, to be a safe and proper anchorage for coal-laden, sea-going barges, while awaiting the subsidence of unfavorable easterly weather; and that a tug having such barges in tow was not liable for their loss during an extraordinary and terrific gale, either for anchoring them at that place in the first instance, or for not removing them further up the bay before the storm broke. 55 Fed. 1006, reversed.

2. SAME—DUTY OF TUG—DISCRETION OF MASTER.

A mistake of judgment on the part of the master of a tug in selecting an anchorage for his barges does not render the tug liable for their loss, where such mistake is only manifested by the result, and it appears that the master exercised reasonable skill and judgment, in view of the circumstances existing at the time.

3. SAME—TUG LEAVING BARGES AT ANCHOR.

The fact that a tug which anchored certain sea-going barges at the Brown anchorage, in Delaware Bay, pending threatening weather, and left them at their anchorage, and engaged in other towage in the meantime, *held* no ground of liability for their loss during an extraordinary storm, where it appeared that the barges were equipped with all the appliances for safe anchorage and were as capable of riding out a gale as full-rigged ships, that it was the common practice for tugs to leave barges so anchored, and that, even if the tug had been present, she would have been unable to prevent the disaster. 55 Fed. 1006, reversed.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

This was a libel in rem by John J. Schrader, owner of the barges Tonawanda and Wallace, against the steam tug Battler (Frank L. Neall, trustee, claimant), to recover for the loss of the barges through the alleged negligence of the tug. The district court rendered a decree for libellant (55 Fed. 1006), and the claimant appealed.

J. Rodman Paul and John G. Johnson, for appellant.

Edward F. Pugh and Henry Flanders, for appellee.

Before ACHESON and DALLAS, Circuit Judges, and WALES, District Judge.

ACHESON, Circuit Judge. The fundamental question here is whether the anchorage of the Brown, in Delaware Bay, 2 or 3 miles to the eastward of the buoy of the Brown, and about 8 or 10 miles from sea, where the master of the steam tug Battler brought to anchor the barges Tonawanda and Wallace, on the afternoon of Thursday, September 5, 1889, was a safe and proper place of anchorage for these barges, such as an experienced, competent, and prudent master of a towing tug would have selected for the purpose, under the surrounding circumstances. The Tonawanda and Wallace were sea-going barges of heavy draught, that of the former being about 21 feet. They carried suitable anchors and chains. Originally, they were ocean-sailing vessels, but they had been fitted up for towage in the coastwise coal trade, by reducing the height of the masts, which were equipped with fore and aft sails only. They were, however, quite as capable of riding out a gale as full-rigged sailing vessels. On Wednesday, September 4th, these barges, which were loaded with coal, were taken in tow at Philadelphia by the steam tug Battler, Capt. Tingle being master, under an agreement to tow them from Philadelphia to Boston. When the tug reached the anchorage of the Brown, the wind was easterly, the atmosphere was hazy, and an easterly swell was setting in. In this state of the weather the master of the Battler deemed that it would not be prudent to take the barges out to sea, and therefore he brought them to anchor, as above stated, to await a favorable change of weather.

In this connection, and as aiding in the just solution of the question with which this opinion opens, two facts may properly be mentioned. In the preceding month of June, the steam tug Argus, Capt. Bernard being master, had in tow these same two barges, Tonawanda and Wallace, outward bound, and, the weather proving unfit to go to sea, the Argus put the barges in the anchorage of the Brown to await good weather, and they lay there for two days before the voyage was resumed. Again, on the evening of Saturday, September 7, 1889, the steam tug C. W. Morse, Capt. Blair being master, having in tow the barges Casilda and St. Cloud, passed down Delaware Bay and went as far outwardly as the Over Falls, when, finding that the weather outlook was unfavorable, the Morse brought back her barges, and anchored them at the Brown anchorage, in proximity to the barges Tonawanda and Wallace, to await good weather. These four barges remained thus at anchor at the Brown anchorage until Tuesday, September 10th, on which day they were struck by an extraordinary and terrific gale, and all of them were lost in the storm.

Before taking up the principal question, two preliminary matters will be considered: First. It was contended by the libellant in the court below, and it is insisted by him here, that the Battler was in fault in not continuing her voyage on Thursday afternoon, or, at least, was blameworthy in not resuming the voyage on Thursday night, or on Friday morning. Upon this point, however, the

judgment of the district court was favorable to the tug. In that conclusion we concur. It is shown by the decided weight of the evidence that it would have been imprudent for the Battler to venture out to sea with two barges in tow at any time after the barges came to anchor on Thursday afternoon before the disaster occurred. Even Adams, the mate of the Tonawanda, and a witness for the libellant, expresses that opinion. In view of the indications as to the condition of the weather out at sea, the master of the Battler, we think, acted wisely in declining to proceed on the voyage, or to resume it. Second. It is alleged that the captain of the barge Tonawanda requested the master of the tug not to go below Fourteen-Foot Bank, an anchorage in Delaware Bay several miles above the Brown anchorage, if he was not going to sea, and that the master of the tug signified his assent to the request. This, however, is denied, and these two persons differ as to what passed between them. But whether or not the alleged request was made is a matter of no great moment. The duty and responsibility of selecting a suitable place of anchorage rested upon the master of the tug.

The question, then, recurs, was the anchorage of the Brown a safe and proper one for the barges Tonawanda and Wallace under the circumstances? Upon this question there is great diversity of opinion between the witnesses on the one side and the other. Many of the witnesses make a comparison between the anchorage of the Brown and the Fourteen-Foot Bank anchorage, stating, respectively, why they prefer the one or the other as a place of security. The evidence tends to show that light-draught schooners generally seek Fourteen-Foot Bank, because they can anchor in on the flats in that locality, to the eastward of the deep-water channel. The actual experience of a number of the libellant's witnesses was with schooners of light draught. On the other hand, the respondent's witnesses speak particularly of vessels of heavy draught, to which class of vessels the barges Tonawanda and Wallace belonged, and they give reasons for their regarding the anchorage of the Brown as a safe and proper harbor for barges like the Tonawanda and Wallace in easterly, heavy weather. Here, in point of numbers, the score is somewhat on the side of the respondent. Now, certainly, the witnesses for the libellant are not superior to those of the respondent, either in intelligence or in nautical skill and experience. If the question whether the Battler selected an anchorage suitable for the occasion turned upon the mere opinions of unbiased and competent witnesses, the scale, we think, would fairly incline to the side of the respondent. The case, however, does not depend wholly upon nautical opinion. There is a great fact, indisputably established, which, in our judgment, is decisive. It clearly appears that vessels of all kinds—schooners, brigs, barks, ships, steamers, and barges—habitually anchor in the anchorage of the Brown when weather-bound. It is shown that the Brown anchorage is frequented both by sea-bound vessels (including barges), when detained by threatening weather, and awaiting a favorable change,

and by vessels which come in from sea for a harbor of safety. Numerous witnesses on the side of the respondent so testify, from personal knowledge and experience. Capt. Gibbons, a witness for the libelant, who expresses the opinion that the anchorage at Fourteen-Foot Bank is safer than the anchorage of the Brown, nevertheless, upon cross-examination, thus testifies:

"Q. You have often seen vessels,—barges,—have you not, anchored at the anchorage of the Brown? A. Yes. Q. Is it a usual and frequent place of anchorage? A. Yes; anchor there very often. Q. Vessels making a harbor from storm and sea anchor there frequently, don't they? A. Yes, sir. Q. Bound up the coast, I mean. A. Yes, sir. Q. Barges do, and vessels and barges waiting for good weather to go to sea frequently anchor there? A. Yes, sir. Q. It is considered, is it not, a safe anchorage for any ordinary weather? A. Well, for ordinary weather, yes."

The evidence on this subject, coming from the respondent's own witnesses, is still more favorable to him, and fully warrants the finding that it has been the common practice of barges, on their way to sea, and hindered by bad weather, to anchor at the Brown anchorage, and lie there awaiting good weather. Having regard, then, to all the proofs, it seems to us that, upon the question whether the anchorage of the Brown was a safe and proper one for the barges Tonawanda and Wallace on this occasion, the clear preponderance of the evidence is with the respondent. We are of the opinion that the principal charge of negligence here made, viz. that the tug anchored the barges in an improper place, is not sustained.

But, even if the proofs did not completely vindicate the tug's choice of an anchorage, still, in view of the conflict of opinion between the two sets of nautical witnesses, and under the facts shown, the utmost that could fairly be alleged against the master of the Battler would be that he made a mistake of judgment, as manifested by the result. The *James P. Donaldson*, 19 Fed. 264. A mere mistake of judgment, however, under the circumstances, is not enough to fasten liability upon the owner of the tug. *Id.*; The *Packer*, 28 Fed. 156. As was said by the court, in *Lawrence v. Minturn*, 17 How. 100, 110, the owners of a vessel are obliged to appoint a master having reasonable skill and judgment, and they are liable to those who suffer through his failure to possess or exert these qualities; "but they do not contract for his infallibility, nor that he shall do, in any emergency, precisely what, after the event, others may think would have been best." In the case of *The W. E. Gladwish*, 17 Blatchf. 77, 83, Fed. Cas. No. 17,355, Chief Justice Waite said:

"The tugs undertook to bring to this work such prudence and such nautical skill as was ordinarily required in such navigation. More was not contracted for, and more was not expected. When the ice was reached it became necessary to determine whether to lie by or to go on. This involved the exercise of judgment as to what ought to be done under the circumstances. A mere mistake is not enough to charge the tugs with any loss which follows. To make them liable, the error must be one which a careful and prudent navigator, surrounded by like circumstances, would not have made."

The master of the Battler is to be judged by the state of affairs which existed when he acted, and not by the after event. When he brought the barges to anchor, no storm was prevailing. The weather indications, then, were simply such as to make it imprudent for the tug to tow two barges out to sea. In selecting for the barges the anchorage of the Brown to await a change of weather, the master of the tug did no unusual thing. He did that which competent and careful navigators were in the habit of doing. Upon the whole case our conclusion is that the master of the Battler was not culpable in anchoring the Tonawanda and Wallace in the place selected by him.

The evidence amply justifies the belief that the barges would have ridden out, in entire safety, any ordinary storm. The catastrophe was occasioned by a storm of exceptional violence and of sudden occurrence. Capt. Gibbons, the libellant's witness already quoted, who lay with his tug within the Delaware breakwater, characterizes the storm as "very extraordinary," and says:

"I had no idea whatever that there was such a gale coming on. \* \* \* Came up to me unexpectedly. I seen the wind to eastward, but I did not think it would increase to such force."

And he adds that, until the storm was actually on, he had no idea whatever that anything like it was going to happen. The captain of the Tonawanda, in response to the question, "When was it, the first time, that it [the wind] became dangerous,—what day was the first day that it became dangerous, in your opinion?" answered, "Monday night." This agrees with the testimony of Capt. Blair, the master of the C. W. Morse, who, speaking of Monday night, states:

"That night I laid down as usual. The glass was on 30, and had been there ever since Saturday, and 30 is a good glass; and I heard the wind, about midnight, spring up and blow, and I jumped up and dressed."

The weather record kept at the lighthouse at the breakwater contains this entry, under date of Monday, September 9th, with respect to the night of that date:

"Midnight: Cloudy, northeast gale; wind shifting to north-northeast, about midnight, to a hurricane, increasing in violence during balance of night."

Capt. Hall, the lighthouse keeper, testifies that he "never saw a storm to compare with it." The extreme violence of the gale can be appreciated, when it is stated that about 30 vessels, at different points in Delaware Bay, were sunk or driven ashore.

What has been said disposes of the complaint that the tug did not remove the barges to Fourteen-Foot Bank. If the selected anchorage was a proper one for barges awaiting good weather to go to sea, surely it was not negligence to let them lie there for the desired and expected change. A removal would have been a very unusual thing. The master of the Battler had no reason to anticipate the extraordinary storm which did the mischief. Moreover, whether the barges would have fared better had they been at Fourteen-Foot Bank is problematical. The witness Fowler testifies,



positively, that he saw three schooners, which were at anchor on the Maurice River flats, go ashore in the storm. There is other evidence as to the position and loss of these vessels, and the fact that such disaster at the Fourteen-Foot Bank anchorage occurred is, we think, shown.

It only remains for us to consider the charge that the Battler was away from the barges much of the time while they lay at the Brown anchorage, and especially when the loss happened. We have already seen that the Tonawanda and Wallace were ocean barges, equipped with all the appliances for secure anchorage, and that they were as capable of riding out a gale as full-rigged ships. In easterly threatening weather, when it is deemed unwise to tow such barges out to sea, the usage in the trade is for the tug to bring them to anchor at some secure place, to await good weather. Then, if the barges are in good order, well manned, and securely anchored in a proper place, in the absence of special reason to the contrary, it is a common practice for the tug to leave the barges temporarily, and take other work. Undoubtedly, the owner of the Tonawanda and Wallace knew this; for in the month of June, 1889, after the tug Argus had placed these barges in the Brown anchorage, the tug left them at anchor, and towed a bark to Philadelphia. The Battler did the same thing on this occasion. During its absence the tug was not needed by the barges, and nothing befell them. The Battler was back by 1 o'clock of Saturday morning, and then went down beyond the Over Falls to see how the weather was out at sea. During the greater part of Saturday the tug lay with the barges. Afterwards the tug lay within the Delaware breakwater. This, it is shown, was and is the common practice of tugs when their barges are at the Brown anchorage. On the afternoon of Sunday the Battler again went down below the Over Falls to ascertain the condition of the weather outside, and found that hazy, easterly weather still prevailed at sea. The presence or absence of the tug was a matter of no consequence. The Battler, if present, could have done nothing to avert the calamity. The more powerful steam tug C. W. Morse, although present with her barges, was unable to do anything whatever to save them. The great storm brought unavoidable destruction to the Tonawanda and Wallace, as it did to so many other vessels.

Under all the circumstances, we are not able to see that the owner of the Battler is justly chargeable with the loss of the libellant's barges.

The decree of the district court is reversed, and the cause is remanded, with a direction to enter a decree dismissing the libel of John J. Schrader, and adjudging him to pay the costs in the court below in No. 79 of 1889, and the costs of this appeal.

## THE BATTLER.

WESTERN ASSUR. CO. et al. v. SCHRADER et al.

(Circuit Court of Appeals, Third Circuit. February 18, 1896.)

**TOWAGE—LOSS OF BARGES—LIABILITY OF TUG.**

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

This was a libel in rem by the Western Assurance Company of Toronto, Canada, against the tug Battler, to recover damages for loss of coal, insured by libellant, which was shipped on the barges Tonawanda and Wallace, and lost, with them, through the alleged negligence of the tug. Frank M. Neall, trustee, as claimant of the Battler, filed a petition for limitation of liability. See 58 Fed. 704. The district court held that libellant was not entitled to share in the proceeds of the tug because it had refused to join with the owner of the barges in an attempt to hold the tug liable, and had stood by, pending the suit brought by him (see 55 Fed. 1006, and 72 Fed. 537), and did not present its claim until a decree had been obtained therein. The court held that, by such conduct, the assurance company had waived or forfeited its claim, in so far as the libellant in that suit was concerned. 67 Fed. 251. From this decree the assurance company appealed.

John F. Lewis, for appellant.

Henry Flanders, for appellees.

Before ACHESON and DALLAS, Circuit Judges, and WALES, District Judge.

ACHESON, Circuit Judge. The decree we have just rendered in the case of Neall v. Schrader, 72 Fed. 537, makes it unnecessary for us to consider the questions raised by the appeal of the Western Assurance Company. The views we have expressed in our opinion in the other case require a reversal of the decree of the court below in this case. In remanding this record, however, we will make no order with respect to the costs in the court below in the proceeding for the limitation of the liability of the owner of the Battler (No. 115 of 1893) 58 Fed. 704, but will leave the question of costs in that proceeding to the judgment of the district court.

The decree of the district court is reversed.

## THE OBDAM.

INTERNATIONAL NAV. CO. v. THE OBDAM.

(District Court, D. New Jersey. February 27, 1896.)

**SALVAGE COMPENSATION.**

Eighteen thousand dollars awarded to a steamship worth, with her freight, \$90,000, for towing into Halifax in rough weather a steamer valued, with her cargo, at \$384,000, which was found with a broken shaft, some 30 miles from Sable Island, in a condition in which her propeller was liable, in the course of long drifting, to batter the rudder post, and seriously damage the ship.

This was a libel by the International Navigation Company against the steamship Obdam to recover compensation for salvage services.

Robinson, Biddle & Ward, for libellants.

Wing, Putnam & Burlingham, for claimant.

GREEN, District Judge. On Thursday, October 31, 1895, in the forenoon, the steamship Pennland, bound on a voyage from Liverpool to Philadelphia, sighted a steamship to the northwest, apparently in distress. This vessel proved to be the Obdam, from Rotterdam, bound to New York. It appeared that her shaft was broken; that she had but an insignificant sail area, and was drifting as the wind and tide might take her. At her request, the Pennland took her in tow, and though, from stress of weather, she was compelled to abandon her for a time, the towing hawser breaking, she afterwards went to her assistance again, and brought her safely into the harbor at Halifax. This action is to recover for these services. It is stipulated that the Pennland, which is a mail, passenger, and freight steamer, is worth \$90,000, and that the Obdam and her cargo were worth \$384,000. It is not denied that the service rendered was a salvage service. The only question in dispute concerns the amount to be awarded. It is alleged by the libellant that when taken in tow by the Pennland the Obdam was in very dangerous proximity to Sable Island, notorious for disastrous shipwrecks. It is quite true that shortly before she was taken in tow the Obdam had drifted to within 30 miles of this "Graveyard of the Atlantic." But the wind had veered to the northwest, and just previous to commencement of these salvage services she had drifted away from this locality, and seemed to be in no immediate danger, at least from this source. It is also claimed that the breaking of the propeller shaft made it possible for the propeller itself, during a long drift, to batter the rudder post, and so seriously damage the ship. This was undoubtedly an element of danger, and deserves consideration. The distance towed was about 200 miles. The actual time consumed was about 2½ days. The services rendered were every way meritorious, and deserve substantial reward. Perhaps more so on account of the position of the Obdam when help was given her, for it is not disputed that she was some distance north of the usual track of vessels crossing the Atlantic, and in fact, from the time of her accident until she was sighted by the Pennland, she had seen but one vessel, and that a fishing vessel, who had promised to report her at the first opportunity. Salvage awards must of necessity be to some extent arbitrary, and rest in the discretion of the court. Having in view the general principles which underlie such awards, and having respect to the special circumstances of this case, the sum of \$18,000 is awarded as a fair salvage.

BISSELL CARPET-SWEEPER CO. v. GOSHEN SWEEPER CO.

(Circuit Court of Appeals, Sixth Circuit. March 5, 1896.)

No. 404.

1. CIRCUIT COURT OF APPEALS—JURISDICTION—INTERLOCUTORY DECREE—DIS-  
SOLVING INJUNCTION.

An order so modifying an interlocutory decree for a broad perpetual injunction against infringing a patent as to permit defendant to manufacture and sell for a limited time certain infringing machines is an order dissolving pro tanto the original injunction, and is, consequently, an appealable interlocutory order or decree, within the act of February 18, 1895, amending section 7 of the act of March 3, 1891.

2. APPEAL FROM INJUNCTIONAL DECREE—EFFECT OF SUPERSEDEAS.

An appeal with supersedeas from an interlocutory decree granting a perpetual injunction against infringement of a patent on a bond conditioned to prosecute the appeal, and, on failure to make the same good, to pay costs and damages, "as well as all damages and profits resulting from" defendant's manufacture and sale of the infringing articles "after the date of the said decree," only operates to suspend the injunction pending the appeal, and is not a license to defendant to continue the manufacture and sale of the infringing articles pending the appeal.

3. CIRCUIT COURT OF APPEALS—EFFECT OF DECISIONS.

The decree and mandate of the circuit courts of appeal have precisely the same finality as the decrees and mandates of the supreme court. Whatever is before the court by virtue of the appeal, and is disposed of by it, is finally settled, and becomes the law of the case, so that the court below must carry it into execution according to the mandate, without power to modify, reverse, enlarge, or suspend it.

4. SAME—APPEAL FROM INTERLOCUTORY ORDERS AND DECREES.

It is the practice of the court that, on an appeal from an order or decree granting a preliminary injunction merely, the court will not ordinarily consider or determine the merits of the cause, but will confine itself to a consideration of the question as to whether the court below has abused its discretion. Consequently, when such an order or decree is affirmed, the court below is still at liberty to enlarge, modify, or suspend the same, as the future circumstances of the case or the ends of justice may require.

5. SAME—APPEAL FROM INTERLOCUTORY DECREE FOR PERPETUAL INJUNCTION.

Where, on appeal from interlocutory decree granting a perpetual injunction, the court necessarily examines and determines the entire merits of the cause, its power to decree is not limited to the matter of the injunction alone, but extends to the whole merits, and its decision is final and conclusive on every point actually decided. Consequently, the court below has no power to modify, in any respect, a decree which is thus affirmed, but must give it full effect in the very terms of the decree of the appellate court. *Richmond v. Atwood*, 2 C. C. A. 596, 52 Fed. 10, and *Marden v. Manufacturing Co.*, 15 C. C. A. 26, 67 Fed. 809, followed. *Watch Co. v. Robbins*, 3 C. C. A. 103, 52 Fed. 337, overruled.

Appeal from the Circuit Court of the United States for the Western District of Michigan.

A. C. Denison and Geo. H. Lothrop, for appellant.

Charles K. Offield and J. W. Champlin, for appellee.

Before TAFT and LURTON, Circuit Judges, and HAMMOND, J.

LURTON, Circuit Judge. This is a second appeal in this case. The former appeal was by the Goshen Sweeper Company, and was from an interlocutory decree determining the validity of a certain patent owned by the Bissell Carpet-Sweeper Company, and finding  
v.72F.no.5—35

that the Goshen Sweeper Company had infringed. The decree awarded a perpetual injunction, and referred the cause to a master for an accounting. This court, upon a full hearing, in which it was obliged to fully consider and determine both the question of the validity and meaning of the second clause of the Plumb patent, as well as the question of infringement, affirmed the decree awarding the injunction, and remanded the case to the circuit court for further proceedings. 72 Fed. 67. After this affirmance, the circuit court, upon motion of the Goshen Sweeper Company, entered an order in these words:

"The defendant in this cause having moved the court for leave to finish the manufacture of carpet sweepers now in the course of construction, and to sell the carpet sweepers already manufactured, as well as those now in process of manufacture, when completed, to others, to sell or use, after hearing counsel for the respective parties upon the motion, and having duly considered the same, it is hereby ordered: That the defendant have permission, and leave is hereby granted to defendant, to sell to others, to be sold or used, the following kinds of sweepers, embraced in the three first horizontal columns in the inventory attached to the affidavit of Thomas H. Bedell, filed in support of said motion, viz.: Now finished: 238 Rapid; 230 Select; 100 Star; 25 Reliable; 3 Banner; 78 Model; 20 Our Own; 25 Grand Republic; 9 Railroad; 22 Rapid. Also, to complete the manufacture of and to sell to others, to be sold or used, the following sweepers of the kinds here given, viz.: 1,465 Rapid; 1,252 Select; 543 Star; 363 Reliable; 210 Banner; 299 Model; 110 Our Own; 141 Grand Republic; 72 Mammoth; 21 Sovereign; 81 Michigan; 6 Railroad; 72 Our Leader; 111 Alliance. That said defendant may stencil the sweepers as demanded by the trade, all of which sweepers named contain the elements of the Plumb patent as construed by the circuit court of appeals, in an opinion handed down on December 9, 1895. That the injunction heretofore granted is hereby modified in accordance with this order. That the defendant account before the master for all sales made hereunder, in accordance with the interlocutory decree entered in this cause. That this leave shall expire six months from this date, and is granted on condition that defendant file with the clerk of this court a bond to complainant, with sureties satisfactory to this court, or to the clerk thereof, in the penal sum of five thousand dollars (\$5,000), conditioned to pay the complainant all the profits and damages that may be decreed against the defendant upon final hearing in this cause for or on account of the sale or disposition of the sweepers as aforesaid."

From this decree the Bissell Carpet-Sweeper Company has been allowed an appeal.

A motion to dismiss the appeal has been entered by the appellee, which must be disallowed. The decree appealed from is one dissolving pro tanto the perpetual injunction theretofore in force, and is an appealable interlocutory order or decree, within the act of February 18, 1895, c. 96 (28 Stat. 666), which amends section 7 of the act of March 3, 1891, so as to allow appeals from interlocutory orders or decrees dissolving injunctions. The injunction in force prior to the decree in question was a broad injunction, absolutely restraining the appellee from making or selling the infringing structures. When an appeal was allowed from the decree granting the perpetual injunction, the circuit court, as it was authorized to do under section 7 of the courts of appeals act, granted an appeal with supersedeas, on a bond conditioned that the defendant should prosecute the said appeal to effect and pay all costs and damages if it failed to make said appeal good, "as well as all damages and

profits resulting from its manufacture and sale of the infringing sweepers after the date of the said decree." This only operated to stay or suspend the injunction pending the appeal. It had no effect or operation as a license to defendant. The status of the defendant was simply that of persons engaged in infringing, and not restrained by operation of the injunction. But, however this may be, so soon as the appeal had been determined adversely to the appellant, the injunction was instantly reinstated, the supersedeas having expired by its own limitation. The clear effect of the decree now complained of was to dissolve this injunction pro tanto. More than this, the decree seems to have gone so far as in terms to grant a license to the defendant to continue its infringement, by authorizing it to complete the manufacture of structures begun, and to sell to others, to be sold or used,—sweepers already complete, as well as those to be finished under the order. Before the provision for an appeal from an interlocutory order or decree granting an injunction, it was not unusual or improper to suspend the operation of an injunction awarded by a decree determining the merits, and referring the case to a master for accounting. The propriety of such a suspension was due to the fact that, while the injunction might be awarded upon a decree which was final as to the merits, yet it was not final under the rulings of the supreme court as to what constituted an appealable decree, within the terms of section 692, Rev. St. Very great hardships frequently resulted from the operation of such an injunction, due to the fact that very often a long and expensive accounting intervened between the allowance of the injunction and the rendition of the final decree from which an appeal would lie. To prevent as much as possible the severe consequences incident to the practical enforcement of interlocutory decrees affecting the merits of the controversy, though not appealable, the supreme court, at an early day, admonished trial judges as to their duty to alleviate as far as possible all such consequences, by saying:

"It is exceedingly important, therefore, that the circuit courts of the United States, in framing their interlocutory orders, and in carrying them into execution, should keep in view the difference between the right of appeal as practiced in the English chancery jurisdiction and as restricted by the act of congress, and abstain from changing unnecessarily the possession of property, or compelling the payment of money by an interlocutory order." *Forgay v. Conrad*, 6 How. 205.

An application to suspend the operation of such an injunction came on to be heard before Justice Swayne, when holding a circuit court, who took occasion, in granting the application, to say:

"An application is made that this final decree shall be suspended, as it regards the injunction, until the account shall be determined upon, and the decree shall be finally made upon that account, and when the defendant, for the first time, will have the right to appeal. He cannot appeal from the decree as it at present stands, because, although the decision is final as to the merits of the case, it is in form an interlocutory decree only, and the rule established by the supreme court is that an appeal can be taken only from a final decree. It has been held, in this class of cases, that a decree is not to be considered final for the purposes of an appeal until after the coming in of the master's report. I have no doubt of the power of the court to sustain

this motion. Such power is incidental, in my judgment, to equity proceedings. There is no question, in my judgment, of the power of the court to stay a judgment at law. And it is a constant practice of the state courts and the circuit courts of the United States, where the equities between the parties require it, to make such an order. If I had any doubt of it, the authority of *Barnard v. Gibson*, 7 How. 650, is conclusive." *Potter v. Mack*, Fed. Cas. No. 11,331.

If an appeal be allowed from an interlocutory order or decree granting an injunction, the injunction will continue in force pending the appeal, unless stayed by order of the court granting the appeal. The granting of a supersedeas rests in the judicial discretion of the court, and its discretion to grant or refuse a supersedeas will not be controlled by mandamus. In *re Haberman Manuf'g Co.*, 147 U. S. 525, 13 Sup. Ct. 527, overruling *Societe Anonyme v. Blount*, 51 Fed. 610.

As we have seen, the circuit judge exercised his discretion, and stayed his final injunction pending appeal. But it is said that after the appeal had been determined, and the decree awarding the injunction had been affirmed, it was still within the discretion of the circuit court to suspend or modify the injunction theretofore allowed, and that the exercise of such discretion is not the subject of review. The answer to this depends upon what this court did in the exercise of its jurisdiction upon the former appeal. Whatever was before it by virtue of that appeal, and was disposed of, has been finally done, and must be regarded as settled. The circuit court is bound by such decree as the law of the case, and must carry it into execution according to the mandate. The decree of this court upon any matter within its jurisdiction can neither be modified, reversed, enlarged, nor suspended by the circuit court; nor can any other or less or greater relief be accorded than that prescribed by its decree and mandate. Any matter undecided and left open by the mandate the court below may hear and decide, and its decree in relation to such new matters can be examined here only upon a new appeal. That the decree and mandate of this court have precisely the same finality as was attached to the decrees and mandates of the supreme court, before the establishment of the circuit courts of appeals, is too obvious for elaboration. As to the finality of a decree and mandate of the supreme court, and the duty of the circuit court in respect thereof, there has never been any serious question.

The very pertinent summary of the doctrine by Justice Gray, in the very late case of *Sanford Fork & Tool Co.*, Petitioner (decided December 23, 1895) 16 Sup. Ct. 291, is quite in point, and is as applicable to the decree and mandates of this court as to those of the court of which he was speaking. The learned justice said:

"When a case has once been decided by this court on appeal, and remanded to the circuit court, whatever was before this court, and disposed of by its decree, is considered as finally settled. The circuit court is bound by the decree as the law of the case, and must carry it into execution, according to the mandate. That court cannot vary it, or examine it for any other purpose than execution, or give any other or further relief, or review it, even for apparent error, upon any matter decided on appeal, or intermeddle with it, further than to settle so much as has been remanded. *Sibbald v. U. S.*, 12

Pet. 488, 492; *Railway Co. v. Anderson*, 149 U. S. 237, 13 Sup. Ct. 843. If the circuit court mistakes or misconstrues the decrees of this court, and does not give full effect to the mandate, its action may be controlled, either upon a new appeal (if involving a sufficient amount) or by a writ of mandamus to execute the mandate of this court. *Perkins v. Fourniquet*, 14 How. 313, 330; *In re Washington & G. R. Co.*, 140 U. S. 91, 11 Sup. Ct. 673; *Bank v. Hunter*, 152 U. S. 512, 14 Sup. Ct. 675; *In re City Nat. Bank of Ft. Worth*, 153 U. S. 246, 14 Sup. Ct. 804. But the circuit court may consider and decide any matters left open by the mandate of this court; and its decision of such matters can be reviewed by a new appeal only. *Hinckley v. Morton*, 103 U. S. 764; *Mason v. Mining Co.* 153 U. S. 361, 14 Sup. Ct. 847; *Nashua & L. R. Corp. v. Boston & L. R. Corp.*, 5 U. S. App. 97, 2 C. C. A. 542, and 51 Fed. 929."

But we do not understand that the applicability of this well-settled rule as the effect and binding force of appellate proceedings is controverted. The contention is, rather, that the jurisdiction of this court under an appeal from an interlocutory decree granting an injunction is limited to a mere consideration of the question as to whether or not the circuit court has abused its discretion in granting the injunction, and that the decision of this court affirming the action of the circuit court amounts to nothing more than a decision that such discretion has not been abused. Upon this assumption, it is said that the jurisdiction of the circuit court over the decree and injunction is just as complete and exclusive after such an affirmance as it was before, and that, as it might before the appeal, for reasons satisfactory, and for a better attainment of justice, modify, discharge, or suspend such injunction at any time before a final decree, so it may exercise the same power and discretion after an appeal and an affirmance. The chief error in this argument lies in the assumption that the inquiry of this court in reviewing the action of the circuit court was limited to a consideration as to whether the lower court had abused its discretion in granting the injunction. Where a preliminary injunction is allowed upon a *prima facie* showing, and without the determination of the merits, this court will ordinarily, on an appeal, consider only the question as to whether, on the *prima facie* case made, there has been an abuse of discretion. Such preliminary injunctions are ordinarily intended only to operate *pendente lite*, or until a hearing on the merits can be had. They are granted upon a mere summary showing upon affidavits. Their issuance is not a matter of right, and rests in the sound discretion of the judge.

"When the inconvenience to result is equally divided, or the preponderance is in favor of the defendant, it will be refused." *Shinkle, Wilson & Kreis Co. v. Louisville & N. R.*, 62 Fed. 690-692.

This court, in *Blount v. Societe Anonyme*, 6 U. S. App. 335, 3 C. C. A. 455, and 53 Fed. 98, in defining the objects and functions of a preliminary injunction, said, through Judge Jackson, that:

"The object and purpose of a preliminary injunction is to preserve the existing state of things until the rights of the parties can be fairly and fully investigated and determined upon strictly legal proofs, and according to the course and principles of courts of equity. The prerequisites to the allowance and issuance of such injunction are that the party applying for the same must generally present a clear title, or one free from reasonable doubt, and set forth acts done or threatened by the defendant, which will seriously or



irreparably injure his rights under such title, unless restrained. The legal discretion of the judge or court in acting upon applications for provisional injunctions is largely controlled by the consideration that the injury to the moving party, arising from a refusal of the writ, is certain and great, while the damage to the party complained of, by the issuance of the injunction, is slight or inconsiderable."

To the same effect are the text writers: 1 Fost. Fed. Prac. § 233; 1 High, Inj. § 7; 2 High, Inj. §§ 938, 939, 1026.

It has therefore been the practice of this court that, when the appeal involves only an order or decree granting a preliminary injunction, this court will not consider or determine the merits of the cause, but confine itself to a consideration of the question as to whether the circuit court has abused its discretion in the allowance of the writ. *Blount v. Societe Anonyme*, supra; *Duplex Printing-Press Co. v. Campbell Printing-Press & Manuf'g Co.*, 16 C. C. A. 220, 69 Fed. 250; *Thompson v. Nelson* (No. 366; decided by this court November 11, 1895) 18 C. C. A. 339, 71 Fed. 339.

In the *Duplex Printing-Press Co. v. Campbell Printing-Press & Manuf'g Co.*, cited above, this court said:

"The motion for a preliminary injunction necessarily involved the exercise by him of a sound judicial discretion in granting or withholding it. By no action of his could he enable this court finally to determine all the questions between the parties to the action, because it is not within the proper province of this court to do so on an appeal from an order granting a preliminary injunction."

Manifestly, if this court, upon an appeal from a mere preliminary injunction, refuse to examine and determine the merits, and affirm the order appealed from, on the ground that the discretion of the circuit court had not been abused, the decree and mandate of this court would leave the circuit court at perfect liberty to enlarge, modify, or suspend its order, as the future circumstances of the case might justify or the ends of justice require. The point actually decided in such a case would simply be that the *prima facie* showing upon which the circuit court had acted was such as to justify this court in saying that discretion had not been abused. If, therefore, upon a further showing, or upon a hearing on the merits, the circuit court should be of opinion that the injunction should be discharged or modified or enlarged or made perpetual, there would be no departure from the point decided by the court. This is all that is said or decided by the Seventh circuit court of appeals in the case of *Andrews v. Pipe Works*, 10 C. C. A., 60-68, 61 Fed. 782.

Quite another question would arise if, on an appeal from such an order, this court, upon the record, should conclude, not only that no case was exhibited for a preliminary injunction, but also that the bill could not be entertained for any purpose. In such a situation, shall it refuse to determine the case on the merits, and refuse to direct the lower court to dismiss the bill? Must it confine itself to a mere expression of opinion that the discretion of the court had been erroneously exercised, and permit a fruitless suit to be prosecuted to a final decree, ultimately to end in dismissal? Clearly, the court ought not to idly sit, and merely advise

the counsel and lower court, but should, if it has jurisdiction, and it has before it a sufficient record to enable it to do justice, pronounce a judgment upon the merits, and direct the inferior court to do what it originally ought to have done. But if the decree awarding the injunction was one which did determine the merits of the cause, upon pleadings, proofs, and exhibits, and was, therefore, final as to the merits, though not final for the purpose of appealing under the rule of the supreme court as to what constitutes a final decree within the meaning of section 692, Rev. St., what, then, is the duty of this court upon an appeal from such a decree by virtue of the seventh section of the court of appeals act? Take the case at bar. The injunction decree appealed from was not a mere preliminary injunction, granted in the exercise of the discretion of the circuit court. The case had been fully prepared by both parties. It came on regularly to be heard on the merits, and was so heard. The court was obliged to decide, and did decide—First, that the complainant's patent was valid; second, that, when properly construed, the sweepers made by the defendant infringed the second claim of the patent owned by complainant company. Upon this basis, the court awarded, as it was bound to do, a perpetual injunction, and ordered an accounting. Under the rule of the supreme court as to an appealable final decree, this was not one, although the merits had been determined, and nothing remained to be done except to ascertain the damages. *Forgay v. Conrad*, 6 How. 204; *Barnard v. Gibson*, 7 How. 656; *Humiston v. Stainthorp*, 2 Wall. 106; *Railroad Co. v. Swasey*, 23 Wall. 405; *Bronson v. Railroad Co.*, 2 Black, 528; *Bostwick v. Brinkerhoff*, 106 U. S. 3, 1 Sup. Ct. 15; *Grant v. Insurance Co.*, 106 U. S. 429, 1 Sup. Ct. 414; *Parsons v. Robinson*, 122 U. S. 112, 7 Sup. Ct. 1153; *St. Louis, I. M. & S. R. Co. v. Southern Exp. Co.*, 108 U. S. 24, 2 Sup. Ct. 6; *Iron Co. v. Martin*, 132 U. S. 91, 10 Sup. Ct. 32; *McGourkey v. Railway Co.*, 146 U. S. 536, 13 Sup. Ct. 170; *Elder v. McClaskey*, 17 C. C. A. 251, 70 Fed. 557. It was, however, an interlocutory decree, awarding an injunction, within the meaning of section 7 of the courts of appeals act, and an appeal was properly allowable. When this case came on to be heard here, this court was obliged to examine the entire record, and determine the merits of the cause, just as the circuit court had done. The rightness or wrongness of the allowance of the injunction depended here, as below, upon a determination of the merits. We were compelled, from the nature of the decree appealed from, to hear and decide upon the validity and proper scope of the second claim of the Plumb patent, and from the evidence determine whether or not the structures made by the defendant company infringed the Plumb patent as thus interpreted. The determination of each of these questions was essential to a decision upon the question of the alleged error in granting the injunction. This was recognized by the learned counsel, who assigned error in respect of the conclusions of the circuit court as to both matters. A review of the record upon these questions was necessarily a hearing upon the merits. The opinion filed upon the

original appeal may be looked to for the purpose of construing the decree and mandate of the court. Sanford Fork & Tool Co., Petitioner, *supra*.

That shows that the conclusion reached in favor of an affirmance was based upon a consideration and decision of all the real and substantial merits of the controversy, save, only, the subsidiary questions pertaining to the accounting. Upon a petition to rehear, we were asked to decide how far the decree of affirmance would conclude the parties. To this, as shown by the opinion upon the rehearing, we answered as follows:

"We find no error in the action of the circuit court in awarding the injunction, and affirm the decree in so far as the question is involved by this appeal. We do not think, in the present status of this suit, no final decree having yet been announced, that we are called upon to determine the effect of this affirmance should the case be again appealed after the account of profits and damages has been stated and confirmed. The mandate will simply recite that the court finds no error in the decree awarding an injunction."

In this conclusion and statement, we followed *Watch Co. v. Robbins*, 12 C. C. A. 174, 64 Fed. 384.

It seems to us that the opinions and decrees of this, as a court of appellate jurisdiction, are final and conclusive upon every point actually decided, and that it is the clear duty of the lower court to give effect to the decree without modification or enlargement, in the very terms of the decree here rendered. They must be either conclusive or merely advisory; they cannot be both, or partly one and partly the other. The function of a court is to consider and decide, not to advise. There must be a general rule; and a reasonable rule, predicated upon the very objects and purposes of appellate jurisdiction, is that whatever is actually decided by such a court is finally settled, and is no longer open to review, reconsideration, or re-examination, for any purpose other than its due execution. Neither would such a decree be open for reconsideration upon a second appeal to this court. If the decree of the lower court is in accordance with the decree and mandate of this court, there is nothing to appeal from. To appeal from such a decree would, in effect, be an appeal from our own decree. No appeal lies from this court to this court. *Sibbald v. U. S.*, 12 Pet. 488, 490; *Stewart v. Salamon*, 97 U. S. 361; *Metcalf v. City of Watertown*, 16 C. C. A. 37, 68 Fed. 859; *Sanford Fork & Tool Co.*, Petitioner, above cited; *Southard v. Russell*, 16 How. 547; *Durant v. Essex Co.*, 101 U. S. 555; *Kingsbury v. Buckner*, 134 U. S. 650-671, 10 Sup. Ct. 638; *Smelting Co. v. Billings*, 150 U. S. 31, 14 Sup. Ct. 4; *Gaines v. Rugg*, 148 U. S. 228, 13 Sup. Ct. 611.

In *Sibbald v. U. S.*, cited above, the court said:

"Appellate power is exercised over the proceedings of inferior courts, not on those of the appellate court. The supreme court have no power to review their decisions, whether in a case of law or in equity. A final decree in chancery is as conclusive as a judgment at law. *Martin v. Hunter's Lessee*, 1 Wheat. 355; *Hopkins v. Lee*, 6 Wheat. 113, 116. Both are conclusive on the rights of the parties thereby adjudicated. No principle is better settled, or of more universal application, than that no court can reverse or annul its own final decrees or judgments for errors of fact or law, after the term in

which they have been rendered, unless for clerical mistakes (*Cameron v. McRoberts*, 3 Wheat. 591; *Bank v. Wistar*, 3 Pet. 431), or to reinstate a cause dismissed by mistake (*The Palmyra*, 12 Wheat. 10), from which it follows that no change or modification can be made which may substantially vary or affect it in any material thing. Bills of review, in cases in equity, and writs of error coram vobis, at law, are exceptions which cannot affect the present motion. When the supreme court have executed their power in a cause before them, and their final decree or judgment requires some further act to be done, it cannot issue an execution, but shall send a special mandate to the court below to award it. Judiciary Act, § 24 (1 Stat. 85). Whatever was before the court, and is disposed of, is considered as finally settled. The inferior court is bound by the decree as the law of the case, and must carry it into execution, according to the mandate. They cannot vary it or examine it for any other purpose than execution, nor give any other or further relief; nor review it upon any matter decided on appeal, for error apparent; nor intermeddle with it further than to settle so much as has been remanded. *Gilliland v. Caldwell* 1 S. C. 194, 197; *Bowyer v. Lewis*, 1 Hen. & M. 557; *Campbell v. Price*, 3 Munf. 228. After a mandate no rehearing will be granted. It is never done in the house of lords (3 Dow, 157); and, on subsequent appeal, nothing is brought up but the proceeding subsequent to the mandate (*Himely v. Rose*, 5 Cranch, 316; *Browder v. McArthur*, 7 Wheat. 58, 59; *The Santa Maria*, 10 Wheat. 443)."

There remains the question as to whether this court exceeded its jurisdiction by deciding any question pertaining to the merits, or departed from the practice of courts of appeal when exercising jurisdiction by virtue of an appeal from an interlocutory decree. The right of appeal from interlocutory decrees granting an injunction was first conferred by the seventh section of the courts of appeals act. Very great hardships, especially in patent causes, had frequently resulted from the strict limitation upon the right of appeal theretofore existing. While this section does not grant an appeal from all interlocutory orders or decrees settling a right, yet it does extend relief in a very large class of cases, where rights may be very seriously affected as a consequence of the improper allowance of an injunction. The class of interlocutory decrees to which this relief is now applicable has been much enlarged by the amendment of February, 1895, already cited. This section and the amendment thereof, being intended to provide a remedy for an evil widely recognized, are entitled to a favorable construction advancing the right as far as consistent with the words of the statute. *Platt v. Railroad Co.*, 99 U. S. 48; *Heydenfeldt v. Mining Co.*, 93 U. S. 638. This enlargement of the right of appeal so as to embrace the class of interlocutory decrees mentioned in the statute was in accord with the well-known usages and practice of English courts of equity in granting appeals from interlocutory decrees, and of such chancery courts in states of the Union as had not by statute limited appeals to those strictly final.

The narrowness of the rule limiting appeals to technical final decrees, and the contrast with the well-known English rule, was recognized by the supreme court in *Forgay v. Conrad*, 6 How. 205, where the court said:

"In limiting the right of appeal to final decrees, it was obviously the object of the law to save the unnecessary expense and delay of repeated appeals in the same suit, and to have the whole case and every matter in controversy in it decided in a single appeal. In this respect the practice of the United

States chancery courts differs from the English practice, for appeals to the house of lords may be taken from an interlocutory order of the chancellor, which decides a right of property in dispute. \* \* \* And the execution of the order is suspended until the decision of the appellate court. But the case is otherwise in the courts of the United States, where the right to appeal is by law limited to final decrees."

It is proper, therefore, to assume that, when congress undertook to enlarge the right of appeal, it did so in the full light of the history of appeals in equity causes, and with a full appreciation of the distinction between interlocutory orders or decrees and final decrees. What the congress meant by an interlocutory decree, granting or continuing an injunction, is to be ascertained by interpreting the technical terms used in the act according to their usual significance in courts proceeding according to the well-known principles, rules, and usages of courts of equity. Thus, an appeal is allowed from an interlocutory "order" or "decree." A preliminary order, by which no question is determined upon the merits, and no right established, is termed a "decretal order," in distinction to an interlocutory decree by which something touching the merits is adjudged. Such an order was seldom regarded as subject to appeal. 2 Daniell, Ch. Pl. & Prac. (Orig. Ed.) 637. The author just cited, at page 631, defines a decree as "a sentence, or order of the court, pronounced on hearing and understanding all the points in issue, and determining the right of all the parties to the suit according to equity and good conscience." "It is either interlocutory or final. An interlocutory decree is where the consideration of the particular question to be determined, or the further consideration of the cause generally, is reserved till a future hearing." Daniell, Ch. Pl. & Prac. (4th Ed.) 986. Under the English practice, a decree was not in strictness regarded as final until enrolled, because until then it was liable to be altered by the court itself, and could not be pleaded in bar to another suit. By enrolling, the possibility of a rehearing was cut off, and it was in condition to be pleaded in bar to another suit. *Id.* 674 et seq. Still, the distinguishing test between an interlocutory and final decree was found in the fact that if no question of fact or law affecting the merits remained undetermined, and nothing remained unfinished except the ministerial execution of the decree, it was regarded as a final decree, and entitled as of course to enrollment. We may assume that, in using the language "interlocutory order or decree," congress had regard to the distinction between an interlocutory order and an interlocutory decree, and intended by allowing an appeal from an interlocutory order, granting or continuing an injunction, to describe those preliminary orders granting an injunction upon a hearing on affidavit, involving no determination of the merits; being allowed, at the discretion of the chancellor, upon a balancing of inconveniences. It is equally clear that, by allowing an appeal from an interlocutory decree, congress intended to allow an appeal from a perpetual injunction ordered, and allowed upon a final hearing of the merits, where the same decree refers the cause to a master for an accounting. This construction of the act has been, so far as we know, universally accepted by the circuit courts of the United States and by the circuit

courts of appeals. *Richmond v. Atwood*, 5 U. S. App. 151, 2 C. C. A. 596, and 52 Fed. 10; *Dudley E. Jones Co. v. Munger Improved Cotton Mach. Manuf'g Co.*, 2 U. S. App. 188, 1 C. C. A. 668, and 50 Fed. 785; *Marden v. Manufacturing Co.*, 15 C. C. A. 26, 67 Fed. 809; *Manufacturing Co. v. Griswold*, 15 C. C. A. 161, 67 Fed. 1017; *American Paper Pail & Box Co. v. National Folding-Box Co.*, 2 C. C. A. 165, 51 Fed. 229; *Curtis v. Wheel Co.*, 7 C. C. A. 493, 58 Fed. 784; *Consolidated Electric Storage Co. v. Accumulator Co.*, 5 C. C. A. 202, 55 Fed. 485; *Blount v. Societe Anonyme, etc.*, 6 U. S. App. 335, 3 C. C. A. 455, and 53 Fed. 98; *Watch Co. v. Robbins*, 6 U. S. App. 275, 3 C. C. A. 103, and 52 Fed. 337; *Industrial & Mining Guaranty Co. v. Electric Supply Co.*, 16 U. S. App. 196, 7 C. C. A. 471, and 58 Fed. 732; *Consolidated Piedmont Cable Co. v. Pacific Cable Ry. Co.*, 7 C. C. A. 195, 58 Fed. 226; *Andrews v. Pipe Works*, 10 C. C. A. 67, 61 Fed. 782.

When the appeal is from a decree determining the merits, awarding a perpetual injunction, and referring the cause to a master for the simple purpose of reporting damages for infringement, there can be no proper review or re-examination of so much of the decree as awards the injunction that does not include the basis upon which it was granted. Thus, though the "injunction is the backbone of the jurisdiction," as pithily observed by Judge Putnam in *Marden v. Manufacturing Co.*, *supra*, yet the appeal necessarily brings up the full record, and places us in full possession of the entire case, so far, at least, as a remedy by injunction was the foundation of the jurisdiction below. It follows, therefore, that if the court finds it essential to pass upon the merits of the case in order to determine the propriety of the injunction, and in no way reserves to the lower court a right to review or re-examine the grounds upon which it had originally proceeded, the decision of this court becomes the law of the case. If that decision was an affirmance of the decree below, that decree becomes the decree of this court, and is no longer open to review, rehearing, or modification, for it has become the settled law of the case. A second appeal can only involve matters subsequent to the decree, for this court, after term passed, has no power to review, rehear, or re-examine its own decrees. This rule of practice and procedure is in accord with the usages and practice of appellate courts obtaining jurisdiction through appeals from decrees, interlocutory in character, which determine the rights of the party appealing. Under the English practice in equity, appeals from interlocutory decrees have from the most remote time been sanctioned. In the very authoritative work of Mr. Daniell upon *Chancery Pleading and Practice*, it is said:

"The mode of obtaining the interposition of the house of lords in the case of an appeal from the chancery court is by petition of appeal, which may be preferred from an interlocutory as well as a final order; in which respect appeals from courts of equity, by petition, differ from appeals, by writ of error, from the judgments of the courts of law, which will only lie when the judgment is final. The reason for this distinction is stated to be that courts of equity often decide the merits of a case in intermediate orders; and the permitting of an appeal, in the early stage of the proceedings, frequently saves the expense of further prosecuting the suit." 2 Daniell, *Ch. Pl. & Prac.* (4th Ed.) 1492.

We have before referred to the very explicit recognition by Taney, C. J., in *Forgay v. Conrad*, of the difference in this respect of the practice in United States courts of equity. Now, it is clear that, under the English practice of granting appeals from interlocutory decrees, the "backbone" of the jurisdiction of the house of lords would be the particular decree appealed from. Yet it was the unquestioned practice of the house of lords to make and direct a final disposition of the cause, when it had before it a full record, and the appeal was from an interlocutory decree granted upon a hearing upon the merits. If no error was found in the decree appealed from, there was a direction that the decree be affirmed. The effect of such an affirmance was to adopt the decree below as its decree, which from thence was no longer subject to alteration. If there was not a concurrence with the decree appealed from, the court did not content itself with merely reversing it, but clearly directed the lower court as to the decree which should be entered; and, if it was so possessed of the whole record as to enable it to see and adjudge that the complainant had no equity in his suit, the court would not only direct a reversal of the decree appealed from, but terminate the litigation by a direction that the bill should be dismissed. *Bouchier v. Taylor* (1776) 7 Brown, Parl. Cas. (1st Ed.) 414; *Governors of Stephens Hospital v. Swan* (1760) 5 Brown, Parl. Cas. (1st Ed.) 454; *Ellis v. Segrave*, Id. 478; *White v. Lightburne*, 2 Brown, Parl. Cas. (1st Ed.) 405; *Scribblehill v. Brett*, 1 Brown, Parl. Cas. (1st Ed.) 57; *M'Can v. O'Ferrall*, 8 Clark & F. 30; *Rous v. Barker*, 3 Brown, Parl. Cas. (1st Ed.) 180. This practice, at an early day, was recognized as the proper procedure for the supreme court of New York upon appeal from intermediate decrees. *Le Guen v. Gouverneur*, 1 Johns. Cas. 437; *Bush v. Livingston*, 2 Caines, Cas. 66; *Bebee v. Bank*, 1 Johns. 529; *Dale v. Roosevelt*, 6 Johns. Ch. 257.

In *Le Guen v. Gouverneur*, cited above, an elaborate opinion was delivered by Chancellor Kent, in which the English cases above cited were carefully reviewed, and the conclusion reached by that learned master of equity that "it was the settled rule of the house of lords in England, upon appeals, always to give such a decree as the court below ought to have given." "This," said he, "is the great and leading maxim in their system of appellate jurisprudence, and instances are accordingly very frequent in which the lords, on appeals from interlocutory orders in chancery, have reversed the order, and decided finally on the merits." He concluded by saying:

"Possessing the authority to decide finally, I think we ought to exercise it in this instance. \* \* \* All the proofs are before us. \* \* \* The cause is as ripe here as it was in the court below for ultimate decision; and, if we are persuaded in our minds that the facts before us can never support the allegation of fraud, we ought to say so, and put an end to the contention."

A like practice prevails in New Jersey. *Newark & N. Y. R. Co. v. Newark*, 23 N. J. Eq. 515-517.

Under the Tennessee statute, appeals will lie at the discretion of the chancellor from an interlocutory decree settling the rights of the parties or overruling a demurrer. *Mill. & V. Code Tenn.* § 3874; *Mathis v. Meek*, 1 Heisk. 534. It has been the settled practice of the supreme court of Tennessee, on appeals from such

interlocutory decrees, to render such decree as the chancellor should have rendered, and to finally dispose of every matter fairly exhibited by the record before it. *Graham v. Merrill*, 5 Cold. 631; *Mathis v. Meek*, 1 Heisk. 534. A like rule seems to prevail in Kentucky (*Shinkle v. Covington*, 83 Ky. 420); and in Minnesota (*Maxwell v. Schwartz*, 57 N. W. 141; *Schleuder v. Corey*, 30 Minn. 501, 16 N. W. 401); and in Michigan (*Ryerson v. Eldred*, 18 Mich. 12, 492; *Perrin v. Lepper*, 72 Mich. 541, 40 N. W. 859).

A difference of opinion has been exhibited in the different circuit courts of appeals.

In the First circuit court of appeals the question as to authority and proper practice has been very ably and elaborately considered, and decided in accordance with the opinion we have intimated. *Richmond v. Atwood*, 5 U. S. App. 151, 2 C. C. A. 596, 52 Fed. 10; *Marden v. Manufacturing Co.*, 15 C. C. A. 26, 67 Fed. 809.

In the Second circuit the question seems to have received no conclusive consideration.

In *Construction Co. v. Young*, 8 C. C. A. 231, 59 Fed. 721, Judge Wallace, for the court, said:

"The language of the section permits a review of the order or decree granting or continuing an injunction so far as may be necessary to do justice in the particular case. Whenever the injunction is the main relief granted, the whole case is necessarily presented for review. When it is a substantial part of the relief granted, it may be necessary to consider the whole case on appeal. But when, as in the present case, it is incidental and subsidiary merely to other relief, an appeal only brings up for determination the question whether, conceding the other relief to have been proper, the injunction was a necessary or proper auxiliary remedy."

In *Manufacturing Co. v. Griswold*, 15 C. C. A. 161-165, 67 Fed. 1017, the appeal was from an interlocutory decree sustaining one claim of the patent involved, finding infringement, awarding an injunction, and decreeing an accounting. The decree was reversed, and the cause remanded, "with instructions to decree in conformity with this opinion." But in *U. S. Electric Lighting Co. v. Edison Electric Light Co.*, 11 U. S. App. 600, 8 C. C. A. 200, and 59 Fed. 501, the court seems to have regarded its decrees affirming a decree awarding an interlocutory injunction, and ordering an account, as not depriving "the circuit court of power to suspend temporarily its injunction upon sufficient cause shown, after proper notice, whenever the ends of justice call for the exercise of the power." The *American Paper-Pail & Box Co. v. National Folding-Box Co.*, 1 U. S. App. 283, 2 C. C. A. 165, and 51 Fed. 229, and *Curtis v. Wheel Co.*, 20 U. S. App. 146, 7 C. C. A. 493, and 58 Fed. 784, were both appeals from preliminary injunctions, and do not necessarily present the question now under consideration, although in the latter case the court did consider the merits of the case, and upon the merits reversed the decree.

In the Third circuit the rule laid down in *Richmond v. Atwood*, *supra*, seems to be followed, though the principle is not discussed. In *Union Switch & Signal Co. v. Johnson Railroad Signal Co.*, 17 U. S. App. 609-620, 10 C. C. A. 176, and 61 Fed. 940, an inter-



locutory decree was reversed, with directions to remand and dismiss the bill. *Consolidated Electric Storage Co. v. Accumulator Co.*, 3 U. S. App. 579, 5 C. C. A. 202, and 55 Fed. 485, was an appeal from a preliminary injunction.

The practice of the Fourth circuit, as indicated by the case of *Green v. Mills*, 16 C. C. A. 516, 69 Fed. 852, is in full accord with the construction we have placed upon the seventh section. The opinion in that case was by Fuller, C. J. The appeal was from a decree granting a preliminary injunction. The court, upon an elaborate opinion, reached the conclusion that the case made by the bill was not one of equitable cognizance. The opinion concludes as follows:

"This being so, we are clearly of opinion that no ground of equitable cognizance exists; and, although the appeal is from interlocutory orders, yet, as we entertain no doubt that such a bill cannot be maintained, we are constrained in reversing these orders to remand the cause, with a direction to dismiss the bill."

*Jones Co. v. Munger Improved Cotton Mach. Manuf'g Co.*, from the Fifth circuit, reported in 2 U. S. App. 188-204, 1 C. C. A. 668, and 50 Fed. 785, was a case in which the court assumed jurisdiction to determine the merits of the case, and did dispose of the case on its merits. Upon a rehearing, it based its authority to consider and determine the merits both on the rule of *Richmond v. Atwood*, *supra*, and upon the ground that objection to jurisdiction had been waived. The mandate, however, was corrected so as to direct the lower court only to discharge the injunction granted, although the court had decided that complainant's bill could not be maintained.

In the Seventh circuit the practice seems unsettled. *Electric Manuf'g Co. v. Edison Electric Light Co.*, 18 U. S. App. 637, 10 C. C. A. 106, and 61 Fed. 834, and *Andrews v. Pipe Works*, 10 C. C. A. 60-67, 61 Fed. 782, were both cases of appeal from preliminary injunctions. In the last case cited, the court followed and applied the decision of *U. S. Electric Lighting Co. v. Edison Electric Light Co.*, *supra*. As this application was only to an affirmance of a preliminary injunction, it ought not to be regarded as a concurrence in the rule of the Second circuit, where the appeal was from an injunction granted upon a determination of the full merits of the case.

In the Ninth circuit the rule of *Richmond v. Atwood*, *supra*, was adopted, and an affirmance of an interlocutory decree held to be final. *Consolidated Piedmont Cable Co. v. Pacific Cable Ry. Co.*, 15 U. S. App. 216, 7 C. C. A. 195, and 58 Fed. 226.

In this circuit the case of *Watch Co. v. Robbins*, 6 U. S. App. 275, 3 C. C. A. 103, and 52 Fed. 337, is in conflict with the weight of authority in courts of co-ordinate jurisdiction, and is not in accord with the views now entertained by this court. So much of the opinion as deals with the question of the enlargement of jurisdiction by consent is eminently sound, and meets our unqualified approval. So far, however, as the opinion proceeded upon the theory that this court, although it might be obliged to consider the

entire merits of the case, could not authoritatively decide or determine any question pertaining to the merits, and should limit its decree to a mere ruling as to whether the injunction should be retained or dissolved, it does not meet the approval of the court. In overruling that case, a majority of the court who then constituted the court now concur, being a majority of the present court. When that case came on to be again heard, this court found itself in possession of a full record, and compelled to examine the entire merits of the cause, inasmuch as the injunction appealed from had been granted only after a full determination of the merits upon all the evidence. This court then said:

"The point was mooted whether we should examine the record as upon an appeal from a final decree, or only examine the question whether the court below had exercised proper discretion in the issuing of an interlocutory injunction. It was decided that we could not hear and finally determine the merits of the controversy as to the validity of the patent and its infringement. *Watch Co. v. Robbins*, 6 U. S. App., 275, 3 C. C. A. 103, and 52 Fed., 337. In looking into the record, however, to determine whether the discretion of the circuit court was properly exercised, we have found ourselves obliged to consider the validity of the patent, and its infringement, with the conclusion above stated. As the patent is valid, and it was infringed by the defendants, the court necessarily exercised proper discretion in granting the injunction appealed from, and its decree is affirmed." *Watch Co. v. Robbins*, 22 U. S. App. 601, 634, 12 C. C. A. 174, and 64 Fed. 384.

It has been suggested that inasmuch as an appeal under section 7 does not, unless specially ordered, operate as a stay of the proceedings, this differentiates the proper practice under this act from that observed by appellate courts under appeals which ipso facto suspend further steps under the decree appealed from. The fact that the appeal does not suspend proceedings under the decree appealed from, except at the discretion of the court allowing the appeal (*In re Haberman Manuf'g Co.*, 147 U. S. 525, 13 Sup. Ct. 527), is not at all peculiar. The provision on that subject is precisely the rule of the house of lords in force since 1807. The history of the practice in this respect is given very fully by Chancellor Walworth in *Hart v. Mayor of Albany*, 3 Paige, 381. From that case it appears that prior to 1772 an appeal from an interlocutory decree was held to suspend all further proceedings in the whole suit pending the appeal. But in that year the case of *Pomfret v. Smith*, 4 Brown, Parl. Cas. 700, was decided by Lord Apsley, who decided that his jurisdiction was suspended only as to the matter appealed from. This was the state of the law when these states separated from the mother country, and the rule stated by Lord Apsley, in the case cited above, was adopted by the courts of New York. *Green v. Winter*, 1 Johns. Ch. 77; *Messonier v. Kauman*, 3 Johns. Ch. 66. The jurisdiction of the lords as a court of appeals being finally established and acknowledged, they saw the necessity to prevent the delays and injustice incident to such a stay of proceedings without bond, and adopted in 1807 a rule that the proceedings in the lower court upon such an appeal should not be stayed, but that it should be within the discretion of the chancellor to stay the proceedings or not, according to the circumstances. *Burke v. Brown*, 15 Ves. 184; *Hovey v. McDonald*, 109 U. S. 150-

160, 3 Sup. Ct. 136; In re Haberman Manufg Co., cited above. The fact that section 7 has been so carefully framed upon the lines of the rule and practice of the house of lords with respect to such appeals strengthens the view we have taken with respect to the meaning of the statute, and as to the proper authority and practice of this court thereunder.

The conclusion we have reached is in the line of the relief intended by congress to be afforded suitors whose rights are affected by temporary submission to an inconclusive decree. The right to appeal at that stage of the cause is optional. If one affected by the action of the court in allowing, dissolving, or continuing an injunction see fit, he may await a final decree, and then appeal. But, if he elects to appeal with the result that another inconclusive decree is rendered, his last estate is no better than his first, for he must proceed with the cause, and submit until he can again appeal. The statutory purpose was to save the litigants from being obliged to submit to the injury incident to an inconclusive decree, and to all the expense of an accounting. But if, after an appeal, resulting in an inconclusive affirmance, he must still proceed with an accounting, which, after all, may prove unnecessary, the statute will have amounted to little. The doctrine of *res adjudicata* rests upon the maxim that there should be an end to litigation. No doctrine rests upon sounder principles of public policy, or is more entitled to a wide application. If, under an appeal from a decree awarding an injunction, this court obtains such a record as to enable it, with justice to the parties to the appeal, to hear and consider the merits of the cause, it would be most anomalous if we have not the power to decide. The judicial function of considering involves the function of determining. The decision of an appellate court is final, and no second appeal is maintainable, except as to matters reserved, or proceedings subsequent to the first appeal.

These considerations lead us to the conclusion that inasmuch as it was decided upon the former appeal that the patent of the complainant was valid, and that the defendant had infringed it, and a perpetual injunction had been properly awarded, there was no power in the circuit court to dissolve, modify, or suspend the injunction. There was no room for the exercise of judicial discretion. The complainant was entitled to the remedy by injunction which had been accorded him, and that relief had been affirmed by this court. The theory that the supersedeas allowed when the appeal was granted operated as a license to make and sell has no sound foundation. It did nothing more or less than to suspend the injunction pending the decree. There is therefore nothing in the suggestion that, in justice, the defendant should be allowed to complete what it had begun, under license of the court. The conditions of the bond afford no room for the idea of a license. The condition was a proper one, as a mere measure of damages in case the appellant failed to successfully prosecute its appeal.

The decree dissolving the injunction will be reversed, and the cause remanded, with directions to take such other and further proceedings as are not inconsistent with this opinion.

## POOLEY v. LUCO et al.

(Circuit Court, S. D. California. February 24, 1896.)

No. 657.

1. **CIRCUIT COURTS—JURISDICTION—SUITS BETWEEN ALIENS.**

The circuit courts of the United States have no jurisdiction of suits between aliens.

2. **SAME—CONSUL AS PARTY.**

The fact that a consul of a foreign nation is a party to a suit does not give the circuit court of the United States jurisdiction thereof.

3. **SAME—LOCATION OF SUBJECT-MATTER.**

The fact that a suit relates to land lying within the district does not give jurisdiction thereof to the circuit court of the United States, when it would not otherwise exist.

Allen & Flint, for complainant.

Willoughby Cole, for defendant Luco.

WELLBORN, District Judge. One of the defendants, Juan M. Luco, pleads to the jurisdiction of the court, and the question now to be determined is as to the sufficiency of this plea. The suit is brought by the complainant, a subject of Great Britain, against said Luco and various other parties, alleged to be citizens of the United States, to foreclose a mortgage executed by said Luco and others of the defendants, on certain real estate, situated in the county of San Diego, in the Southern district of California. Said Luco denies that he is a citizen of the United States, and alleges that he is a citizen of Chile, and the duly-appointed and recognized consul general of Chile for the United States, residing in the city of San Francisco, state of California.

Jurisdiction, if it exists at all, must rest upon one or more of the following grounds: First, diverse citizenship of the parties; second, consular status of defendant Luco; third, location in this district of the res,—the mortgaged property. These grounds I will examine in the order of their statement.

1. The question whether or not a circuit court has jurisdiction of a case, on the ground that both parties are aliens, has been authoritatively and often decided in the negative. *Montalet v. Murray*, 4 Cranch, 46; *Hodgson v. Bowerbank*, 5 Cranch, 304; *Prentiss v. Brennan*, Fed. Cas. No. 11,385; *Jackson v. Twentyman*, 2 Pet. 136; *Rateau v. Bernard*, Fed. Cas. No. 11,579; *Hinckley v. Byrne*, 1 Deady, 224, Fed. Cas. No. 6,510.

In this last case, Deady, J., used the following language:

"It has long since been settled that an action between aliens only cannot be maintained in the circuit court; that the language of the judiciary act giving jurisdiction where 'an alien is a party' must be restrained within the terms of the constitution, which only 'extends the judicial power' to an action between an alien and a citizen of a state of the United States. When both plaintiff and defendant are aliens, the judicial power of the United States does not extend to the case."

The controversy in the case at bar being between aliens, there is not such diverse citizenship as brings the case within the federal jurisdiction.

2. Has the court jurisdiction because of the consular status of the defendant? In his opening brief, plaintiff contends that "the circuit court of the United States has jurisdiction, concurrent with the district court, in cases affecting consuls"; citing *Bors v. Preston*, 111 U. S. 252, 4 Sup. Ct. 407. I have examined the case cited carefully, and, so far from supporting, it seems to me antagonistic to complainant's contention. In that case the plaintiff was a citizen of New York, and the defendant consul, at the port of New York, for the kingdom of Norway and Sweden; but the latter's citizenship did not affirmatively appear, either in the pleadings or elsewhere in the record. The ruling of the court was to the effect that, inasmuch as the complainant was a citizen of New York, jurisdiction must depend upon the alienage of the defendant; and, further, that such alienage could not be inferred from the fact that the defendant held and exercised the office of consul of a foreign government, and, therefore, that the record "did not present a case which the circuit court had authority to determine." Since the consular character of the defendant was one of the prominent facts in the case, the decision necessarily holds that the fact of a defendant being a consul of a foreign government does not confer jurisdiction upon the circuit court. The opinion, however, declares that, where there is a controversy between a citizen and an alien, jurisdiction is not defeated by the fact that the alien happens to be the counsel of a foreign government.

The other case cited by plaintiff (*Valarino v. Thompson*, 7 N. Y. 576) seems to me to be also strongly against his contention. While the points there decided were: "A consul of a foreign government, residing in the United States, is not liable to be sued in the state courts. \* \* \* The fact that the consul is impleaded with a citizen upon a joint contract will not give jurisdiction to the state courts,"—yet the decision was based upon the ground that the district court of the United States had jurisdiction of the cause, exclusive of the state courts. Nowhere in the opinion is there even an intimation of jurisdiction in the circuit court.

In *Lorway v. Lousada*, 1 Lowell, 77, Fed. Cas. No. 8,517, also cited by plaintiff, the action was pending in the district court, and the decision was simply to the effect that that court, not the circuit court, had jurisdiction. The first paragraph of the syllabus is as follows:

"The district court has jurisdiction of a suit brought by an alien against the consul of his nation, residing within the district, to recover the amount of official fees improperly exacted."

The *Havana*, 1 Sprague, 402, Fed. Cas. No. 6,226, another of plaintiff's citations, was a case also in the district court, and in admiralty. The discretionary power to hear and determine a cause, there asserted, rests upon a rule of law peculiar to admiralty, and confined to the district court.

In *Lorway v. Lousada*, *supra*, the rule is expressed thus:

"Courts of admiralty, it is true, exercise a considerable latitude of discretion in entertaining suits between strangers; and they are guided to some extent in the particular case by the nature of the controversy, whether it involves a question of general law or only the local law of the foreign country. This distinction, perhaps, arose out of the great diffidence with which courts

of admiralty in England were formerly accustomed to approach questions of local law, whether domestic or foreign. However this may be, it is now the better opinion, in this country at least, that where circumstances make it either necessary or highly convenient that the jurisdiction should be retained, as, for instance, when the voyage of a foreign vessel is broken up here, a court of admiralty will take the case, whether the law which it will be bound to administer happen to be local or general. In short, the question is one of discretion in the exercise of an admitted power, and not of the power itself. See, per Taney, C. J., *Taylor v. Carryll*, 20 How. 611; *The Havana*, 1 Sprague, 402, Fed. Cas. No. 6,226; *The Wilhelm Frederick*, 1 Hagg. Adm. 138; *Patch v. Marshall*, 1 Curt. 452, Fed. Cas. No. 10,793; *The Jerusalem*, 2 Gall. 191, Fed. Cas. No. 7,293; notes to 2 Pars. Mar. Law, bk. 3, c. 3. And the remark of Mr. Justice Curtis in *Patch v. Marshall*, 1 Curt. 455, Fed. Cas. No. 10,793, is to be understood, I have no doubt, in reference to a court of admiralty and its jurisdiction, which alone was involved in that case."

No case has been brought to my attention where it has been held, or even intimated, that the consular character of a party to the controversy gives jurisdiction to the circuit court. Nor do I believe that such a precedent can be found. There is no statutory provision conferring upon the circuit court jurisdiction on the ground indicated, while the jurisdiction seems to be granted, in terms, to the district courts. Rev. St. U. S. § 563, subd. 18.

In *Bors v. Preston*, *supra*, the supreme court, at page 263, 111 U. S., and page 407, 4 Sup. Ct., says:

"But as this court and the district courts are the only courts of the Union which, under the constitution or the existing statutes, are invested with jurisdiction, without reference to the citizenship of the parties, of suits against consuls, or in which consuls are parties, and since the circuit court was without jurisdiction, unless the defendant is an alien or a citizen of some state other than New York, it remains to consider whether the record shows him to be either such citizen or an alien."

See, also, *Lorway v. Lousada*, *supra*.

Whether the state courts have concurrent jurisdiction with the district courts in suits against consuls since the repeal of paragraph 8 of section 711 of the Revised Statutes has not been definitely adjudicated. *Froment v. Duclos*, 30 Fed. 385. Plaintiff, in his concluding brief, suggests that although the supreme court in *Bors v. Preston*, has declared that subdivision 8 of section 711 of the Revised Statutes is repealed, "yet we find it to-day in the second edition of the Revised Statutes," etc. While it is true that the subdivision of the section in question is still found in the second edition of the Revised Statutes, yet it is printed in italics, thus denoting that the subdivision is repealed. See preface to second edition of the Revised Statutes. However, it is not necessary, in this case, to decide either upon the jurisdiction of the state courts or the federal district courts. Whatever may be the law with reference to these courts, I am clearly of opinion that the circuit court has not jurisdiction of a case because of the consular character of the defendant.

3. The remaining question is: Does the situation, in this district, of the mortgaged property, give jurisdiction to the circuit court? To my mind, clearly not. *Mossman v. Higginson*, 4 Dall. 11. In that case the suit was brought to foreclose a mortgage.

Complainant was a subject of Great Britain. The record did not disclose the citizenship of the defendants. The jurisdiction of the court was objected to, because of this latter fact. Complainant below urged that, since the suit was to foreclose a mortgage, the mere alienage of one of the parties was sufficient. To this it was replied by the defendants:

"The judiciary act was only intended to carry the constitution into effect, and cannot amplify or alter its provisions. The constitution nowhere gives jurisdiction (nor has any judge ever countenanced the idea) in suits between alien and alien. It is not an exception to the rule that the bill in equity is in the nature of a proceeding in rem, for there cannot be a foreclosure of the equity of redemption without a personal suit."

The second paragraph of the syllabus of the court is as follows:

"In proceedings in a federal court in equity to foreclose, it is as necessary to describe the parties as in any other suit."

The opinion of the court was brief, and as follows:

"The decisions on this subject govern the present case; and the eleventh section of the judiciary act can and must receive a construction, consistent with the constitution. It says, it is true, in general terms, that the circuit court shall have cognizance of suits 'where an alien is a party'; but as the legislative power of conferring a jurisdiction on the federal courts is, in this respect, confined to suits between citizens and foreigners, we must so expound the terms of the law as to meet the case 'where, indeed, an alien is one party,' but a citizen is the other. Neither the constitution nor the act of congress regards, on this point, the subject of the suit, but the parties. A description of the parties is therefore indispensable to the exercise of jurisdiction."

It will be observed that the judiciary act of 1789, as stated by the court in the opinion last quoted, provided "that the circuit court shall have cognizance of suits 'where an alien is a party'"; yet, under that provision, the court, in view of the constitutional provision limiting jurisdiction to suits between citizens and foreigners, held that jurisdiction did not exist, except "where, indeed, an alien is one party, but a citizen is the other." The expression found in the judiciary act of 1789, "where an alien is a party," is omitted from the judiciary acts of 1875, 1887, and 1888, and the cases covered by said expression, as judicially construed, provided for in the words "or a controversy between citizens of a state and foreign states, citizens, or subjects." Section 8 of the judiciary act of March 3, 1875, referred to in complainant's brief, and above cited, entitled "An act to determine the jurisdiction of the circuit courts of the United States, and to regulate the removal of cases from state courts, and for other purposes," providing for service upon absent defendants in suits to enforce liens, etc., does not purport to confer jurisdiction where it would not otherwise exist, but simply prescribes certain procedure in cases where jurisdiction does exist; or, more specifically, where a suit is within the jurisdiction of the court, and the object of the suit is to enforce a lien, etc., and some of the defendants are absent from the district within which the suit is brought, then the section is applicable, and simply provides a mode of service on such defendants.

The case of *Wheelwright v. Transportation Co.*, 50 Fed. 709, cited by complainant, does not conflict with this construction of said act, because in that case, which was brought in Louisiana, there was diverse citizenship, the plaintiff being a citizen of the state of New York, and the defendant a citizen of the state of New Jersey. While it is true the opinion speaks of said section 8 as conferring jurisdiction, yet it must be remembered that the question of jurisdiction, accurately speaking, was not before the court, because, admittedly, there was such diverse citizenship as gave jurisdiction. The real question was whether or not, admitting the parties to be citizens of different states, the defendant could be sued in a district other than that of his own or plaintiff's residence. This was a question, not of jurisdiction, but simply involving a matter of personal privilege of the defendant.

I am of opinion that the plea of defendant Luco is sufficient in law, and the same will be allowed.

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SHERRY v. OCEANIC STEAM NAV. CO., Limited.

(Circuit Court, S. D. New York. November 1, 1895.)

1. PRACTICE—ATTORNEY'S LIEN.

An attorney has no lien, at common law, on his client's cause of action.

2. SAME—FOLLOWING STATE LAWS.

The federal courts are not required, by Rev. St. § 914, providing that the federal practice, etc., shall be conformed as near as may be to that of the state, to adopt every subordinate provision of a state code of procedure; and a state statute, giving to an attorney a lien for his compensation upon his client's cause of action, will not be adopted or followed in a federal court, so far as it is construed to require the court to go on and try a cause, for the attorney's benefit, after the defendant has settled the plaintiff's claim, and paid him, in ignorance, and without notice of an agreement between the plaintiff and his attorney for compensation to the latter out of the proceeds of the suit.

This was an action by William Sherry against the Oceanic Steam Navigation Company, Limited, to recover damages for a personal injury. The plaintiff had agreed in writing to pay his attorney one-half of any money realized by judgment, settlement, or otherwise, stipulating that the agreement should be a lien on any such money. After the commencement of the action it was settled between the parties, without the knowledge of the attorneys on either side, by the payment of \$100 by the defendant to the plaintiff. When the case appeared upon the calendar for trial, the defendant's attorneys moved to strike it from the calendar as settled. Decision upon the motion was reserved, and the plaintiff's attorney thereupon secured an order upon the defendant to show cause why he should not be allowed to prosecute the action for his own benefit. In his affidavit the plaintiff's attorney alleged, upon information and belief, that the defendant knew of his contingent interest in the recovery, but this was positively denied by the



defendant's agent and attorneys. The New York Code of Civil Procedure, as amended in 1879, provides as follows:

Section 66. The compensation of an attorney or counsellor for his services, is governed by agreement, express or implied, which is not restrained by law. From the commencement of an action or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action or counterclaim, which attaches to a verdict, report, decision, or judgment in his client's favor and the proceeds thereof in whosoever hands they may come; and cannot be affected by any settlement between the parties before or after judgment.

Herman H. Shook, for plaintiff.

Foster & Thomson, for defendant.

LACOMBE, Circuit Judge. Plaintiff's attorney had no lien at common law on the cause of action. *Randall v. Van Wagenen*, 115 N. Y. 527, 22 N. E. 361; *Swanston v. Mining Co.*, 13 Fed. 215. His sole reliance is on the amendment passed in 1879 to section 66 of the Code of Civil Procedure, an act which relates to state courts, officers of justice, and civil proceedings. Section 914 of the United States Revised Statutes does not operate to import this act in its entirety into the federal system of jurisprudence. It simply undertakes to conform the federal practice, pleadings, and forms and modes of proceeding in civil causes to the state model, only "as near as may be," not as near as may be possible, nor as near as may be practicable. It remains still with the judges of the federal courts to construe, and in a proper case reject, any subordinate provision in such state statute as would unwisely incumber the administration of the law, or tend to defeat the ends of justice in their tribunals. *Railroad Co. v. Horst*, 93 U. S. 300. Without expressing any opinion generally as to the character of such legislation as finds expression in the amendment referred to, it is sufficient to say that any such construction of it as would require this court to go on and try a cause after the defendant had adjusted the plaintiff's claim to plaintiff's satisfaction, and paid him the same, in ignorance, and with no notice of any agreement between plaintiff and his attorney, would unwisely incumber the administration of the law. Whatever rights the state statute may give the attorney against his client or his adversary he may prosecute in the state court, but such statute cannot operate to constrain this court to incumber its calendar with a case all controversy in which has been finally settled between the parties.

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**SOBRIO v. MANHATTAN LIFE INS. CO.**

(Circuit Court, S. D. California. February 24, 1896.)

No. 665.

**SERVICE OF PROCESS—MANAGING AGENT—CALIFORNIA STATUTE.**

The statute of California relative to service of process (Code Civ. Proc. § 411, subd. 2) provides that service upon a foreign corporation "doing

business and having a managing or business agent, cashier, or secretary within the state" shall be made by delivering a copy of the process to such agent, cashier, or secretary. The marshal made return upon a subpoena that he had served it upon "H., agent for" a foreign corporation, defendant. An uncontroverted affidavit, presented upon a motion to quash the service, stated that one L. was the managing agent of the defendant in the state. *Held*, that the service was bad.

Joseph M. Kinley, for complainant.  
Finlayson & Finlayson, for defendant.

WELLBORN, District Judge. This is a motion to quash and set aside service of subpoena on the ground that the writ was not served upon the managing or business agent, cashier, or secretary of the defendant. Defendant is a corporation formed under the laws of the state of New York, and doing business in the state of California. The law of the latter state regulating the service of process upon foreign corporations is as follows:

"Sec. 411. The summons must be served by delivering a copy thereof as follows: \* \* \* 2. If the suit is against a foreign corporation, or a nonresident joint stock company or association, doing business and having a managing or business agent, cashier, or secretary, within this state: to such agent, cashier, or secretary." Code Civ. Proc. Cal. § 411, subd. 2.

The return of the marshal on the subpoena states that he served the same upon "L. A. Hitchcock, agent for the Manhattan Life Insurance Company at Los Angeles, California." It appears from an affidavit offered by defendant in support of its motion, and made by one John Landers, and which is uncontroverted, that said Landers is the managing agent, or, as he styles himself in the affidavit, "the resident manager," of the defendant in California, with his office in the city and county of San Francisco; and, further, that said Hitchcock is not, and never has been, the managing or business agent of defendant. Upon these facts, and under the law above quoted, I am of opinion that the subpoena has not been legally served, and an order will be accordingly entered, allowing defendant's motion, and quashing and setting aside the service evidenced by the above-mentioned return of the marshal.

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RITTER v. MUTUAL LIFE INS. CO. OF NEW YORK.

(Circuit Court of Appeals, Third Circuit. March 9, 1896.)

No. 2.

APPEAL FROM CIRCUIT COURT OF APPEALS TO SUPREME COURT.

After the affirmance by the circuit court of appeals of a judgment for defendant, and the going down of the mandate, the plaintiff in error filed a petition in that court, stating that he desired to take an appeal to the supreme court of the United States, and praying that "the said mandate be recalled, and that the said record be directed to be returned to this court," and for "such further order as may be necessary to enable him to perfect his appeal." *Held*, that the recall of the mandate was unnecessary to the taking of an appeal, and that as the transcript of the record is never remitted to the court below, but remains in the appellate court, the prayer of the petition must be denied.

**In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.**

This was an action by A. Howard Ritter, executor of the last will of William M. Runk, deceased, against the Mutual Life Insurance Company of New York, to recover upon policies of life insurance. There were a verdict and judgment for defendant (69 Fed. 505); and on appeal to this court the judgment was affirmed (17 C. C. A. 537, 70 Fed. 954). After the going down of the mandate, the plaintiff in error filed the following petition in this court:

The petition of A. Howard Ritter respectfully represents: That he is the plaintiff in the above cause, which is an appeal from the judgment entered on the 2d day of December, 1895, in favor of the defendant, to wit, Mutual Life Insurance Company of New York, affirming the judgment of the court below. That on the 8th day of January, 1896, a mandate was duly issued from this court certifying that the judgment of the said court below was affirmed, which said mandate has been filed in the court below. That the effect of said judgment in this court was to deny the right of your petitioner to recover certain moneys; and that, since said judgment was entered, no change in the relations, situation, or condition of either of the parties has been made or occurred, but they are now precisely as at the time said judgment was rendered. That your petitioner desires an appeal from the judgment of this court to the supreme court of the United States. He therefore prays that the said mandate be recalled, and that the said record be directed to be returned to this court, and that such other and further order be made herein as may be necessary to enable your petitioner to take and perfect his said appeal. And your petitioner will ever pray, etc.      A. Howard Ritter, Exr.

George Tucker Bispham, for the motion.  
C. P. Sherman, contra.

Before ACHESON, Circuit Judge, and WALES and GREEN, District Judges.

**PER CURIAM.** The prayer of this petition must be refused. We do not see that the plaintiff needs the recall of our mandate in order to make his proposed application to the supreme court. The transcript of the record is never remitted to the court below, but remains in this court. That is the case here. The prayer of the petition is denied.

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**WICHITA NAT. BANK OF WICHITA et al. v. SMITH.**

(Circuit Court of Appeals, Eighth Circuit. January 7, 1896.)

No. 687.

**1. REMOVAL OF CAUSES—DIVERSE CITIZENSHIP.**

A suit brought in a state court can be removed to a federal court on the ground of diverse citizenship only when the defendant is a nonresident of the state in which it is brought. *Thurber v. Miller*, 14 C. C. A. 432, 67 Fed. 371, followed.

**2. SAME—NATIONAL BANK.**

A national bank cannot remove a suit upon the ground that it is a federal corporation.

**3. SAME—FEDERAL QUESTION—COMPLAINT.**

A cause cannot be removed upon the ground that it involves a federal question unless that fact appears from the plaintiff's complaint.

**In Error to the Circuit Court of the United States for the District of Kansas.**

This action was brought in the district court of Sedgwick county, Kan., by Sylvester Smith, the defendant in error, against the Wichita National Bank, a banking association established under the laws of the United States, located at Wichita, in the state of Kansas, for the recovery of \$5,000 damages for the alleged wrongful conversion of a mortgage coupon bond by the bank. The bank was duly served with a summons in the action on the 15th day of March, 1893, and filed its answer on the 11th day of April, 1894. On the 13th day of August, 1894, the bank became insolvent, and on the 5th day of September, 1894, W. N. Ewing was duly appointed receiver thereof by the comptroller of the currency. On December, 12, 1894, Ewing, as receiver of the bank, filed a motion in the state court to be made a defendant in the action, which motion was sustained, and thereupon, on the same day, the receiver filed a petition to remove the case into the circuit court. The petition for removal states that the plaintiff, Smith, is a citizen of Connecticut, and that the bank was a citizen of Kansas up to the time it passed into the hands of the receiver; that when the bank became insolvent the petitioner was appointed receiver thereof by the comptroller of the currency; that the matter in dispute in the suit "draws into question and comes properly under the" national banking act and other acts regarding the insolvency and winding up of national banks, and that the controversy is wholly between the receiver and the plaintiff in the action. The state court granted the removal. The circuit court overruled a motion to remand the case. There was a trial to a jury, and a verdict and judgment for the plaintiff, and the receiver sued out this writ of error.

Fred W. Bentley (David Smyth was with him on the brief), for plaintiffs in error.

Thomas G. Frost, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The removal of the case from the state to the federal court is attempted to be supported upon two grounds. The first contention is that the removal can be sustained upon the ground that the parties to the action are citizens of different states; but that is a ground of removal only where the defendant is a nonresident of the state in which the suit is brought. *Thurber v. Miller*, 14 C. C. A. 432, 67 Fed. 371. The bank could not remove the suit upon this ground for the reason that by the provision of section 4 of the act of congress of March 3, 1887 (24 Stat. 552, c. 373), as corrected by the act of August 13, 1888 (25 Stat. 433, c. 866), the bank, for all jurisdictional purposes, is a citizen of Kansas, in which state it is located. The appointment of a receiver for the bank did not dissolve the corporation. The bank still remained a proper party to the suit. There is nothing in the petition for removal or in the record showing the residence or citizenship of the receiver to be elsewhere than in Kansas. The suit was not, therefore, removable upon the ground of diverse citizenship.

It is next contended that the suit was properly removed upon the ground that it is one arising under the laws of the United States. Since the passage of the act of March 3, 1887, a national bank cannot remove a suit upon the ground that it is a federal corporation. The federal origin of the bank no longer affects in any way the jurisdic-

tion of suits by or against it. It has no greater or less right to remove a suit upon the ground that it arises under the constitution or laws of the United States than any citizen of the state in which the bank is located. *Petri v. Bank*, 142 U. S. 644, 12 Sup. Ct. 325; *Burnham v. Bank*, 10 U. S. App. 485, 3 C. C. A. 486, 53 Fed. 163; *Dill. Rem. Causes* (5th Ed.) § 107. And upon this record the receiver of the bank has no greater rights in this regard than the bank. In *Railway Co. v. Shirley*, 111 U. S. 358, 361, 4 Sup. Ct. 472, the court say "that a substituted party comes into a suit subject to all the disabilities of him whose place he takes so far as the right of removal is concerned." *Burnham v. Bank*, supra; *Railway Co. v. Noyes' Adm'r*, 21 U. S. App. 45, 8 C. C. A. 237, 59 Fed. 727. Moreover, the petition for removal does not show that any federal question is involved in the case, and the record shows that no such question is involved. But, if the petition for removal disclosed that the suit was one arising under the laws of the United States, it could not be removed by the defendant upon that ground unless that fact appeared from the plaintiff's complaint. *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 14 Sup. Ct. 654; *Postal Tel. Co. v. Alabama*, 155 U. S. 482, 15 Sup. Ct. 192. The complaint does not show that the suit is one arising under the laws of the United States, but the contrary. The judgment of the circuit court is reversed, and the cause remanded, with directions to remand the same to the state court from whence it was removed. Ewing, the receiver, having wrongfully removed the case into the circuit court, must pay all the costs in that court as well as all costs that have accrued in this court.

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FOLEY et al. v. HARTLEY et al.

(Circuit Court, D. Nevada. March 2, 1896.)

No. 602.

**EQUITY PRACTICE—ABATEMENT—PENDENCY OF OTHER SUITS.**

One F. died intestate. His widow was appointed administratrix, and instituted proceedings in a state court for distribution of his estate to herself and his mother, brothers, and sister, as his heirs. One H., a minor, intervened by guardian in these proceedings, claiming to be an illegitimate child of F., recognized as such by F., in writing, in his lifetime, and claimed one-half of the estate, as F.'s heir. The mother, brothers, and sister of F. then began a suit in the United States circuit court, before any jurisdiction of them had been obtained in the state court, to have H.'s claims declared invalid; but, before they had obtained jurisdiction of H. in this suit, they appeared in the state court proceedings by an application to remove the same to the federal court on the ground of diverse citizenship, which application was granted. H. then filed a plea in abatement of the suit in the federal court, on the ground that jurisdiction of all parties and of the issues raised was first obtained in the proceedings in the state court. *Held*, that as there was but one issue to be tried, which was the same in both proceedings, and as all parties were first served or appeared in the proceedings begun in the state court, an order should be made, in the suit begun in the federal court, suspending all proceedings therein until the questions raised in the other cause were disposed of, or until the further order of the court.

W. E. F. Deal, for complainants.

James F. Dennis and Henry Mayenbaum, for respondents.

HAWLEY, District Judge (orally). On July 26, 1894, M. D. Foley died intestate in Washoe county, Nev. The value of his estate is estimated and was appraised at over \$150,000. On August 1, 1894, Mrs. Minnie D. Foley, widow of deceased, petitioned the district court of Washoe county for letters of administration, and on the 20th day of August she was duly appointed administratrix of said estate. On the same day T. V. Julien was appointed an attorney to represent the absent heirs. On July 12, 1895, the administratrix filed a petition praying for partial distribution of the estate. In this petition she states the heirs of M. D. Foley, deceased, other than herself, to be Johanna Foley, his mother; John D. Foley, Jeremiah Foley, and Edmund D. Foley, his brothers; and Anna D. Foley, his sister. August 20, 1895, was set for the hearing of said petition, and due notices thereof were posted as required by law. On the 13th day of July, 1895, Dr. George H. Thoma filed a petition for letters of guardianship of the person and estate of Vernon Harrison Hartley, a minor, claiming that said minor's estate "consists of an undivided one-half of the estate of M. D. Foley, deceased, to wit, real estate and personal property in said county," and on the same day an order was duly made and entered appointing Dr. Thoma as guardian of said minor's person and estate. On the 9th day of August, 1895, John D. Foley, his brothers, mother, and sister, who will hereafter be designated as the "nonresident heirs," commenced this suit in the United States circuit court; averring that the claim of the defendants casts a cloud upon their title to the one-half interest of the estate of M. D. Foley, and praying for a decree that said minor, Vernon Harrison Hartley, "does not own, nor is he entitled to have, any part of the estate of said M. D. Foley, deceased, as an heir at law or otherwise, and that your orators are heirs at law of said M. D. Foley, deceased, and as such are entitled to \* \* \* the undivided one-half thereof claimed by said minor," etc. On the 16th day of August, 1895, Vernon Harrison Hartley, by his guardian, filed in the proceedings pending in Washoe county an answer to the petition of Mrs. M. D. Foley for partial distribution; averring, among other things, "that he, the said minor, is the posthumous and illegitimate child, and the son and offspring, of said M. D. Foley, deceased, and is the son and offspring of his mother, Alice M. Hartley," an unmarried woman; that before his birth his said father, M. D. Foley, deceased, prior to his death, did, in writing signed in the presence of a competent witness, acknowledge himself to be the father of said illegitimate child. He objects to any distribution to the "non-resident heirs," and prays for a decree that they are not entitled to any part of said estate, and that one-half of said estate be distributed, awarded, and given to said minor child. On the 17th day of August, 1895, the district court made an order that the 23d day of September, 1895, be appointed for the hearing of the petitions of Mrs. M. D. Foley and

Vernon H. Hartley, and the distribution of the estate, and the usual notices of such hearing were given. With reference to this order, J. F. Dennis, one of the attorneys for the minor heir, testified upon the hearing of the plea in abatement that on the day the order was made he met Mr. Julien, and said that he had ascertained that he (Julien) was an attorney for the absent heirs, and that he (Dennis) was going to appear before the court to have the petition of the minor heir for a partial distribution of Foley's estate set for hearing, and that Julien stated he did not care when it was set down, provided it was distant 30 days; that after some contention "we agreed to set it down upon the day named in the minutes of the court." He also testified that at that time he was aware that the nonresident heirs had filed their bill of complaint, by W. E. F. Deal, their attorney, in the United States circuit court, and that a copy of the subpoena had been served upon Dr. Thoma, guardian of the minor heir, five or six days before the order was made. W. E. F. Deal, counsel for complainants, testified as follows:

"I am the attorney for the Eastern heirs. I was retained as quickly as a letter could go to the place where these parties reside, and an answer be returned. There never has been an attorney for these persons who filed this bill of complaint and a supplemental bill in the matter of this contest, except myself. Mr. Julien was not employed in this matter. He informed them of the fact, and they employed me; and I have been their attorney from the time letters of guardianship were issued, on the 13th day of July, 1895. \* \* \* I learned of it on the 15th. I was appointed to represent them in this contest, and there never has been any other attorney except myself in that matter. \* \* \* I never received any notice of the intention of counsel representing the guardian and the minor that they intended to take any steps to set the petition that I filed for Mrs. Foley for hearing. I never knew it until after it had been done, and it was never Mrs. Foley's intention, or was it mine, to proceed any further with her petition; but the intention always has been to let the heirs take their own course, as their counsel might advise them."

On August 19, 1895, Mrs. M. D. Foley filed in the state court an order dismissing her petition for partial distribution of the estate, and asked that the order theretofore made, "fixing the 23d day of September, 1895, for the hearing of said petition, be set aside and vacated." On September 23, 1895, Mrs. M. D. Foley appeared by her attorney, W. E. F. Deal, and filed a demurrer to the petition of Vernon Harrison Hartley for a distribution of the estate. On the same day the nonresident heirs, complainants herein, appeared specially in the state court, and filed objections to the jurisdiction of the court, and to the hearing, consideration, or determination of the petition of Vernon Harrison Hartley. On the same day a citation was issued to Dr. Thoma, guardian of the minor heir, to testify and exhibit the writing of M. D. Foley acknowledging the minor to be his child, before the court, on the 28th of September, 1895. On the same day complainants herein filed their petition and bond for the removal of the case to the United States circuit court, and the court thereupon made an order of removal as prayed for, and stopped all further proceedings therein. On November 4, 1895, complainants, by leave of the court, filed

a supplemental bill in this case, setting forth the proceedings taken in the state court after the filing of the original bill herein; praying "that it be adjudged and decreed that said Vernon Harrison Hartley is not, and never was, the posthumous or illegitimate child, or the son or offspring, or issue or lineal descendant, of said M. D. Foley, \* \* \* and that said M. D. Foley did not at any time prior to his death, in writing signed in the presence of a competent witness, or otherwise, or at all, acknowledge himself to be the father of said Vernon Harrison Hartley, and that said purported written acknowledgment be adjudged and declared to be false, fraudulent, forged, and counterfeited, and null and void, \* \* \* and decreed to be delivered up to be annulled and canceled," etc. On November 5, 1895, the minor child was duly served with process from this court, according to law. On the 29th of November, 1895, G. H. Thoma, guardian, and the minor heir, filed a demurrer to complainants' bills, and on the 2d day of December, 1895, filed their plea in abatement.

Upon these facts, the contention of the guardian and the infant is that this suit should be dismissed because the state court first obtained jurisdiction of all the parties and of the issues raised herein. The contention of the complainants is that this court first obtained jurisdiction of the issue to be tried herein, and of the persons of complainants, and that the trial should be had in this suit.

The law is well settled that the circuit courts and state courts, in certain controversies between citizens of different states, are courts of concurrent and co-ordinate jurisdiction; that the court which first obtains jurisdiction of the parties should retain it until complete relief is afforded within the scope of the issues raised; that neither party can be forced into the other jurisdiction; that the pendency of a former action between the same parties for the same cause of action is pleadable in abatement to a second action, because the latter is regarded as vexatious. *Smith v. McIver*, 9 Wheat. 532; *Shelby v. Bacon*, 10 How. 56; *Ober v. Gallagher*, 93 U. S. 199; *Insurance Co. v. Brune's Assignee*, 96 U. S. 588, 592; *Ward v. Todd*, 103 U. S. 327; *Heidritter v. Oil-Cloth Co.*, 112 U. S. 294, 305, 5 Sup. Ct. 135; *Coal Co. v. McCreery*, 141 U. S. 475, 12 Sup. Ct. 28; *Union Mut. Life Ins. Co. v. University of Chicago*, 6 Fed. 443; *Owens v. Railroad Co.*, 20 Fed. 10; *Williams v. Morrison*, 32 Fed. 177; *Sharon v. Terry*, 36 Fed. 337; *Hatch v. Bancroft-Thompson Co.*, 67 Fed. 802; *Foster v. Bank*, 68 Fed. 723. The rule in equity is analogous to the rule at law. *Insurance Co. v. Brune*, 96 U. S. 588, 593; *Story*, Eq. Pl. § 741. In *Foster v. Vassall*, 3 Atk. 587, Lord Hardwicke said, "The general rule of courts of equity with regard to pleas is the same as in courts of law, but exercised with a more liberal discretion."

It is admitted that the issues raised herein might have been made in the proceedings pending in the state court for the settlement of the estate of M. D. Foley, deceased. Of this there can be no doubt. In the ordinary administration of the estate, it might become the duty of the state court in that proceeding to



determine who were the legitimate heirs of M. D. Foley, deceased. The only issue raised in this suit is between the nonresident heirs and the minor, Vernon Harrison Hartley; each claiming one-half of the estate, and each admitting that Mrs. M. D. Foley, widow of deceased, is entitled to the other half. The issue of fact in dispute is whether or not M. D. Foley, in his lifetime, in writing, acknowledged Vernon Harrison Hartley to be his son, in the presence of a competent witness. If the nonresident heirs had the right to remove the proceedings in the state court to this court upon the ground of the diverse citizenship of the parties, then there was no necessity of bringing this suit, as the object sought to be attained could have been reached in the proceedings commenced in the state court. If both cases are properly before this court,—and if both are equity cases,—it would seem that no hardship could occur to either of the parties if an order was made that they should be consolidated and tried together. But it may be that the respondents are entitled to a decision as to which is the proper suit or proceeding in which to try the issue of fact. It is apparent that there is but one real issue of fact to be tried, and that it should not be tried and could not be tried in both cases. If the nonresident heirs had not appeared in the state court, it may be that they would have the right to demand that the issue should be tried in this suit, because the state court, at the time this suit was brought, had not obtained any jurisdiction over them; but having thereafter voluntarily appeared in the state court, and filed their petition for removal of that cause or proceeding to this court, and thereby constituted a general appearance, it is now too late for them to claim that the state court had no jurisdiction over them by virtue of the proceeding therein taken. The filing of a petition for removal, and the removal of the cause from the state court to the federal court, amount in law to a waiver of all objections previously made to the jurisdiction of the state court. *Railway v. Brow*, 13 C. C. A. 222, 65 Fed. 941, and authorities there cited; *Bushnell v. Kennedy*, 9 Wall. 387, 393. From the facts, it appears that this court first obtained jurisdiction over the persons of complainants herein; but no service of process was made upon the minor heir, so as to obtain jurisdiction over his person, until after the complainants had made an appearance in the state court, which was after that court had obtained jurisdiction over the minor heir. The question, therefore, as to what disposition ought to be made of this plea of abatement, is not entirely free from doubt; and it is somewhat difficult to determine just what order should be made herein, to promote the ends of justice and meet the requirements of the law. One thing is certain: There is no need of but one trial, and the parties should not be required to be and appear in both cases. In 1 Fost. Fed. Prac. § 175, it is said:

“An abatement, in the sense of the common law, is an entire overthrow or destruction of the suit, so that it is quashed and ended. But, in the sense of courts of equity, an abatement signifies only a present suspension of all proceedings in the suit, from the want of proper parties capable of pro-

ceeding therein. At the common law a suit, when abated, is absolutely dead. But in equity a suit, when abated, is (if such an expression be allowable) merely in a state of suspended animation, and it may be revived."

To save any question as to the rights of the parties, it is deemed best to make an order that all further proceedings in this suit be suspended until after the questions raised and pending between the parties thereto in the matter of the estate of M. D. Foley, deceased, be disposed of, or until the further order of this court.

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STATE TRUST CO. OF NEW YORK v. NATIONAL LAND IMP. &  
MANUF'G CO. et al.

Ex parte FITZSIMONS.

(Circuit Court, D. South Carolina. June 30, 1893.)

1. COMITY BETWEEN STATE AND FEDERAL COURTS—CONCURRENT JURISDICTION.

In cases of concurrent jurisdiction it is a fixed rule of the federal courts never to take jurisdiction of a cause which presents the same issues and seeks the same relief as are presented and sought in a cause pending in a state court. *Gates v. Bucki*, 4 C. C. A. 116, 53 Fed. 969, followed.

2. SAME—CREDITORS' BILL—MORTGAGE FORECLOSURE.

A bill was brought in a state court by simple contract creditors against a corporation, averring that it was wholly insolvent, that its funds and property were being improperly wasted and dissipated, and that a number of suits had been or were about to be brought against it. The bill prayed that a receiver be appointed, and that the officers and creditors of the corporation should be enjoined. To this bill no incumbrancers were made parties. Before service on defendant it made an assignment of all its property for benefit of creditors. Afterwards a bill was filed in a federal court to foreclose a trust deed on the property of the corporation, and the corporation, its assignee for benefit of creditors, and other lien creditors, were made parties. *Held* that, as the complainant in this suit and the other lien creditors were not parties to the suit in the state court, its proceedings could not affect them; that the issues involved in the two suits were not the same, and that there was no conflict of jurisdiction which would prevent the federal court from entertaining the suit; but that, as the question of the validity of the assignment was reserved by the state court, and was within its jurisdiction, the federal court would not pass upon it.

3. SAME—APPOINTMENT OF RECEIVERS.

On an intervening petition by a receiver appointed by a state court, asking that certain property in the hands of a temporary receiver, subsequently appointed by a federal court, be delivered up, *held* that, although there was no conflict of jurisdiction between the two courts, yet as it appeared that the temporary receiver was ineligible for appointment as permanent receiver, and as embarrassing questions were likely to arise as to the rights of the parties suing in the two courts respectively in certain property in the possession of the receiver, the federal court would appoint as its permanent receiver the same receiver already appointed by the state court.

4. RECEIVERS—APPOINTMENT.

A person who is connected with the firm of counsel for complainant is ineligible to appointment as permanent receiver of defendant's property. *Finance Co. v. Charleston, C. & C. R. Co.*, 45 Fed. 436, followed.

Trenholm & Rhett, for complainants.  
Mordecai & Gadsden, for petitioner.

**SIMONTON**, Circuit Judge. This case comes up upon a petition of **W. Huger Fitzsimons**, Esq., receiver, appointed for the National Land Improvement & Manufacturing Company by the state court. The prayer of the petition is that certain property heretofore of this corporation in the hands of **Henry S. Holmes**, Esq., receiver, be delivered to him. Mr. Holmes was appointed temporary receiver in certain proceedings filed in this court, entitled "**State Trust Company of New York v. National Land Improvement & Manufacturing Company et al.**" On 13th June, 1893, the Honorable **J. F. Izlar**, judge of the First circuit of the state of South Carolina, upon hearing a complaint of **J. D. Ackerman & Bro.**, suing as well in their own behalf as on behalf of all other creditors in like plight of this National Land Improvement & Manufacturing Company against said corporation, issued a rule against the corporation to show cause why a receiver be not appointed, and why the temporary injunction included in said order, directed to all the creditors of the corporation, be not made perpetual. The summons on this complaint and this rule to show cause were served on the defendant on 14th June, 1893. On the 13th June, 1893, the National Land Improvement & Manufacturing Company executed an assignment for the benefit of its creditors of all of its property and assets to **Aaron J. Barton** as assignee, who accepted the same. The record does not disclose the actual priority as to the hour of signing between this order of the judge and the execution of the assignment. It was stated, however, at bar, and is assumed as a fact, that the order was signed about five hours before the assignment was executed. Nothing in the record induces the belief that the defendant corporation had any notice, actual or otherwise, of the order of Judge Izlar. On 17th June, 1893, a bill was filed in this court by the State Trust Company of New York against this National Land Improvement & Manufacturing Company, **Aaron J. Barton**, assignee, **John H. Steinmeyer**, executor, and **Andrew J. Riley**. Hearing this bill, an order was passed, filed on the same day, appointing **Henry S. Holmes** receiver, as prayed in the bill. The present motion is predicated upon the position that the state court had taken jurisdiction of the subject-matter of this suit, and that this court will hold its hand. A court of the United States will always avoid, if possible, a conflict of jurisdiction with a state court. These courts should never interfere with each other, and should practice the most liberal comity towards each other. It is a fixed rule of this court never to take jurisdiction of a case which presents the same issues and seeks the same relief as are presented and sought in a cause pending in the state court. **Gates v. Bucki**, 4 C. C. A. 116, 53 Fed. 969; **Howlett v. Improvement Co.** (1893) 56 Fed. 161. An examination of the pleadings in each court will disclose whether a conflict exists. The plaintiffs in the state court, bringing a creditors' bill, aver that they are simply contract creditors of the defendant corporation,—by the way, the only defendant,—as holders of two promissory notes, and that repeated demands have been made for payment without success, and repeated promises to make a statement of the affairs of the corporation have

been broken; that a number of suits either have been or are about to be instituted against the corporation; that the corporation, and its officers as well, are wholly insolvent; that the president of the corporation and the general manager are president and vice president of the Nickel Savings Bank in Charleston, and have improperly allowed all the choses in action of the defendant corporation to get into the possession and control of said bank; that J. C. Mallonee, general manager of defendant corporation, is using its funds in speculating in futures for his own benefit, and that there is great danger of waste of the property of the corporation if it and its officers are not restrained. Then comes the prayer for the injunction and the appointment of a receiver. The bill in this court is by the trustee of a deed in the nature of a mortgage executed by the defendant corporation to secure an issue of 250 bonds of \$1,000 each, which deed was duly recorded. This deed is an exhibit to the bill, and it also sets out parts of it. Among other things, is this:

"If the company, its successors or assigns, shall at any time hereafter make default, or refuse, neglect, or omit for six months to pay the semiannual interest on the bonds intended to be secured hereby, or any of them, or to make any other payment of the principal of said bonds or otherwise, as provided herein; or shall suffer or allow any taxes, assessments, or charges to be or become in arrears, whereby the security of this mortgage may be impaired; or shall fail to pay and discharge any lien upon said premises or property, or any part thereof, for labor or material or otherwise, which the protection of the lien of this mortgage shall require to be paid; or shall fail to keep the premises or property insured, with the provision of the loss thereunder shall be paid to the trustee herein as its interest may appear (as hereinafter more particularly specified and set forth); or if proceedings of any kind shall be commenced against the company for the appointment of a receiver, or for the foreclosure of any deed of trust or mortgage on the property hereby conveyed, or any part of it; or in case of the institution of any proceedings, either at law or in equity, whereby the control or ownership of the property, or any part thereof, herein mentioned, may be affected or disturbed; or in case the company shall do, or permit to be done, anything that may in any wise tend to diminish the value of the premises or property hereby conveyed, or to impair, weaken, or diminish the security intended to be effected under and by virtue of this agreement; or in case the company shall make default or breach in the performance or observance of any other condition, obligation, or requirement in the said bonds or herein imposed upon the company or its successors or assigns in reference to the said bonds, or the due performance of any covenants or agreements hereof,—then, and in either of such events, the holders of one-third in amount of the said bonds secured hereby, and then outstanding, in respect to which such default shall have occurred, may, by an instrument in writing by them signed and addressed and delivered to the trustee, notify the trustee of such default, and declare the principal of all said bonds due and payable, and in said instrument may also request the trustee to proceed hereunder for the collection of the principal and interest of all the bonds then outstanding within a reasonable time after the receipt of such notice; and thereupon, and upon the giving of said notice, the entire principal of all the then outstanding bonds shall become immediately due and payable, anything in said bonds or herein contained to the contrary notwithstanding; and thereupon the trustee shall and may, upon being indemnified to its satisfaction against all costs, expenses, and liabilities to be by the said trustee incurred, or without such request or security or indemnity it shall be lawful for the trustee, in its own discretion, to forthwith demand, and, with or without process of law, and with such force as may be necessary, to enter upon, take, and maintain immediate and exclusive possession of all

and singular the lands, tenements, and hereditaments, premises, railroads, rolling stock, machinery, rights, privileges, and other property hereby conveyed and assigned, or intended to be conveyed or assigned."

The bill then charges breach of this provision in the making of the assignment to Barton by the defendant corporation, which is declared void, in the utter inability of the corporation to go on in its operations, or to pay interest on its bonds, or to keep the property insured; that the principal of all the bonds has been declared due in strict conformity with the terms of the deed. The prayer is for a receiver, the sale of the property, and the satisfaction of the trusts of the mortgage deed. To this bill the corporation mortgagor and subsequent maker of the assignment is a party, and with it the assignee, Aaron J. Barton, in possession of the property, A. J. Riley, a lien creditor, and John H. Steinmeyer, holder of a prior mortgage, are also made parties. A decree is sought against the corporation defendant, but the gist of the bill is the enforcement in rem of the rights of complainant under the deed of trust. It appears from this abstract that the complainant in the state court has but one defendant, the corporation, and that no prior incumbrancer, including the present complainant, is made a party. While it would have been proper, still it was not necessary, to make the prior incumbrancers parties. *Evans v. McLucas*, 12 S. C. 61. But, inasmuch as they are not parties, none of the proceedings can affect them. *Finley v. Bank*, 11 Wheat. 304; *Warren v. Burton*, 9 S. C. 198. From this it follows that the order for injunction was not directed against this complainant, and that the state court is not dealing with any of the matters set up in this bill. This removes the idea of any conflict of jurisdiction.

It was suggested at the hearing, that, inasmuch as the validity of the assignment was not attacked in the complaint in the state court, or in the petition now under consideration, no question can arise between the petitioner and the receiver of this court. If the assignment is valid, all the property covered by the trust deed is in the hands, not of the corporation, or of its receiver, but of the assignee in derogation of the trust deed. But the question as to the validity of the assignment appears to be reserved in the order of the state court as one to be passed upon. As it clearly is a matter within the jurisdiction of that court, we will not interfere with or discuss it.

While it is clear that on the pleadings as they stand, the two courts do not conflict with each other, still, in the further progress of these cases, there will be occasions on which difficult and embarrassing questions will arise. The trust deed does not cover all the property of the corporation, and there must arise differences of opinion respecting what property is embraced in it. In the meanwhile it is of vital importance for the interests of all creditors that the business of the corporation be not interrupted, and that its assets perishable in character be disposed of. Litigation, protracted and conflicting, means ruin to many, loss to all. The petition will be dismissed.

It was brought to the attention of the court during the argument that Mr. H. S. Holmes, heretofore named the temporary receiver, is connected with the firm of the counsel for complainant. Under the

rule adopted in this court, after careful consideration, this makes him ineligible for the appointment of permanent receiver. The whole question was discussed in *Finance Co. v. Charleston, C. & C. R. Co.*, 45 Fed. 436, and for this reason alone, against the prejudice of both judges then sitting, Mr. Lord was not continued as receiver. See, also, *Phinizy v. Augusta & K. Ry. Co.* (decided at this term) 56 Fed. 273. This making it necessary to name another receiver, all interests will be subversed if the appointment be given to W. Huger Fitzsimons, Esq. Let an order be entered appointing him receiver, with all the usual powers as receiver, and with directions that he file an inventory of the property in his charge within 30 days from this date, and file his reports monthly with the clerk of this court; his bond to be fixed at \$10,000.

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**DE LA VERGNE REFRIGERATING MACH. CO. v. PALMETTO BREW-  
ING CO. et al.**

(Circuit Court, D. South Carolina. January 27, 1896.)

**COURTS—JURISDICTION—COMITY—POSSESSION OF PROPERTY.**

Certain minority stockholders of the P. Co. commenced a suit, in a state court, on December 30th, against the P. Co., its president, the S. Co. and the D. Co., mortgage creditors of the P. Co., in which they alleged that the president, controlling a majority of the stock, was mismanaging the affairs of the P. Co., and had by his mismanagement caused its insolvency, but that with proper management the company could be relieved from its embarrassment, and prayed that the P. Co. and its president be restrained from exercising any control over its property, that its creditors be enjoined from bringing suits, and for the appointment of a receiver. Upon this bill, a rule to show cause why a receiver should not be appointed, with an injunction against the defendants and the creditors of the P. Co., was issued, returnable January 13th. On January 6th the D. Co., one of the defendants in the suit in the state court, and holder of mortgages on the P. Co.'s real and personal property, but which, being a nonresident, had not been served, commenced a suit in the United States circuit court against the P. Co., for the foreclosure of its mortgages, making the necessary allegations to entitle it to a foreclosure of the mortgages and the appointment of a receiver, and thereupon applied for the appointment of a receiver. A receiver was appointed by the circuit court and took possession of the property. On the return of the rule in the state court, on January 13th, that court appointed a receiver in the stockholders' suit, who then, on January 17th, intervened in the suit in the federal court, and asked to have the possession of the P. Co.'s property turned over to him by the receiver of the federal court. *Held* that, as the controversies in the two suits were entirely distinct, and the relief sought antagonistic, the stockholders in the one seeking to keep the P. Co. a going concern and prevent the enforcement of the claims of creditors, and the mortgagee in the other suit seeking to enforce its lien, as the complainant in the federal court could not obtain the relief to which it was entitled, in the stockholders' suit, without appearing therein and becoming an actor, and as the federal court's receiver was in actual possession before the appointment of the state court's receiver, the former would not be directed to surrender possession to the latter.

This was a suit by the De La Vergne Refrigerating Machine Company against the Palmetto Brewing Company and others, for the foreclosure of a mortgage. A. F. C. Cramer was appointed receiver, and took possession of the property of the Palmetto Brewing Com-

pany. August Bequest intervenes, praying for the delivery to him, as receiver appointed by a court of the state of South Carolina, of the property in the hands of the receiver of this court.

Mordecai & Gadsden, for petitioner.

J. N. Nathans, James Simons, Mitchell & Smith, and Huger Sinkler, for respondents.

SIMONTON, Circuit Judge. On the 6th of January, 1896, the complainant, alleging that it is a creditor of the Palmetto Brewing Company, secured by mortgage of real estate of said company, and also by chattel mortgage, filed a bill in this court, in behalf of itself and all other creditors of the Palmetto Brewing Company, against the Palmetto Brewing Company, a body corporate under the laws of the state of South Carolina, making parties codefendant the Security Savings Bank, another corporation of the state of South Carolina, a mortgage creditor, and the Consumers' Coal Company, also a South Carolina corporation, a general creditor of the brewing company. The bill, after alleging that the complainant is a citizen of the state of New York and the defendants all citizens of the state of South Carolina, and alleging the nature and character of its claim against the brewing company, charges that the said company is wholly insolvent and unable to meet its liabilities; that, in addition to this, certain of the stockholders are having serious differences with the directors of the company, which have a disastrous effect upon the affairs of the company. It prays a foreclosure of its mortgages, marshaling of the assets, and a distribution of their proceeds among all the creditors. It also prays the appointment of a receiver. The bill being thus filed by a citizen of the state of New York against citizens of the state of South Carolina, the complainant setting up mortgages of realty and of personalty, the insolvency of its debtor being averred, and dissensions between the stockholders alleged, tending to show that this condition of insolvency would continue and the assets of the corporation be exposed to deterioration, and the rights of creditors disregarded, the jurisdiction of the court was unquestionable, and the complainant established its right to the appointment of a receiver. *Kountze v. Hotel Co.*, 107 U. S. 378, 2 Sup. Ct. 911 (Bradley, J.). Hearing the bill and affidavits attached, this court appointed A. F. C. Cramer temporary receiver of the property of the Palmetto Brewing Company, and under its order the said receiver took peaceable possession of the property out of the hands of the brewing company, in whose possession he found it, and now holds the same.

On the 17th of January, 1896, the petitioner, A. Bequest, intervened in the said suit and filed his petition therein. In his petition he shows that he was appointed receiver of the Palmetto Brewing Company by an order of Hon. W. C. Benet, judge of the First judicial circuit of South Carolina, and presiding judge of said circuit, bearing date the 13th of January, 1896, entered in a cause entitled "Theodore Wenzel and John W. Burmester, Plaintiffs, against the Palmetto Brewing Company, J. E. Doscher, Security Savings Bank, a Body

Corporate under the Laws of the State of South Carolina, and the De La Vergne Refrigerating Machine Company, a Body Corporate under the Laws of the State of New York." Pending the said action, the proceedings in this court heretofore spoken of were had, and that in the cause in the state court his honor, the presiding judge, had issued an order enjoining the defendants and creditors of the Palmetto Brewing Company, and also a rule to show cause, on a day fixed by him, why a receiver should not be appointed for the Palmetto Brewing Company. The proceedings in the state court began 30th December, 1895. This order of Judge Benet bears date the 31st of December, 1895. The petitioner further states that, at the return of the rule, January 13, 1896, he had been appointed by Judge Benet receiver of the brewing company, and that he had demanded possession of the property, plant, and assets of the Palmetto Brewing Company, in the possession and control of A. F. C. Cramer, the receiver of this court, which demand was refused. The prayer of the petitioner is that his petition may be ordered filed in this cause, and that the said A. F. C. Cramer and the parties to the bill of complaint in this court be required to show cause, before this court, why the order appointing A. F. C. Cramer as receiver by this court should not be rescinded and made of none effect, and why the petitioner, as the lawful receiver of the Palmetto Brewing Company, should not obtain and retain possession of all and singular its property, plant, and assets. Upon the filing of the petition a rule was issued, directed to the parties in the bill of complaint in this case, to show cause why the prayer of the petition should not be granted. The complainant, being a nonresident of the state, substituted service of the order was made on J. N. Nathans, its solicitor. These parties have all answered the rule.

With regard to the right of the state court to entertain the cause filed therein to recognize the right of the plaintiffs, minority stockholders, to bring their action, and with regard to the validity of the action and orders of his honor, Judge Benet, therein, this court can make no question. These were the acts of a court of co-ordinate jurisdiction with this upon a matter within its jurisdiction, and this court has not the right to sit in review over the propriety and validity of this action. Any errors which may have been committed, if, indeed, there were errors,—and on this point this court has no right to an opinion,—can be corrected in the court of last resort to which he is responsible. They cannot be examined in this court. We must treat the case, therefore, as the request of the receiver, bearing the credentials of the state court, which this court cannot gain-say or question. What this court has to decide is this: It having been brought to its attention that certain proceedings were instituted in the state court prior to any action by this court, which proceedings have culminated in the appointment of a receiver for the Palmetto Brewing Company, subsequent to the appointment of a receiver by this court, will this court now reverse its action, dispossess its receiver of the custody and control of the property, plant, and assets of the Palmetto Brewing Company, and order him to turn over his possession to the petitioner as receiver of the state court?



It is the established law of this circuit that, when proceedings have been begun in the state court, and other proceedings are subsequently commenced in this court, if the proceedings in each court present the same controversy, seek the same relief, and are substantially between the same parties, this court will arrest its action, hold its hand, and suspend proceedings, not as a matter of right, but in the exercise of that comity which should exist between two courts established by distinct sovereignties and exercising jurisdiction within the same territory. *Howlett v. Improvement Co.*, 56 Fed. 161; *State Trust Co. of New York v. National Land Imp. & Manuf'g Co.* (June 30, 1893) 72 Fed. 575. If this condition of things exists in this case the same rule will be observed. This necessitates an examination of the proceedings in the state court, to ascertain the character of the controversy and of the parties, and the scope and purpose of the complaint filed therein.

These proceedings were instituted by two minority stockholders of the Palmetto Brewing Company against the company itself, J. H. Doscher, president or manager of the said company, the Security Savings Bank, and the De La Vergne Refrigerating Machine Company. After stating the corporate character of the brewing company, and that it was engaged in selling beer and other malt liquors, the purpose for which it was chartered, and that they are owners of certain shares of the capital stock of the company, the plaintiffs charge that the majority of the stock is owned or controlled by the said Doscher and his relatives and friends, and that so he is the president of the company. It further charges that, under what is known as the "Dispensary Law" of this state, the said brewing company has been licensed to manufacture and sell beer under the conditions prescribed in the act, a license subject to revocation at any time, in case the officers and directors of the company fail to comply with these conditions and the regulations of the board of control. That Doscher has frequently violated these conditions and regulations in certain particulars, charged in the complaint, by reason whereof the license of the company for the sale of beer is liable to be revoked, resulting in a total loss of the enterprise, and irremediable damage to the stockholders. They further allege that the stockholders can procure no redress from the management of the company, because the same is entirely in the hands of Doscher, under whose express directions and for whose profit the unlawful acts have been committed. They then charge loss of property by the corporation, through the negligence of the directors, and a very serious loss in the goods manufactured by the company through one Richter at Wilmington, N. C., who has abused his powers and duties as agent of the company; that by the action of the directors and its president the credit of the company has been seriously impaired, so that it is insolvent and unable to meet its ordinary obligations as they mature,—the loss of credit resulting in putting a large part of the floating debt of the company in the hands of Doscher; that the stock of the company has depreciated from \$75 to \$25 a share; that this mismanagement of the company in the interest of Doscher and the majority of the stockholders was a positive loss to the other stockholders. The plaintiffs

then allege, that, if the affairs of the company were conducted on a business basis, and for the interests of all the stockholders alike, it could be relieved from its present embarrassment, but that the present officers of the company have shown themselves utterly unfit to manage the property. Then, after stating the fact of the existence of the bond and mortgage due to the De La Vergne Refrigerating Machine Company, securing \$10,000 of principal, no part of which they say is paid, and also the fact of the bond to the Security Savings Bank, with the mortgage securing the same, for an amount of \$25,000, no part of which, also, has been paid, but asking or suggesting no course as to them, they add that, unless relieved by this honorable court, the plaintiffs and all other minority stockholders of the said company are utterly powerless in the premises. The complaint concludes with a prayer—First, that the Palmetto Brewing Company be restrained and enjoined from the exercise of any control whatever over the property, plant, and franchises; second, that Doscher be restrained and enjoined from interfering in any manner whatsoever with any of the property of the company; third, that the creditors of the Palmetto Brewing Company be enjoined from prosecuting any actions against the company except in these proceedings, and that a receiver be appointed for the Palmetto Brewing Company, with a prayer for general relief. The order passed by his honor, Judge Benet, upon hearing this complaint, grants the prayer contained in it.

It thus appears that the whole scope and purpose of the complaint is to secure to minority stockholders proper representation in the management of the company and the protection of their rights. To this end they seek to prevent any further violation of the conditions and regulations under which the brewery was made a part of the dispensary, and thus preserve the valuable privilege to the company. It declares that, under proper management, the company can be relieved from its embarrassment, notwithstanding its present condition of insolvency. Although it mentions the fact that there are creditors of the company, two of them lien creditors, it seeks no relief whatever as to them, and evidently contemplates that they should be provided for in the due course of business of the company, when the objectionable manager is removed and the affairs of the company put on a business basis. In other words, the object which the plaintiffs had in view was the keeping of their company a going concern, for the benefit of the stockholders of the company. It is true that, incidentally, the creditors of the company might ultimately be benefited, but the purpose of the complaint is not to satisfy these liens, but to promote and protect and secure the interests of stockholders. The apparent motive in asking an injunction against creditors was to compel them to stay their hands until the company could be reorganized, its unfaithful officers removed, and its affairs placed upon a successful business basis. On the other hand, the proceeding in this court looks to the winding up of the company, marshaling its assets, and paying its creditors, the general creditors as well as the lien creditors. Its statements in one respect concur with the statements of the complaint; that is, as to

the utter insolvency of the company. Because of this insolvency, the complainant in this court seeks to establish its rights secured to it by its mortgages and to enforce them. To this end it has invited the co-operation of all creditors, and asks that provision be made for them. Every class is represented, and the relief prayed for would be complete to the lien creditors, to the unsecured creditors, and to all the stockholders of the corporation who are represented in these proceedings by the company. The prayer of the complainant is not addressed to the discretion of the court, but it comes with mortgages in its hands, giving it certain rights, by contract, paramount to all other rights, and asks that they be enforced. The stockholders in the proceedings in the state court held their rights in subordination to and inferior to the rights of the creditors. They cannot exercise any right of property in the assets of the corporation, after creditors seek to enforce liens, until the value and extent of those liens have been ascertained and the liens discharged. They seek a change in the management of the company, and the protection, in the future, of their rights, which have been grossly violated. They ask this in order that their shares, which the misconduct of the present management has made valueless by driving the company into insolvency, may be rehabilitated, and be given value by more careful, economical, and business methods. The proceedings in this court look to the destruction of the corporation and the liquidation of its debts, under the averment that its liabilities exceed its assets. We take the case made in the state court. What relief do they give the complainant in this case? It holds two mortgages on property of the Palmetto Brewing Company securing bonds. The property with which the complainant is concerned is the property of the brewing company; that is, its interest, subject to the liens of the present complainant. It does not offer to redeem these liens. It does not and cannot pray the foreclosure of them. It cannot ask that the property be sold without the express assent of the lienholder, or without changing and amending the whole scope and purpose and prayer of the complaint, and serving complainant anew with process, making, in fact, a case wholly new. In the meantime it seeks to enjoin the complainant from any assertion of its rights, an injunction which would become operative upon it as soon as it came in and submitted to the jurisdiction. In other words, the present proceedings in the state court would afford no relief whatever to the complainant, certainly none of the relief it asks at the hands of this court, without an appearance and answer in the state court, followed up by some action on its part, making it an active moving party, seeking by its own proceeding affirmative relief. Without discussing, therefore, the character of the parties to the two proceedings, it is manifest that the controversies they present are entirely distinct, and the relief sought in the one, not only different from, but wholly antagonistic to, the relief sought in the other.

The counsel who argued this case with equal ability and earnestness have treated it as threatening a conflict of jurisdiction. But, as has been said, it is a question of comity. The jurisdiction of the

court over the controversy made here is unquestionable. The jurisdiction of the state court over the controversy made there cannot be disputed. The receiver of this court is in actual peaceable possession. The receiver of the state court was appointed subsequent to his appointment, in proceedings antedating those in this court. "The decisive test, as expressed by the weight of authority, is that, when the controversy in both actions is the same, the court first acquiring jurisdiction of the controversy will retain it; and it is not necessary that it should take actual possession through its receiver of the property to obtain exclusive jurisdiction. If, however, the controversy is not the same, there is no conflict of jurisdiction as to the question or cause, and the court which first acquires jurisdiction over the property, by actual seizure through its receiver, will enforce that jurisdiction, and assume the actual possession to which it gives the right; and until the property is seized, no matter when the suit was commenced, the court does not have jurisdiction over the property, and another court of concurrent jurisdiction may appoint a receiver, and through him take possession of the property." *Gluck & B. Rec.* pp. 67, 68; *Andrews v. Smith*, 5 Fed. 833; *Compton v. Jesup*, 15 C. C. A. 397, 68 Fed. 263. In view, therefore, of the fact that the controversy in the suit in this court is entirely distinct from that in the state court, and that the scope and purpose of the proceedings in the state court are not those of the proceedings in this court, connected with the fact that the receiver heretofore appointed in the main cause is in actual, peaceable possession of the property, and that the complainant holds a legal lien on the property, entitling it to its possession through a receiver, the mortgagor being insolvent, and that this court has been asked by it not to exercise an act of discretion, but to give effect to a right secured to it by the constitution and laws of the United States, the prayer of the petition cannot be granted, and it is so ordered.

But the petition, with its exhibits, discloses that the minority stockholders have reasons, satisfactory to them, to distrust the parties controlling the corporation, and, therefore, that the corporation will not properly represent their interests. It is therefore ordered that the petitioner, or any person representing the minority stockholders, may, if they be so advised, become parties to these proceedings, to take such course therein as may seem best for the interest which concerns them and may represent them.

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UNITED STATES v. BELLINGHAM BAY BOOM CO.

(Circuit Court, D. Washington, N. D. February 20, 1896.)

RIVERS AND HARBORS—OBSTRUCTION TO NAVIGATION—ACT CONG. SEPT. 19, 1890.

Section 10 of the act of congress of September 19, 1890, providing for the removal of unlawful obstructions to navigable waters, does not authorize the courts to decree the removal of a boom in a small navigable river, which, at the time of its construction, prior to the passage of the act, was fully authorized by the legislature of the state within which

the river lies, and which is necessary to the use of the river as a highway for floating logs from forests on its banks; the value of such logs being much greater than that of other products likely to be transported on the river, and the obstruction to navigation caused by the boom not being complete.

W. H. Brinker, U. S. Atty.

T. G. Newman, for defendant.

HANFORD, District Judge. This is a suit in equity, by the United States, brought under direction of the attorney general, against the Bellingham Bay Boom Company, a corporation organized and existing under the laws of the state of Washington. The substantial averments of the bill are as follows: That the Nooksack river is a navigable stream, which empties into Puget Sound, in Bellingham Bay, in the county of Whatcom, state of Washington, and its waters are navigable from its mouth a distance of several miles towards its source; that the said defendant, for a period of more than one year last past, has maintained, and continues to maintain, an obstruction in the navigable waters of said river at and near where it empties into Bellingham Bay, as aforesaid, such obstruction consisting of a boom in which logs floated down said river are stopped and moored, the boom being constructed in such manner as to blockade the river during a large portion of the year, rendering navigation thereon impossible during said time; that said river is used for navigation by steamboats and small craft, and that said defendant has not obtained permission of the secretary of war of the United States to continue or to maintain said boom, and the said boom was constructed and is maintained without the permission of the secretary of war, and is continued in said navigable waters aforesaid, without his consent. The prayer of the bill is for a permanent injunction, forbidding the further continuing or maintaining of said obstruction, or any part thereof, and for a mandatory injunction to cause the removal of said obstruction, and for general equitable relief.

The defensive matter contained in the answer is as follows: The defendant says that it became incorporated in the month of June, 1890, under and by virtue of an act of the legislature of the state of Washington entitled "An act to declare and regulate the powers, rights and duties of corporations organized to build booms, and to catch logs and timber products thereof"; that, under and by virtue of the said act and articles of incorporation adopted thereunder, power and authority were given defendant in the waters of the Nooksack river, in the state of Washington, to construct, maintain, and use all necessary sheer or receiving booms, dolphins, piers, piles, or other structure necessary or convenient for carrying on the business of the defendant in catching, booming, sorting, rafting, and holding logs, lumber, or other timber products, and to improve the Nooksack river so as to facilitate the business of logging, driving, rafting, sorting, booming, and holding logs, and protecting from loss those engaged in carrying on the same; that the construction and maintenance of defendant's boom were affirmatively authorized by the laws of the state of Washington in the month of June, A. D. 1890; that, under and by virtue of

said laws of the state of Washington, the said defendant, prior to the 19th day of September, A. D. 1890, did construct, erect, and maintain its boom for the business purposes aforesaid, in strict accordance with the laws of the state of Washington, and not otherwise, at the mouth of the Nooksack river, in the county of Whatcom, state of Washington, and has there continued to so maintain and operate its said boom up to this time. And defendant alleges that, in the construction and maintenance of said boom, it has expended a large sum of money, to wit, the sum of \$50,000; that the Nooksack river is a small stream, lying wholly and entirely within the state of Washington, emptying its waters into Bellingham Bay, and navigable for but a few miles from its mouth, by small, light-draught water craft. Defendant denies that its boom is constructed in such a manner as to blockade said river during a large portion of the year, rendering navigation thereon impossible during said time, but alleges that at certain periods of the year, not to exceed twice in any one year, large quantities of brush, trees, and drift are by freshets and excessive high water carried down to the mouth of said Nooksack river, where the said brush, trees, and drift become lodged by reason of shoal water occasioned by the widening of said river and the deploying of its waters into the said Bellingham Bay. Defendant further alleges that, under and by virtue of the power and authority to improve said river vested in it by the laws of the state of Washington, it has from time to time, from the date of its incorporation up to the present time, and covering a period of more than four years, expended large sums of money, to wit, the sum of \$2,500 per year, in the purchase of powder, tools, and labor for the improvement of said river, by removing the said brush, trees, and drift from the mouth thereof, and removing trees, snags, and drift from the channel thereof to a distance of 20 miles from its mouth. Defendant further alleges that by reason of the location and maintenance of its boom and of the improvement of said river, made by the defendant as aforesaid, the navigation of said river for boats and water craft has been greatly facilitated, and that, in the absence of such improvement to the navigation by defendant as aforesaid, the mouth of said river would become entirely obstructed by brush, trees, and drift, rendering navigation thereon totally impossible during the greater portion of the year; that immense forests of fir and cedar timber, of the market value of many millions of dollars, which constitute the chief wealth of Whatcom county, border and are tributary to the said Nooksack river and its branches, which said river is the natural and only outlet for most of said timber to the mills and market; that the commerce conducted and carried on upon said river by the transportation of goods, wares, and merchandise is, and always has been, trifling and inconsiderable in amount, and in value greatly inferior to that of the logs and timber products floated down said river to the mills and market; that, during the four years last past, the total value of all such goods, wares, and merchandise so transported upon said river has not amounted to more than \$5,000; and defendant alleges that the market value of the saw logs and timber products floated down said river, and caught, sorted, boomed, and rafted at defendant's boom, during the same

period, amounts to \$90,000; that the greatest and chief value of the said Nooksack river to the citizens of this and other states of the Union is its use as an outlet for floating saw logs and timber products to the mills and market; that none of the timber situate upon or tributary to the said river as aforesaid can be taken to the mills and market by floating down said river without the maintenance of a boom located at the mouth thereof for catching, sorting, booming, holding, and rafting the same; that there are a number of saw and shingle mills located on the shores of Bellingham Bay, which are largely dependent for their supply of saw logs upon logs floated down said river, and, if deprived of such source of supply, will suffer great damage and injury. The defendant further alleges that it has at all times maintained and operated its said boom in accordance with the laws of the state of Washington thereunto pertaining, and has always exercised great care that its said boom should not interfere with the navigation of said Nooksack river by boats and water craft navigating the same. To this answer a general replication was filed.

The evidence has been taken before an examiner, and reported to the court. At the time of introducing proofs, it was stipulated between the parties that the Nooksack river is a navigable stream, having its source in Whatcom county, and running through Whatcom county, to Bellingham Bay, emptying its waters into said bay, and is navigable from its mouth for a distance towards its source by light-water craft, and said river is wholly within said county. On the part of the government, 19 witnesses were called and sworn,—two steamboat captains, who have had practical experience in navigating the Nooksack river with small steamboats; one merchant; one proprietor of a sawmill; one fisherman; one school teacher; and a number of farmers and county officials. They all appear to have a general knowledge of the country through which the river flows, and the history of the settlement of the Nooksack valley; the testimony of said witnesses being in general to the effect that the piles driven to support the defendant's boom, and the boom itself, impede the passage of steamboats, and that it has a tendency to collect drift timber and cause shoaling at the mouth of the river, by detaining the silt and sand, and causing the same to form a bar, and that navigation of the river by boats is interfered with by the bar, and by jams of drift collecting therein, and by filling up of the channel. For the defendant nine witnesses were sworn and have testified, including steamboat men, engineers, and the persons who superintended the work done by the defendant in constructing the boom and clearing the river of jams and obstructions; and their testimony tends to prove the allegations of the defendant's answer as to the particular time when the boom was constructed, the condition of the river prior thereto, and the particular work and expenditures of the defendant in clearing the river of jams, and keeping it open for navigation. As to these disputed facts, the defendant's witnesses, having particular knowledge, are better able to testify intelligently, by reason of having made examinations and surveys, or being connected with the work done, than the witnesses for

the government, who speak only from a general knowledge. No engineer has been called by the government to testify as to facts ascertained by an actual survey.

Upon consideration of all the evidence, I find that, prior to the construction of the boom, trees and drift carried down the river by floods formed jams, which obstructed navigation, requiring labor and expense to keep the river open; and that the boom company, since commencing to construct the boom, at an expense of many thousand dollars, cut out, blasted, and removed all drift which prior to the commencement of this suit lodged in the vicinity of the boom, and kept the mouth of the river clear of obstruction other than the boom itself and the saw logs collected therein; and, by such expenditures and work, the company has rendered ample recompense for the impediment to navigation of the river by vessels, caused by its boom.

The boom was constructed in the summer of 1890, and completed prior to the 19th day of September, 1890 (the date of approval of the act of congress pursuant to which this suit was instituted); and the construction of the boom was duly authorized, as alleged in the answer, by an act of the legislature of the state of Washington approved March 17, 1890, which act authorizes the incorporation of boom companies, and section 3 provides:

"Such corporations shall have power and are hereby authorized, in any of the waters of this state or the dividing waters thereof, to construct, maintain and use all necessary sheer or receiving booms, dolphins, piers, piles or other structure necessary or convenient for carrying on the business of such corporations." Laws Wash. 1889-90, p. 470.

By uncontradicted evidence, it is shown that there are immense forests of timber, which, when cut into saw logs, can be brought to market in the most convenient way by floating down the Nooksack river, the value of which is many times greater than the probable value of other products which may be transported upon the river; and, to make the river available as a means for bringing timber to market, it is necessary to maintain a boom at its mouth.

In view of all the facts, and considering that this river is wholly within this state, I hold: First, that the legislature of the state had ample power prior to the enactment by congress of the river and harbor act of September 19, 1890, to authorize the construction of this boom, and that at the time of its construction it was authorized by law, and therefore not a nuisance, nor an unlawful obstruction of navigation; and, in the second place, that the chief value of the Nooksack river as a highway is for the floating of saw logs, and that persons and corporations having occasion to use it for that purpose have rights equal to the rights of others to use the river as a highway for boats and vessels, and that a boom at the mouth of the river necessary for gathering and holding saw logs is to be regarded as an aid to the use of the river for a lawful purpose, and entitled to protection the same as a wharf or pier constructed at a convenient place for the convenience of vessels.



In the case of *Pound v. Turck*, 95 U. S. 459-465, Mr. Justice Miller, in the opinion of the court, says:

"There are within the state of Wisconsin, and perhaps other states, many small streams navigable for a short distance from their mouths in one of the great rivers of the country, by steamboats, but whose greatest value in water carriage is as outlets to saw logs, sawed lumber, coal, salt, etc. In order to develop their greatest utility in that regard, it is often essential that such structures as dams, booms, piers, etc., should be used, which are substantial obstructions to general navigation, and more or less so to rafts and barges. But to the legislature of the state may be most appropriately confided the authority to authorize these structures where their use will do more good than harm, and to impose such regulations and limitations in their construction and use as will best reconcile and accommodate the interest of all concerned in the matter. And, since the doctrine we have deduced from the cases recognizes the right of congress to interfere and control the matter whenever it may deem it necessary to do so, the exercise of this limited power may all the more safely be confided to the local legislature."

It was unnecessary for the defendant to obtain permission of the secretary of war to construct this boom, for the very good reason that, when it was constructed, there was no law in existence requiring the permission of that officer. This bill seems to have been prepared under a supposition that the seventh section of the act of September 19, 1890, entitled "An act making appropriation for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes" (1 Supp. Rev. St. 2d Ed., p. 800), is retroactive in its effect, or at least, taken in connection with the tenth section of the same act, it renders all obstructions of navigable rivers not authorized by the secretary of war unlawful, and that the circuit court may require the same to be removed. But the seventh section, from its words, is clearly prospective, and must be so considered in its application to cases. And the tenth section does not make the maintenance of all previously constructed bridges, piers, docks, wharves, and similar structures erected for business purposes unlawful, nor authorize the removal of the same, but, on the contrary, makes an exception which, in my opinion, includes the boom in question. The first clause of the section is as follows: "That the creation of any obstruction, not affirmatively authorized by law, to the navigable capacity of any waters in respect to which the United States has jurisdiction, is hereby prohibited." And it is only the continuance of such obstructions—that is to say, any obstructions not affirmatively authorized by law—which is made unlawful by the act, and that part of the section authorizing the courts by injunction to prevent and remove obstructions in navigable rivers provides that "the creation and continuing of any unlawful obstruction in this act mentioned may be prevented, and such obstruction may be caused to be removed by the injunction of any circuit court exercising jurisdiction in any district in which such obstruction may be threatened or may exist." To bring the case within the law authorizing an injunction for the removal of this boom, it is necessary for the court to find the same to be an unlawful obstruction. But the same having been affirmatively authorized by a valid law of this state at the time

of its creation, and being lawfully in existence at the date of the act of congress, the court cannot so find, and is therefore without authority to command its removal.

Let there be a decree dismissing the suit.

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AIKEN et al. v. COLORADO RIVER IRR. CO. et al.

(Circuit Court, S. D. California. February 24, 1896.)

No. 651.

CORPORATIONS—RECEIVERS—STOCKHOLDERS' SUIT.

In a suit brought by stockholders in a corporation against the corporation and its directors to stop alleged fraudulent and illegal transactions of the company, and to compel an accounting from the directors for profits unlawfully realized by them through breaches of their fiduciary obligations, and to procure the rescission of a fraudulent contract and the cancellation of spurious stock, where it is alleged that the directors are tools of and under the control of one of their number, who profits by the frauds alleged, and who maintains his control by means of the spurious stock, the appointment of a receiver to collect and preserve the property of the corporation to meet the charges which the plaintiffs seek to establish is a proper remedy.

A. B. Hotchkiss, for complainants.

W. H. Hart and Aylett R. Cotton, for defendants.

WELLBORN, District Judge. This is a motion by the defendant the Colorado River Irrigation Company to vacate the order heretofore made for the appointment of a temporary receiver, and to dissolve the temporary injunction heretofore granted in said suit. The motion rests entirely upon demurrer, and therefore the allegations of the bill must, for the purposes of this hearing, be accepted as true. I shall not undertake to review the numerous grounds of the motion as therein stated. None of them, in my opinion, are tenable. I think that the facts set forth in the bill present a proper case for the interposition of a court of equity, and that the appointment of the receiver was both within the jurisdiction of the court and justified by the exigencies of the case. The bill does not ask a dissolution of the corporation, or a statutory receivership to wind up its business. All that it seeks to accomplish through the receiver is the collection into his hands and preservation of the property of the corporation to meet the equitable charge or lien which plaintiffs insist they will ultimately establish against such property. It is the ordinary stockholders' action to stop, according to the allegations of the bill, fraudulent and illegal transactions of the company, and to compel an accounting from certain directors for profits unlawfully realized by them through breaches of their fiduciary obligations, and to procure the rescission of a fraudulent contract, and the cancellation of certain spurious stock. The directors thus charged with betrayals of their trust are made parties to the bill. While it is true that the substantial relief prayed for is largely

against one of these directors, John C. Beatty, and upon liabilities from him nominally direct to the corporation, yet the right of the plaintiffs to enforce these liabilities in their own names results from the alleged facts that, said corporation being under the control of directors, who are the "instruments and tools of said Beatty," will not, by suit or otherwise, redress the wrongs complained of, and that by means of said spurious stock said Beatty is enabled to perpetuate said control. To a board of directors or a body of stockholders thus constituted and influenced, formal demand for remedial action in the corporate name against the wrongdoers would be mere idle ceremony not required by law. The bill, however, does allege that earnest efforts have been made on behalf of the complainants to induce the directors of said company to institute in the name of the company appropriate proceedings against the defendant Beatty, but that they have neglected and refused to do so, for the reason that they are under the complete control and domination of said defendant. In *Hawes v. Oakland*, 104 U. S. 460, the court, after declaring that, in order to maintain a suit of the character therein discussed, the stockholder must make honest efforts to induce immediate action on the part of the directors, and, failing in this, then on the part of the stockholders as a body, proceeds as follows: "And he must show a case, if this is not done, where it could not be done, or it was not reasonable to require it." The facts of the present case amply fulfill this requirement. It may be further observed, in this connection, that the bill of complaint complies fully with equity rule 94 in alleging that each of the complainants was a shareholder at the time of the transaction complained of, and that the suit is not a collusive one to confer upon this court jurisdiction of a case of which it would not otherwise have cognizance. The ultimate objects of the bill being such as above indicated, a temporary receivership is clearly an authorized and appropriate incident to the relief sought. The decision in the *French Bank Case*, 53 Cal. 495, upon which the defendant largely relies, is not, I think, applicable here. There, the plaintiff, who was a creditor and member of the corporation, sued to recover judgment for his debt, and to have the corporation declared insolvent, and a receiver appointed to take charge of all the property and business of said corporation, and wind up its affairs, the main ground of the relief sought being the corporation's insolvency. The decision of the court was simply to the effect that, for the purpose and upon the ground stated, the court had no jurisdiction to appoint the receiver. That the decision was intended to be limited to the precise facts before the court is shown in the following extract from the opinion:

"The corporation itself being the sole party defendant, the trustees—those persons upon whom the management of its affairs is devolved—are not parties, nor is any relief sought against them personally. That there is no inherent power in the district courts, as being courts of equity, to appoint a receiver in such a case as that presented by the complaint of Gallagher, is therefore apparent both upon principle and authority."

The court quotes with approval the language of Chancellor Kent:

"That the persons who, from time to time, exercise the corporate powers, may, in their character of trustees, be accountable to this court [the court of chancery] for a fraudulent breach of trust."

And then adds:

"And in exercise of these admitted equity powers of the court, referable to the well-known grounds upon which its jurisdiction ordinarily proceeds, embracing the cognizance of fraud, accident, trust, and the like, the rights of natural persons injured or put at hazard through corporate proceedings unauthorized by law, will find ample protection and redress." *French Bank Case*, 53 Cal. 551.

The construction which I have placed upon the *French Bank Case* seems to be confirmed by positive expressions of the supreme court of California in a later case, where it is said:

"But it has never been held that creditors and stockholders of banking corporations have no remedy, independent of the bank commissioners' act, against the abuses here charged. We know of no case in which this court has held that they were without a remedy in a court of equity, and certainly nothing of the sort was decided in the only case to which we have been cited by counsel,—*French Bank Case*, 53 Cal. 495. All that was decided in that case was that a court of equity has no jurisdiction, in a suit by a private person against the corporation alone, to appoint a receiver to wind up its business; the practical effect of such a decree being a dissolution of the corporation,—a result which, it was held, could be accomplished only at the suit of the state. But that an action might be maintained against the directors of a corporation in a proper case was expressly conceded. *People's Home Sav. Bank v. Superior Court of City and County of San Francisco*, 103 Cal. 34, 36 Pac. 1015.

In the present suit, the bill of complaint, whose scope and general features I have already adverted to, clearly presents a "proper case" for equitable cognizance, and shows, unquestionably, that complainants have capacity to maintain a stockholders' suit, within the rules and principles declared in the leading case of *Hawes v. Oakland*, 104 U. S. 460. With such a high precedent supporting the bill, further citation of authorities to that end is unnecessary. For an epitomized account, however, of the origin and development of the doctrine enunciated in *Hawes v. Oakland*, see *Cook, Stock & Stockh.* (2d Ed.) §§ 644b, 645.

As already stated, the receivership is merely a conservative provision, incidental to the main object of the bill, and, I think, clearly justified by the facts of the case. The exigencies upon which a court of equity ordinarily appoints a receiver of the property of a corporation, have been stated thus:

"Independently of statutory authority, a court of equity will ordinarily appoint a receiver of the property of a corporation in only seven cases: \* \* \* Thirdly. At the suit of persons interested, whether as stockholders or creditors in the property, where there is a breach of duty by the directors, and an actual or threatened loss. \* \* \* Fifthly. Where for a long time a corporation has ceased to transact business, and its officers have ceased to act." 1 *Post. Fed. Prac.* 397, and cases cited.

The allegations of the bill bring this case within each of these two classes.

The facts that the receiver resides in the state of New York, and was not required to give bond in this jurisdiction, were matters

entirely within the discretion of the court, and furnish no ground for vacating the order appointing the receiver.

The point made by defendant in its brief that this court has no jurisdiction of the subject-matter of the bill, because it appears therefrom that at the commencement of the action, the United States court of the Southern district of New York had acquired jurisdiction of said matters, is not well taken. The circuit court of New York is the court of primary jurisdiction, and the suit here ancillary. Such ancillary proceedings, outside of the primary jurisdiction, are too strongly fortified by principles of comity, and too amply sustained by precedents, to be now successfully called in question.

The motion to dissolve injunction and vacate order appointing receiver is denied.

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PARK v. NEW YORK, L. E. & W. R. CO.

FARMERS' LOAN & TRUST CO. v. SAME.

(Circuit Court, S. D. New York. September 5, 1895.)

1. CONTRACTS—INTERPRETATION—EXPRESS BUSINESS.

Prior to 1888 the express business of the E. R. R. was carried on by the E. Express Co. under a contract with the E. R. Co. On March 16, 1888, the W. Express Co. made a contract with the E. Express Co. by which it assumed the latter company's obligations under the contract with the railroad company, and immediately afterwards the W. Co. made a contract directly with the railroad company for the conduct of the express business. By this contract it was agreed that, in consideration of a percentage of the gross receipts of the express business, the railroad company would furnish facilities for such business, and carry the express matter on its passenger trains, and that in case the amount of express matter should be too large to be conveniently carried on such trains, or if competition with other express companies should make it necessary, the railroad company would run special trains, so arranged as to enable the express company to compete with its rivals, and that, if the railroad company's percentage of the receipts from the business of such trains should be less than the cost of running the same, the express company should pay the difference. In a subsequent clause of the contract the railroad company agreed that it would keep its equipment and train service in such a state of efficiency as would enable the express company to compete successfully with its rivals. At the time this contract was executed, special express trains were being run each way between the termini of the road. Shortly after the making of the contract the railroad company presented bills to the express company for the expense of these trains in excess of the railroad company's receipts therefrom. The express company declined to pay the same, and, as part of a settlement of various differences, it was agreed that the bills should be withdrawn, and that the railroad company would continue running the trains without extra charge. Subsequently it became necessary, in order to enable the express company to compete with its rivals, to expedite the running of these trains. The length of the railroad between its termini, and the character of its road, were such that under equal conditions it could not make as good time as some of the competing lines, but it was conceded to be possible to make the service on the special express trains better than it was. *Held*, that the general provisions of that part of the contract which required the railroad company to maintain such a train service as to enable the express company to compete with its rivals were controlled by the specific provisions relating to special express trains, and payment of the extra cost thereof by the express company;

that the subsequent agreement of settlement did not absolve the express company from obligation to pay for all further improvement in the train service which might become necessary; and that the railroad company was not bound to expedite the service of the special express trains, except upon payment of the increased cost by the express company.

2. SAME.

The contract between the railroad company and the W. Express Co. provided that it should apply to certain named lines of road, and to all others which the E. R. Co. should lease, operate, or control, or over which it should have running arrangements. The E. R. Co. owned stock of, and had running arrangements with, another road, which had also a separate contract with the E. Express Co., which was assigned to the W. Express Co. at the time its contract with the E. R. Co. was made, and was recognized by the latter as existing. *Held*, that the fact that such road would, at the expiration of its special contract, come under the terms of the E. R. Co.'s contract, as a controlled road, did not make the E. R. Co. responsible for violations thereof occurring during its continuance.

Frederic B. Jennings, for the motion.

Allan McCulloh, opposed.

LACOMBE, Circuit Judge. This is an application by the receivers of the New York, Lake Erie & Western Railroad Company (hereinafter called the "Erie Railroad Company") for instructions relative to a contract made between the company and Wells-Fargo Company on March 16, 1888, for the conduct of an express business over the lines of the railroad company. Under the terms of this contract the express company agreed to pay to the railroad company 40 per cent. of the entire gross earnings received from the operation of the express business over the lines covered by the contract. On the same day (March 16, 1888) a further contract was made, the two contracts being parts of the same transaction, whereby the express company guaranteed that the proportion of gross earnings to be paid to the railroad company under the first-named contract should amount to not less than \$500,000 a year; that is to say, \$41,666.66 a month. For the months of July, 1894, to February, 1895, inclusive, the express company has not paid the full amount of the minimum guaranty for which provision is made in the contract above referred to. The whole amount claimed for said months is \$333,333.28, of which the sum of \$296,542.59 has been paid, leaving a balance claimed by the receivers amounting to \$36,790.69, wherefore the receivers ask the instructions of the court. The relations of the two companies always have been, and, despite existing differences, are, amicable; and by arrangement between counsel the express company has answered the petition of receivers, and been heard upon the application, apparently with the expectation that upon the court's construing the contract all differences between the parties to it can be mutually adjusted without litigation. The express company has paid to the receivers the full 40 per cent. of the gross earnings provided for, which, however, did not amount to the minimum guaranty. It has declined to make further payments on account of said eight months, to offset losses which it has sustained by reason, as it contends, of the failure of the railroad company and the receivers to perform the terms

of the contract upon their part. The affidavits contain many statements of facts which are controverted, and are largely taken up with averments on one side, and explanations or contradictions on the other, of general defective and inefficient service furnished by the receivers. The argument, however, was confined to the two main averments hereinafter set forth, as to which there is no dispute as to the facts. Upon these, and upon these only, can the court undertake to express an opinion. Disputed questions of fact may best be disposed of otherwise than upon affidavits, and, when the main points of difference are settled by a construction of the contract accepted by both parties, these minor contentions will no doubt be adjusted without the intervention of the court.

The main grounds upon which the express company resists the claim of the receivers are these: (1) Loss of business arising from the refusal of the receivers to expedite the train service over the lines of the railroad. (2) Losses arising by reason of the strike at Chicago in the summer of 1894.

Inasmuch as the several contracts between the companies must be construed in the light of the surrounding circumstances, a somewhat full review of the facts is necessary.

Prior to 1888 the express business of the railroad was transacted, under contract with the railroad company, by the Erie Express Company, which also had a contract with the Chicago & Atlantic Railroad Company, dated May 15, 1887, the two roads making together a continuous line from New York to Chicago. This contract between the Erie Express and the Chicago & Atlantic contained explicit and comprehensive provisions as to the character of service to be rendered, and the manner in which the business should be conducted, and reserved to the Chicago & Atlantic, as consideration for the rights and privileges and facilities thereby granted, 40 per cent. of the gross earnings of the express company for the distance carried over the Chicago & Atlantic Railway. This contract was to continue in force for 10 years, and thereafter, unless and until terminated by 60 days' notice in writing. It contained a clause providing that in case the New York, Lake Erie & Western Railroad Company should contract with any other express company (than the Erie Express Company) for the conduct of express business over its line, the Erie Express Company should have the right to assign its contract with the Chicago & Atlantic to such other express company, which should have and enjoy all the rights and privileges, and be subject to all the covenants and conditions, therein provided to be enjoyed and performed by the Erie Express; it being "mutually understood and agreed that, in case such assignment is made, it shall be upon condition that the company to which said assignment is made shall agree that from and after the date of such assignment the minimum sum to be paid the railway company hereunder by such company shall be \$36,000 per year." The terms of the contract of the Erie Railroad Company with the Erie Express Company do not appear, nor does the date of its expiration. On March 16, 1888, the Erie Express Company executed a written agreement with the Wells-Fargo Com-

pany, whereby, in consideration of the assumption by Wells-Fargo Company of all the obligations imposed upon the Erie Express Company by the contract of May 15, 1887, with the Chicago & Atlantic, and of payment of the full value of the Erie Express Company's plant, it assigned to Wells, Fargo & Co. its good will and plant, and also the contract with the Chicago & Atlantic Railway Company, " \* \* and also all its rights, title, and interest in and to all other contracts, agreements," etc., " \* \* \* under or by virtue of which it carried on the express business on the lines of New York, Lake Erie & Western Railroad Company, the Chicago & Atlantic Railway Company, and any and all other lines of railroad whatsoever." Assuming the contract between the Erie Express Company and the Erie Railroad Company to be assignable, this last-quoted agreement transferred its privileges and obligations to the Wells-Fargo Company; but, instead of continuing to operate under the older contract, Wells-Fargo Company itself entered into the new contracts with the Erie Railroad which now call for construction. No such new contracts were made by Wells-Fargo Company with the Chicago & Atlantic, but it continued operations on that railroad under the contract assigned to it by the Erie Express Company. Subsequently the Chicago & Atlantic was sold out under foreclosure, and bought by a new corporation, called the Chicago & Erie Railroad Company; but so far as appears the contract of May, 1887, which has not expired by its own limitation, was never abrogated by the original parties or their successors in interest, and, in the absence of further information as to proceedings in foreclosure, must be presumed to bind the successors of the Chicago & Atlantic, and to be still in force. Certainly the papers show that it has been treated by both parties to the present controversy as being in force subsequently to the sale in foreclosure, and the acquisition of the road of the Chicago & Atlantic by the Chicago & Erie. The terms of the contract of March 16, 1888, are as follows: By the first clause the Erie Railroad Company agrees:

"First. To provide on each of its daily passenger trains sufficient facilities of the kind customarily furnished to express companies by railroad companies for the transportation of all freight and express matter which may be tendered by the express company to the railroad company, at any station at which passenger trains may stop, and to receive and transport such freight and express matter upon such passenger trains leaving such station next following such tender, and to carry and deliver the same without detention. And said railroad company further agrees that in case the amount of freight and express matter so tendered for transportation by said express company shall be in excess of the amount that can conveniently be carried upon the regular passenger trains of said railroad company, or if competition with other express companies shall make it necessary in order to enable said express company to retain its due and fair share of the express business between any points on said lines, the railroad company will run special express trains between such points, leaving and arriving at such time as will enable the express company to compete for business with express companies having similar trains run over railroads upon which such other companies may be doing an express business. If the shares of the earnings of such special express train accruing to the railroad company at the rate hereinafter fixed shall be less than the actual cost of running such train, then the express company shall pay to said railroad company the dif-



ference between such earnings and such actual cost. \* \* \* The lines of road to which this contract shall be applicable are given, together with their respective mileages, in the schedule hereunto attached. And the said railroad company hereby further agrees that, in addition to the lines mentioned in said schedule, this contract shall include any and all other lines of road which it may lease, operate, or control, or over which it shall have running arrangements, during the existence of this contract."

The line of Chicago & Atlantic (now Chicago & Erie) is not included in the schedule annexed to the contract.

By the second clause the express company agrees to pay to the railroad company 40 per cent. of the entire gross earnings received by it in the operation of the express business on said lines included in said schedule, or afterwards acquired in the manner above stated. Succeeding clauses provide in detail for manner of payment; for the carrying of safes, of express messengers and guards; for lighting and heating; for telegrams for agents; for damage claims, and other matters not germane to the question now under discussion. The thirteenth clause provides as follows:

"Thirteenth. It is the intention of this contract to make the operation of the express business over the lines herein mentioned mutually advantageous to the railroad company and express company; and it is understood and agreed that the railroad company shall, to the extent of its ability, assist the express company in acquiring traffic, and also in securing connections, arrangements, and contracts with other railroads and transportation companies. And the railroad company hereby agrees that it will, during the existence of this contract, keep and maintain its equipment, and will keep its train service in such a state of efficiency as will enable the express company to successfully compete with express companies doing business over the lines competitive to the lines covered by this contract, and the express company will, to the extent of its ability, assist the railroad company in securing freight and passenger business; and it is agreed and understood that the express company shall not make contracts with lines competitive with said railroad company for the transaction of an express business, except upon consultation with and approval of the railroad company, and except, further, in case railroad companies with which the express company has contracts covering after-acquired lines should, by extension, lease, or trackage arrangements, become competitive with said railroad company. It is further agreed and understood that the express company will forward by the lines of the railroad company all its business, foreign and domestic, for points east of Chicago, reached by said lines of said railroad or its connections, and, in like manner, will send all its west-bound matter originating east of Chicago by way of said lines, except as hereinabove provided. But this provision shall not be construed to compel the express company to use the lines of the railroad company for through business between New York and Chicago, if, by reason of the expiration or determination of the contracts now existing, or the failure or inability of the railroad company to secure another route, the express company should lose the right to do the express business between the western terminus of the lines of the railroad company and Chicago."

The collateral contract of March 16, 1888, between the same parties, guarantees the payment by Wells-Fargo Company to the Erie Railroad of \$500,000 in cash, as a further consideration for entering into the main contract, and that the proportion of gross earnings to be paid under its provisions "shall amount to not less than \$500,000 yearly for the lines included in the schedule attached to said contract."

At the time these contracts were made, two special express trains (Nos. 13 and 14) were being run one each way between New

York and Chicago. Apparently, the service by these two trains has since been improved, but still greater improvements in the service of similar trains run on other roads prevent the express company from competing successfully with other express companies using those roads. It is conceded that it is possible to further expedite the service by Nos. 13 and 14, and the receivers state that they are willing so to do, if repaid the additional expense to the railroad of such improvements. As before stated, the question of a right under the contract to quicker service by those trains only will be discussed. It was a fact well known, of course, to both parties, when the contract was entered into, that the distance from New York to Chicago was greater by the Erie and Chicago & Erie than by competing roads, and made still greater running time, by reason of more difficult grades and curves; and that fact should not be lost sight of in construing the thirteenth clause, above quoted. It must have been fully understood by both parties that if all the railroads running from New York to Chicago maintained their lines in the highest state of perfection, used the very best engines, cars, equipment, and appliances known to the art, and arranged for the running of their trains with the greatest skill as to adjustment of loads, hours of departure, etc., it would not be possible for the Erie to make as quick time between the two termini as could be made by a shorter line. The provision in that clause for a train service in such a state of efficiency as will enable the express company to successfully compete, etc., while calling for a service relatively the best, certainly does not mean that the railroad shall accomplish the impossible, by maintaining a service better than the best. The present service by trains 13 and 14, however, is concededly not the best practicable, and should be improved, and the only question now to be decided is whether the additional cost of expediting these trains should be borne by the railroad or the express company. If the thirteenth clause stood alone, the railroad company might fairly be required to improve this service at its own expense; for that clause calls for an express service unlimited by the exigencies of the other business, freight and passenger, carried on by the railroad company. But the phraseology of the thirteenth clause is general, while that of the first clause is specific; and though both are to be construed together, and all clauses of the contract to be given effect according to the fair import of its language, if there be inconsistency between general and specific provisions the latter will control, to the extent, at least, that they are plainly specific. These two trains are specifically provided for in the latter half of the first clause as "special express trains," and whatever improvements may be required to bring up the service of those trains to the standard prescribed in such first clause, or even in the thirteenth or general clause, it is expressly provided that the difference between what the railroad company earns by running them, and the cost of so running them, shall be paid by the express company. It would be unwise, in advance of such improvements in the service of these two trains as the receivers offer to make, to

express an opinion as to the precise degree of efficiency which the contract entitles the express company to exact, but that the increased cost of securing such efficiency, if any "special express trains" such as the first clause calls for, shall be borne by the express company, is a plain requirement of the contracts of March 16, 1888.

It further appears that, not long after the making of this contract, the railroad company presented bills to the express company for the difference between the earnings and the actual cost of running said two trains, which, as was said before, had been regularly run on the road during the time of the Erie Express Company. The Wells-Fargo Company declined to pay, and that claim, with other differences arising between the companies, was adjusted by a further contract dated November 1, 1889. That contract recites that questions have arisen between the parties as to the true meaning and construction of certain clauses of the two agreements (the main contract and the contract of guaranty) entered into March 16, 1888, which differences the contract of November 1, 1889, is to harmonize. It provides that for a limited period the minimum guaranteed shall be \$450,000, instead of \$500,000; manifestly not an agreement as to the meaning of the former contract, but a distinct modification of its terms. It contains further provisions as to sharing the loss or damage sustained by an accident at Shohola; as to the express company's maintaining an accounting department; as to the transportation of milk, garden, or other products; and as to the interpretation to be given to the seventh paragraph of the main contract. Its second clause reads as follows:

"Second. The railroad company agrees to withdraw the bill which it has rendered against the express company for the difference between the earnings and actual cost of running trains between New York and Chicago now known as trains 'Nos. 13 and 14,' and will continue them, or a similar service, making no charge for the same."

This paragraph undoubtedly modified the original contract so as to require the railroad company to continue the two special express trains which it had put on the road before the Wells-Fargo Company succeeded the Erie Express, and to run them so as to furnish service similar to that already afforded by them, without any charge to the express company. But it would be too broad a construction of the contract of November 1, 1889, to hold that the railroad company thereby assumed the obligation of expediting and improving the service of those two trains, to an unlimited extent, entirely at the cost of the railroad company, no matter how great that cost might be. It would need much plainer language than is here employed to warrant such a construction.

The other question to be decided on this application is whether the express company may offset against the claim now presented its losses sustained in consequence of interruption to business or diminution of earnings arising by reason of the strike in Chicago in the summer of 1894. It seems from the affidavits that such interruption as there was in consequence of the strike occurred on

the line of the Chicago & Erie. The application of a similar rule of interpretation to that already employed disposes of this question. Assuming that either by reason of the Erie Railroad's ownership of the stock of the Chicago & Erie, or because of its having running arrangements with the latter road, the line of the Chicago & Erie would come within the general enumeration at the close of paragraph 1 of the contract of March 16, 1888, the mutual rights and obligations of the parties are still to be determined by the specific and exclusive contract of 1887, which makes special provision for the express business to be carried on upon the line of the Chicago & Erie. That contract was never abrogated by the original parties to it. It was continued in force by express assumption of its obligations upon the assignment to Wells-Fargo Company, which was executed on the same day as the contract of March 16, 1888, with the Erie Railroad. Its burdens have been assumed and discharged by the Chicago & Erie, and it has not been terminated by the circumstance that subsequent arrangements between the Chicago & Erie and the Erie Railroad are such that, upon the expiration of the special contract for the former line, the Wells-Fargo Company might be entitled to demand service from it under the general contract for lines not enumerated in the schedule. The terms of the contract of guaranty seem to indicate that such was the intention of the parties, for the \$500,000 as minimum of receipts guarantied is restricted to the lines enumerated in the schedule attached to the contract of March 16, 1888, which does not include the line now operated by the Chicago & Erie. Evidently there was no intention to abrogate the special contract which already provided for a minimum from that line in advance of its expiration under its own terms. All questions, therefore, as to liability for losses by reason of strikes sustained on the line of the Chicago & Erie, should be left to be determined between that road and the Wells-Fargo Company. The receivers, therefore, are instructed that, so far as appears, neither the failure to expedite the trains 13 and 14 so long as Wells-Fargo Company declines to pay the extra costs, nor the losses sustained by the strike, are an answer or offset to their claim for the guaranteed minimum. No opinion, however, is expressed as to the disputed questions of fact, which deal with service other than that by "special express trains."

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SAVAGE v. WORSHAM.

(Circuit Court, S. D. California. February 24, 1896.)

No. 580.

PUBLIC LANDS—CANCELLATION OF PATENT—INTEREST IN LAND.

Complainant filed a bill against the patentee of a tract of public land, seeking to have the patent declared void on the ground of frauds alleged to have been practiced by defendant on the land department in obtaining it, and to be himself declared entitled to the land by virtue of an alleged preference right under the act of congress of May 14, 1880 (1 Supp. Rev. St. 282), giving such right to one who has contested, paid the fees, and

procured the cancellation of a pre-emption, homestead, or timber-culture entry. Complainant's bill failed to show that he had ever contested defendant's entry. It showed affirmatively that defendant's entry had not been canceled, and it did not aver that any evidence of the frauds which were claimed to vitiate defendant's patent had ever been presented to the register or receiver of the land office. *Held*, that complainant had not shown any right to or interest in the land.

William E. Savage, in pro. per.  
Chapman & Hendrick, for defendant.

**WELLBORN, District Judge.** The property in controversy in this suit is the S. E.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$  of section 22, township 2 S., range 11 W., San Bernardino meridian, and situated in Los Angeles county, Cal. The defendant holds the legal title to said land, under a patent from the United States issued August 14, 1893; and the object of the suit is to charge him as a trustee of complainant, or, as indicated in the prayer of the bill, to declare said patent void on account of alleged mistakes of law and fact committed by the land department, and fraud and imposition alleged to have been practiced upon said department by the defendant. Complainant derives his warrant for thus attacking defendant's title from a preference right of entry claimed by him under section 2 of the act of May 14, 1880 (section 2, Act 1880; 1 Supp. Rev. St. U. S. 282). This section reads as follows:

"In all cases where any person has contested, paid the land office fees, and procured the cancellation of any pre-emption, homestead or timber-culture entry, he shall be notified, by the register of the land office of the district in which such land is situated, of such cancellation, and shall be allowed thirty days from the date of such notice to enter said lands, provided, that said register shall be entitled to a fee of one dollar for the giving of such notice, to be paid by the contestant, and not to be reported."

The rule is well settled that the court will not interfere with the title of a patentee of the United States unless the adverse claimant shows that, but for the error or fraud or imposition of which he complains, he would be entitled to the patent. It is not enough to show that the patent should not have been issued to the patentee. *Lee v. Johnson*, 116 U. S. 48-53, 6 Sup. Ct. 249; *Bohall v. Dilla*, 114 U. S. 47-51, 5 Sup. Ct. 782; *Savage v. Worsham*, 66 Fed. 852. Assuming, without deciding, however, that a preference right of entry under the aforesaid act of 1880 is such an interest as will authorize an attack upon a patent obtained adversely thereto through fraud or mistake, the question arises, does the bill show that complainant has, or ever had, the preference right of entry which he claims? To the acquisition by him of this right, three things are necessary: First, he must have been a contestant of the defendant's homestead entry; second, he must have paid the land-office fees; and, third, he must have procured the cancellation of said entry (section 2, Act 1880, *supra*). The bill fails to show either the first or third of these prerequisites. With reference to the first, it is to be observed that the secretary of the interior on September 17, 1889, expressly held that the complainant was not a contestant, while, so far as concerns the third, the whole bill is framed on the theory, and directly avers, that the defendant's homestead entry was never canceled, but, on the contrary, ripened into a

patent. The complainant insists, however, that, but for mistakes of law and fact in the land department, and fraud practiced thereon by defendant, said homestead entry would have been canceled, and that complainant would thereby have become a successful contestant. Placing upon the allegations of the bill the most favorable construction for the complainant, all that can be claimed is that the defendant's final proof for the commutation of his homestead entry to cash entry was insufficient, in the matter of residence and cultivation, to entitle him to the commutation applied for. But there is not anywhere in the bill even a pretense that any such facts were ever shown to the register or receiver as would have justified the cancellation of the defendant's homestead entry. There is a wide distinction between the cancellation by the land department of a homestead entry, and a refusal by the same authority of an application by the settler for patent before the expiration of the homestead limit of five years. To justify the former action,—that is, cancellation of a homestead entry,—affirmative testimony must be adduced that the settler has changed his residence or abandoned the land for more than six months. Rev. St. § 2301. There is not the slightest allegation in the bill that such testimony was ever submitted to the land department. The most and all that the bill charges in this respect is that the defendant's final proof was not sufficient to authorize the commutation of his entry. It is true, the bill alleges that this final proof was willfully false, and that in point of fact the defendant did not reside on said land, or cultivate the same; but there is no averment, or even the semblance of an averment, that proof of either of these facts was ever made, or attempted to be made, by the complainant or any one else. So far as the disclosures of the bill go, they sustain, rather than antagonize, the ruling of the land department that the complainant was not a contestant, within the meaning of the second section of the act of 1880.

I am of opinion that the bill does not show that the complainant has, or ever had, any right to or interest in said land. This view of the case renders it unnecessary for me to pass upon the other grounds of demurrer urged in defendant's brief. Demurrer sustained, and 20 days allowed the complainant to amend, if he shall be so advised.

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INVESTOR PUB. CO. OF MASSACHUSETTS v. DOBINSON et al.

(Circuit Court, S. D. California. February 24, 1896.)

No. 632.

1. EQUITY PLEADING—FORM OF ALLEGATION—GENERAL DEMURRER.

An allegation of an essential fact in a bill in equity, by way of recital, but in such form that the existence of the fact appears by necessary implication, is good as against a general demurrer.

2. UNFAIR COMPETITION—SIMILAR CORPORATE NAMES.

Complainant, the Investor Publishing Company, alleged in its bill that it had for many years published a trade journal, called "The United States Investor," which had acquired a high reputation and large circulation in the United States and other countries; that defendant the Investor Pub-

lishing Company of California had begun the publication of a similar paper, called "The Investor," at the head of the editorial column of which it placed the words "Published by the Investor Publishing Company"; and that such acts of the defendant had caused confusion in complainant's business, diverted its trade, and caused damage to it. *Held*, that the bill stated a case for equitable relief.

Wells & Lee, for complainant.

Sheldon Borden, for defendants.

WELLBORN, District Judge. The bill of complaint, to which defendants have interposed a general demurrer, alleges, in substance, that the plaintiff is a corporation formed and existing under the laws of the state of Massachusetts, and the defendant company a corporation formed and existing under the laws of the state of California; that, for more than five years last past, plaintiff has published, and still publishes, in the city of Boston, state of Massachusetts, and in the city of Philadelphia, state of Pennsylvania, a weekly trade and financial journal, named "United States Investor"; that said paper, under said name, has become widely and favorably known, throughout the United States, Canada, the republic of Mexico, England, the continent of Europe, and Australia, and that plaintiff has also become widely and favorably known throughout said territory; "that defendant the Investor Publishing Company of California, on or about the 14th day of March, 1894, at the city of Los Angeles, state of California, began the publication of a trade and financial journal under the name of 'The Investor,' and the defendant G. A. Dobinson is the editor in chief of said trade and financial journal. And your orator charges that defendants, by adopting the name of 'The Investor' for such paper, and by printing at the head of its editorial column the words 'Published by the Investor Publishing Company, Incorporated,' the same as your orator's corporate name, has thereby diverted the trade belonging to your orator; that this similarity in the names has produced great confusion in plaintiff's business, and is depriving your orator of the benefit of the reputation acquired by the high character and popularity obtained by your orator among investors and advertisers throughout the United States and elsewhere, whereby your orator has been and is greatly damaged. And your orator further says that he fears, and has reason to fear, that said defendant will continue to use the name and style of 'The Investor Publishing Company,' and will continue to publish the said trade and financial journal under the name of 'The Investor,' and thereby cause irreparable injury to your orator's exclusive right to the corporate name 'The Investor Publishing Company,' and to its exclusive right to the name of 'United States Investor.'" The bill prays that defendant may be decreed to account for and pay over the income and profits unlawfully derived from the violation of plaintiff's rights, and also for an injunction from the further use of the names "The Investor" and "The Investor Publishing Company," or any imitation thereof.

Under their demurrer, defendants insist that plaintiff has not, by the use shown in the bill, acquired such a right to the word "Investor" as precludes, unqualifiedly, the adoption by defendant of a similar name for a like use, but that before defendant's journal could infringe

plaintiff's rights, not conceding, however, even then, an infringement, it would have to be so advertised or published as to confuse it with plaintiff's, and that the only allegation in the bill to this effect is by way of recital, and not a positive averment, and therefore insufficient. The allegation referred to is the latter part of the following clause: "And your orator charges, that defendants, by adopting the name of 'The Investor' for such paper, and by printing at the head of its editorial column the words 'Published by the Investor Publishing Company, Incorporated,'" etc.

In order to correctly pass upon the question of the sufficiency of this allegation, it is necessary, in the outset, to observe and distinguish the respective offices of a general and special demurrer. "The former will be sufficient (although special causes are usually stated) when the bill is defective in substance. The latter is indispensable when the objection is to the defects of the bill in point of form." Story, Eq. Pl. § 455. Accordingly, it has been expressly held that, where an essential fact appears by necessary implication, such a statement of the fact is good, as against a general demurrer. *Amestoy v. Transit Co.*, 95 Cal. 314, 30 Pac. 550. In that case the court says:

"Respondent states the rule to be that only those allegations of the complaint are admitted by the demurrer which are material and which are well pleaded. As a general proposition that is undoubtedly correct, but it must be taken in connection with the other well-established rules of pleading. A complaint which would be obnoxious to a general demurrer would not support a judgment. When the latter question arises, courts have always discriminated between insufficient facts and an insufficient statement of facts; and where the necessary facts are shown by the complaint to exist, although inaccurately or ambiguously stated, or appearing by necessary implication, the judgment will be sustained. Reason requires that this same rule shall be applied in the case of a general demurrer."

Again, in the text-book above mentioned occurs the following:

"In *Baker v. Booker*, 6 Price, 381, Baron Wood said: 'A demurrer only admits matters positively alleged in the bill; not every fanciful pretense suggested.' But this proposition must be taken sub modo; for if a fact be not positively asserted, and yet is material, and is stated in terms which may be deemed reasonably certain in their import, the demurrer will admit them." Story, Eq. Pl. § 452, note 3.

Defendants contend, however, that here, as in all other cases, the bill should be most strongly construed against the plaintiff. The general proposition involved in this statement is unquestionably correct, but it is applicable only where the averment in controversy admits of two interpretations, in which case that one least favorable to the pleader is to be adopted. 1 *Fost. Fed. Prac.* § 106. Such is not the case here. The averment is not susceptible of a double meaning, nor is it obscure. The only objection to it is that it is not direct. This defect, if such it be, is matter of form, and therefore cannot be reached by general demurrer. Whether the allegation would stand, against a special demurrer it is not necessary to determine. All that I now hold is that the allegation is sufficient in the absence of such a demurrer.

Assuming, then, that the bill alleges that the defendant printed, at the head of the editorial column of its journal, "Published by the



Investor Publishing Company, Incorporated," the case made by the bill is substantially as follows: That plaintiff, an incorporated company, has for a number of years published, in the cities of Boston, New York, and Philadelphia, a trade journal called "The United States Investor," and that such journal has become widely and favorably known, throughout the United States and other countries; that, during this period, the defendants, at the city of Los Angeles, Cal., began the publication of a journal called "The Investor," and printed at the head of the editorial column of said journal the words "Published by the Investor Publishing Company, Incorporated"; that these acts of the defendant company have produced great confusion in plaintiff's business, diverted its trade, and deprived it of the benefit of its high character and popularity among investors and advertisers, throughout the United States and elsewhere, and thereby plaintiff has been and is greatly damaged. Do these allegations show such an injury to the plaintiff as a court of equity will redress? is the remaining question to be determined.

That the name of a corporation is an essential part of its being, and that the courts, independent of statutory provision, will protect the corporation in the use of its name, seems to be well settled by the authorities, and the controlling principles in such a case are those applicable to trade-marks. *State v. McGrath*, 92 Mo. 357, 5 S. W. 29; *Farmers' Loan & Trust Co. v. Farmers' Loan & Trust Co. of Kansas* (Sup.) 1 N. Y. Supp. 44; *Celluloid Manuf'g Co. v. Cellonite Manuf'g Co.*, 32 Fed. 94; *Newby v. Railway Co.*, Deady, 609, Fed. Cas. No. 10,144; 4 Cent. Law J. pp. 338, 339; 10 Cent. Law J. pp. 82-84, 104-106, 123-126; *William Rogers' Manuf'g Co. v. Rogers & Spurr Manuf'g Co.*, 11 Fed. 495.

In the first of these cases, the court, at page 357, 92 Mo., and page 29, 5 S. W., says:

"The name of a corporation is a necessary element of its existence, and, aside from any statute, the right to its exclusive use will be protected upon the same principle that persons are protected in the use of trade-marks. *Boone, Corp.* § 32; *Newby v. Railway Co.*, Deady, 609, Fed. Cas. No. 10,144; *Ex parte Walker*, 1 Tenn. Ch. 97; *Holmes, Booth & Haydens v. Holmes, Booth & Atwood Manuf'g Co.*, 37 Conn. 291. In the case last cited, the name of the corporation first organized was 'Holmes, Booth & Haydens,' and was made up of the names of the principal shareholders. Two of the shareholders, Holmes and Booth, with other persons, thereafter organized another corporation, by the name of 'Holmes, Booth & Atwood Manufacturing Company.' The similarity of the two names resulted in confusion, and it was found as a fact that dealers in the market were liable to be misled into the belief that the corporations were the same. On these facts, it was held the new corporation should be enjoined from using the name adopted. These cases show the rights that arise from the use of a corporate name."

In *Newby v. Railway Co.*, supra, the court says:

"The corporate name of a corporation is a trade-mark from the necessity of the thing, and, upon every consideration of private justice and public policy, deserves the same consideration and protection from a court of equity. Under the law, the corporate name is a necessary element of the corporation's existence. Without it a corporation cannot exist. Any act which produces confusion or uncertainty concerning this name is well calculated to injuriously affect the identity and business of a corporation."

In the case next below cited, the court holds, in substance, that while a corporation cannot, for all purposes, acquire an exclusive right to any English word of general meaning, yet it may acquire a proprietary right in a special use to and for which the word has been, by such corporation, appropriated and employed. In that case the court says:

"As to the first point, it is undoubtedly true, as a general rule, that a word merely descriptive of the article to which it is applied cannot be used as a trade-mark. Everybody has a right to use the common appellatives of the language, and to apply them to the things denoted by them. A dealer in flour cannot adopt the word 'flour' as his trade-mark, and prevent others from applying it to their packages of flour."

And speaking of the word which was there in controversy, namely, "celluloid," the court further says:

"As a common appellative, the public has a right to use the word for all purposes of designating the article or product, except one,—it cannot use it as a trade-mark, or in the way that a trade-mark is used, by applying it to and stamping it upon the articles. The complainant alone can do this, and any other person doing it will infringe the complainant's right. Perhaps the defendant would have a right to advertise that it manufactures celluloid. But this use of the word is very different from using it as a trade-mark stamped upon its goods. It is the latter use which the complainant claims to have an exclusive right in; and if it has such right (which it seems to me it has), then such a use by the defendant of the word 'celluloid' itself, or of any colorable imitation of it, would be an invasion of the complainant's right. \* \* \* The subject is well illustrated by the case of *McAndrew v. Bassett*, 4 De Gex, J. & S. 380. The plaintiffs produced a new article of liquorice, and stamped the sticks with the word 'Anatolia'; some of the juice from which they were made being brought from Anatolia, in Turkey. The article becoming very popular, the defendants stamped their liquorice sticks with the same word. Being sued for violation of plaintiff's trade-mark, one of their defenses was that no person has a right to adopt as a trade-mark a common word, like the name of a country where the article is produced. Lord Chancellor Westbury said: 'The argument is merely the repetition of the fallacy which I have frequently had occasion to expose. Property in the word for all purposes cannot exist; but property in the word as applied by way of stamp upon a particular vendible, as a stick of liquorice, does exist the moment the article goes into the market so stamped, and there obtains acceptance and reputation, whereby the stamp gets currency as an indication of superior quality, or of some other circumstance which renders the article so stamped acceptable to the public.' " *Celluloid Manuf'g Co. v. Cellonite Manuf'g Co.*, 32 Fed. 98, 99.

At page 100, the court further says:

"The defendant's counsel in the present case placed great reliance on the decision in *Leather-Cloth Co. v. American Leather-Cloth Co.*, 11 H. L. Cas. 523. After carefully reading that case, I do not see that it necessarily governs the present. No question was made as to the names of the companies. The trade-mark was a large circular label stamped upon the cloth, containing, within its circumference, the name of the former company which carried on the manufacture, and the places where it had been carried on, thus: 'Crockett International Leather-Cloth Company, Newark, N. J., U. S. A.; West Ham, Essex, England.' Within the circle were, first, the figure of an eagle, displayed, under the word 'Excelsior'; and then certain announcements in large type, as follows: 'Crockett & Co., Tanned Leather Cloth; patented Jan'y 24, '58. J. R. & C. P. Crockett, Manufacturers.' The court held this label to be partly trade-mark and partly advertisement; and as the cloth was not patented, and J. R. & C. P. Crockett were not the manufacturers, the court was inclined to agree with the lord chancellor that these statements invalidated the label as a trade-mark; but Lords Cranworth and Kingsdown preferred to place their decisions against the plaintiff on the ground that the defend-

ants' label did not infringe it. They pointed out differences in figure, and showed that the announcements were different; and the defendants' announcement being 'Leather Cloth Manufactured by Their Manager, Late with J. R. & C. P. Crockett & Co.,' without reference to a patent, Lord Kingsdown said: 'The leather cloth, of which the manufacture was first invented or introduced into the country by the Crocketts, was not the subject of any patent. The defendants had the right to manufacture the same article, and to represent it as the same with the article manufactured by the Crocketts; and, if the article had acquired in the market the name of "Crocketts' Leather Cloth," not as expressing the maker of the particular specimen, but as describing the nature of the article, by whomsoever made, they had a right in that sense to manufacture Crocketts' leather cloth, and to sell it by that name. On the other hand, they had no right, directly or indirectly, to represent that the article which they sold was manufactured by the Crocketts, or by any person to whom the Crocketts had assigned their business or their rights. They had no right to do this, either by positive statement, or by adopting the trade-mark of Crockett & Co., or of the plaintiffs, to whom the Crocketts had assigned it, or by using a trade-mark so nearly resembling that of the plaintiffs as to be calculated to mislead incautious purchasers.'

Careful examination of the authorities relied on by defendants satisfies me that they do not conflict with the foregoing cases. In *Goodyear's India Rubber Glove Manuf'g Co. v. Goodyear Rubber Co.*, 128 U. S. 598-604, 9 Sup. Ct. 166, cited by defendants, the ruling of the court was to the effect that names descriptive of a class of goods could not be exclusively appropriated by any one, and this principle they held applicable to the words "Goodyear Rubber," declaring them to be "terms descriptive of well-known classes of goods, produced by the process known as 'Goodyear's invention.' " The opinion of the court further quotes with approval the case of *Canal Co. v. Clark*, 13 Wall. 311, where it was held "that geographical names, designating districts of country, could not be appropriated exclusively, as they pointed only to the place of production, and not to the producer." "Could such phrases," said the court, "as "Pennsylvania wheat," "Kentucky hemp," "Virginia tobacco," or "Sea Island Cotton," be protected as trade-marks, could any one prevent all others from using them, or from selling articles produced in the districts they describe under those appellations, it would greatly embarrass trade, and secure exclusive rights to individuals in that which is the common right of many.'" *Goodyear's India Rubber Glove Manuf'g Co. v. Goodyear Rubber Co.*, supra.

Manifestly, the words "Investor" and "Investor Publishing Company" do not fall within either of the above forbidden classes.

The court further points out the principles upon which the owner of a trade-mark is protected in its use, as follows:

"The trade-mark must, either by itself or by association, point distinctively to the origin or ownership of the article to which it is applied. The reason of this is that, unless it does, neither can he who first adopted it be injured by any appropriation or imitation of it by others, nor can the public be deceived.' To the same purport is the decision in *Manufacturing Co. v. Trainer*, 101 U. S. 51. There the court said: 'The object of the trade-mark is to indicate, either by its own meaning or by association, the origin or ownership of the article to which it is applied. If it did not, it would serve no useful purpose, either to the manufacturer or to the public; it would afford no protection to either, against the sale of a spurious in place of the genuine article.' See, also, *Manufacturing Co. v. Spear*, 2 Sandf. 599; *Falkinburg v. Lucy*, 35 Cal. 52; *Choynski v. Cohen*, 39 Cal. 501; *Raggett v. Findlater*, L. R. 17 Eq. 29."

While the name "Investor" does not, "by its own meaning," do so, yet, by its "association" with the Investor Publishing Company of Massachusetts, as clearly set forth in the complaint, it does indicate both the origin and ownership of the journal, and therefore falls within the reasoning of the last quotation.

In the next case cited by defendants, that of Richardson & Boynton Co. v. Richardson & Morgan Co. (Sup.) 8 N. Y. Supp., 53, I find nothing against the principles above indicated. There the court simply held, upon the trial of the case, as a matter of fact, that the similarity of names complained of did not work confusion in or damage to the complainant's business. The following extract from the opinion of the court indicates its ruling, and the grounds thereof, viz.:

"In cases of this description, each contains features peculiar to itself, and the right to relief depends rather upon questions of fact than on questions of law. The rule which governs adjudications in respect to questions such as that presented by the case at bar is reasonably plain, and it is distinctly held that such a similarity of names as is likely to produce confusion in the minds of ordinary unsuspecting persons will be restrained. Therefore the question involved in this case is, was there such a similarity of names? We might indulge in speculation in reference to the likelihood of confusion arising from similarity of these names in the conduct of business, and that such similarity was calculated to deceive and impose upon the public, and upon the purchasers of goods of the character in which the parties to this action were accustomed to deal. But the most satisfactory evidence in reference to the results likely to follow from alleged similarity is evidence of actual cases in which such deception and imposition has occurred. In the case at bar attempts have been made to show that confusion has arisen from the alleged similarity of names; but it is singularly barren of evidence showing that a single customer has been lost to the plaintiff by reason thereof, or any satisfactory evidence that a single person has been deceived into calling in the one store when he intended to visit the other."

In the case at bar, the bill expressly alleges that confusion, loss of trade, and damage have resulted to plaintiff from the similarity of names.

The decision in Koehler v. Sanders, 122 N. Y. 65, 25 N. E. 235, also cited by the defendants, is to the effect that the firm name of the plaintiffs, who constituted a partnership, under the name of the "International Banking Company," was descriptive of a class of business, and therefore not capable of exclusive appropriation. This case, so far as concerns the point stated, is simply in line with that of Good-year's India Rubber Glove Manuf'g Co. v. Goodyear Rubber Co., supra. It is further to be noted that in Koehler v. Sanders the defendants, who, like the plaintiffs, were partners, but under a wholly different name, that of Edward Sanders & Co., did not employ the designation objected to by plaintiffs—"International Bank"—in such a way as to confuse their business with that of plaintiffs, but expressly advertised the "International Bank" as that of Edward Sanders & Co.

In the case of Trust Co. v. Nine (Neb.) 43 N. W. 348, also cited by the defendants, the court simply held that "Nebraska," being a geographical name, could not be exclusively appropriated. The decision, therefore, in that case, does not antagonize, but is in harmony with, the principles enunciated in the other foregoing cases.

To the precedents already cited in support of the bill may be added that of *Investor Pub. Co. v. Simons*, in the circuit court of the United States for the western division of the western district of Missouri, unreported, wherein the court rendered a decree enjoining the defendant from using the words "Investor Publishing Company"; the complainant in said suit being the same company as the complainant herein.

The objection urged in defendants' last brief, that the bill does not show that the defendant corporation was publishing its journal at the time of the institution of the suit, I think, is not well taken. Whether or not the complainant has sufficiently answered this objection by saying that, upon the allegation of the bill, said defendant began the publication of its journal about March 14, 1894, the presumption arises of a continuance of such publication down to the institution of the suit, is unnecessary for me to decide, in the view I take of the matter. An injunction is not the only relief sought for in the bill, but it also prays for an accounting with the defendants. So far as this latter relief is concerned, it does not depend, I apprehend, upon the fact of publication at the time the suit was commenced. The law is well settled that "a demurrer to a bill, for want of equity, will not lie when the complainant is entitled to part of the relief prayed for." *Mercantile Trust & Deposit Co. v. Rhode Island Hospital Trust Co.*, 36 Fed. 863; *Merriam v. Publishing Co.*, 43 Fed. 450.

The demurrer is overruled, and the defendants assigned to answer to the bill at the rule day in April next.

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#### THE ELMBANK.

#### PRICE v. THE ELMBANK.

In re COFRAN et al.

(District Court, N. D. California. March 4, 1896.)

No. 10,639.

#### 1. EQUITABLE ASSIGNMENT OF FUND—ORDERS TO PAY.

An assignment of "all my right, title, and interest in and to any compensation" for certain salvage services, and directing the owners or consignees of the property saved, or any other person into whose hands the fund may come, to pay the assignee \$3,200, is, notwithstanding the general words of the assignment, merely an order to pay a specified sum, and is therefore merely an equitable assignment of a part, as distinguished from a legal assignment of the whole, fund.

#### 2. SAME—PARTIAL ASSIGNMENT OF CHOSE IN ACTION.

An order to pay to a third party a specified amount out of whatever may be realized for salvage services is enforceable in admiralty, as an equitable assignment of part of a fund, and is not subject to the rule at law which forbids the splitting up of causes of action.

#### 3. SAME—BONA FIDE PURCHASERS.

One taking an equitable assignment of part of a fund or chose in action, as security for a pre-existing debt alone, is not a bona fide purchaser for

value, and cannot acquire priority over a previous assignment of the same character, by first giving notice of the assignment to the person holding the fund.

These were petitions by J. W. G. Cofran and Rudolph Neumann, to procure payment of certain sums claimed by them, respectively, out of money decreed to Thomas Price as salvage, in the suit of said Price against the bark Elmbank. See 62 Fed. 306, and 16 C. A. 164, 69 Fed. 104.

Van Ness & Redman, for petitioner Cofran.

Chickering, Thomas & Gregory and Gerstle & Sloss, for petitioner Neumann.

MORROW, District Judge. A decree was entered in this court on July 18, 1895, in favor of the libelant, in accordance with the mandate of the circuit court of appeals, for the sum of \$6,000, less the costs of the appeal. The sum awarded was for certain salvage services rendered by the libelant in putting out a fire in the cargo of sulphur stowed in the hold of the bark Elmbank, while the vessel was being discharged at a wharf in the port of San Francisco. See 62 Fed. 306, for opinion of district court, and 16 C. C. A. 164, 69 Fed. 104, for opinion of the circuit court of appeals. Upon the entry of the decree, the claimants of the ship and cargo, instead of paying the amount of the award to the libelant, and securing a satisfaction of the decree, deposited the sum in the registry of the court, and obtained a full satisfaction of record, and the entry of an order that the several bonds given by the claimants for the release of the vessel and cargo be exonerated. This course appears to have been taken by the claimants in view of certain assignments executed by the libelant before the adjudication of the award, whereby the latter made such transfers to his creditors of his claim against the vessel that the aggregate of these claims is in excess of the sum now remaining in the registry of the court. The claimants, having been released from all liability in the case, are not concerned in the disposition of the award, and the same may be said of the libelant, who has failed to present any petition, or make any application for any part of the proceeds of the decree in his favor. Two petitions have, however, been presented to the court for the balance in the registry, based upon orders or assignments executed by the libelant. One of these assignments is in favor of J. W. G. Cofran for \$1,585.42, and the other is in favor of Rudolph Neumann for \$3,200. The amount in the registry of the court is \$3,054.75, and the court is asked to determine the priority of these assignments, and distribute the sum accordingly. This may be done under the forty-third admiralty rule. *Schuchardt v. Babbidge*, 19 How. 239; *The Lottawanna*, 21 Wall. 558; *The Guiding Star*, 18 Fed. 263; *The E. V. Mundy*, 22 Fed. 173. The petition of Cofran was filed on July 23, 1895, and that of Neumann on July 25, 1895. Cofran's claim is based on an order to pay the sum of \$1,585.42, signed by Price, and

drawn upon "M. J. Brandenstein & Co., and Whom Concerned." It is as follows:

"Thomas Price & Sons.

"San Francisco, June 28, 1893.

"Ship Elmbank, M. J. Brandenstein & Co., and Whom Concerned: Pay to the order of J. W. G. Cofran the sum of \$1,585.42 from any money or moneys which may be awarded to me, or which I may recover from the ship Elmbank <sup>and</sup> cargo service by reason of recent fire aboard said ship. <sub>or</sub>

"[Signed]

Thomas Price."

The instrument under which Neumann claims is as follows:

"San Francisco, June 28th, 1893.

"For value received I hereby assign, transfer, and set over unto Rudolph Neumann, of San Francisco, California, all my right, title, and interest in and to any compensation for services performed by me upon the bark Elmbank in the matter of rescuing said vessel from destruction by fire; and I hereby direct Messrs. M. J. Brandenstein & Co., Mr. C. V. S. Gibbs, adjuster, the owner or owners, consignee or consignees, of said ship, or any other person or persons in whose hands the money for my services shall come, to pay the sum of \$3,200 out of the same to the said Rudolph Neumann, his agent, or attorneys.

Thomas Price."

"Received a copy of within document this 28th day of June, 1893.

"M. J. Brandenstein & Co."

The matter was referred to the commissioner to ascertain the facts and make his report thereon. He finds that both of these assignments were made by Price on the same day, viz. June 28, 1893; that the one to Cofran was made at 8:30 o'clock in the morning, and the one to Neumann at 11 or 12 o'clock of the same day. He recommends, therefore, that the Cofran assignment, being the first in point of time, be paid in full, with his costs, and the remainder be paid to Neumann. Exceptions are presented to this report, by counsel for Neumann on several grounds. In support of these exceptions, it is claimed: (1) That the assignment to Neumann was a legal assignment of an entire fund, while that to Cofran was only an equitable assignment of a part, without the consent of the debtor, and that therefore Neumann's assignment is superior and entitled to priority; (2) that the assignment to Cofran was for part of the fund only, and therefore void, because the debtor was not notified, and did not accept the assignment; (3) that Neumann's assignment and claim are superior to Cofran's, because he first notified the United States marshal and clerk of this court.

It may be noticed, preliminarily, that, in referring to the instruments under which the petitioners claim, counsel speak of them as "assignments." Properly speaking, they are "orders to pay." But an order to pay, when given by a creditor upon his debtor, acts as an equitable assignment of the fund or of the personal property upon which it is drawn. 17 Am. & Eng. Enc. Law, p. 226; and cases there cited.

It becomes important, at the outset, to determine the legal effect of Neumann's assignment,—whether it was to the whole of the fund, or only a part of it. While it purports to be, in the first part of the instrument, an assignment of the whole fund, yet,

In the last part, it is limited to a specified sum, viz. \$3,200, and it directs "Messrs. M. J. Brandenstein & Co., Mr. C. V. S. Gibbs, adjuster, the owner or owners, consignor or consignees of said ship, or any other person or persons in whose hands the money for my services shall come, to pay the sum of \$3,200 out of the same to the said Rudolph Neumann, his agent, or attorneys." It is a well-settled maxim of equity jurisprudence that equity will look through and behind the mere form of a transaction, and scrutinize the substance. Applying this rule of interpretation to the assignment to Neumann, looking through the mere legal form of the words employed, and taking the instrument as a whole, it is difficult to escape the conclusion that it was intended as an assignment *pro tanto*; that is, to the extent of \$3,200. Otherwise, why specify any sum? The amount of the award which libellant might be adjudged entitled to was then undecided and undiquidated; and if it was intended that Neumann should get the whole award, why interpolate this limitation as to amount? The language of the sixth subdivision of Neumann's petition confirms this view. It is as follows:

"That on the 28th day of June, 1893, Thomas Price, the libellant herein, by an instrument in writing sold, assigned, and set over to this petitioner all his right, title, and interest in his said claim for salvage against the said bark Elmbank and her cargo, and also in the judgment and decree rendered therein, to the amount and sum of thirty-two hundred dollars."

I am of the opinion that the general words in the assignment were inserted as a matter of precaution, and to give priority to this assignment, to the extent of \$3,200, over any others that there might be. The designation of persons who are directed to pay this amount, includes every one who, in the regular course of proceedings, could obtain possession of the fund, and they are directed to pay the sum of \$3,200, and not the whole award. Both assignments were, therefore, orders to pay specified sums of money out of the salvage award when it should be determined, and both were given, so far as appears, for pre-existing debts. In other words, they were given as security for debts previously due by Price to Cofran and Neumann. It may be observed that there does not appear to be any direct proof that the consideration for Neumann's assignment was a pre-existing debt, but that such was the fact seems to be conceded by counsel for Neumann. This view of the nature of Neumann's assignment practically disposes of the first proposition contended for by his counsel, except as it relates to the validity of an assignment of part of a fund not yet in existence, without notifying and obtaining the assent of the holder of the fund, which is precisely the same question presented in the second proposition and will now be considered.

To fully understand this contention, the facts and the nature of this proceeding must first be clearly comprehended. This is not an action at law, but it is a proceeding of an equitable nature to distribute a fund in the registry of the court. The proceeding is in the nature of interpleader. The case of *Mandeville v. Welch*, 5



Wheat. 277, and other cases following the doctrine laid down in that case, cited by counsel for Neumann, to the effect that there can be no assignment of a part of a fund or debt without the consent of the debtor, were actions at law. The rule at law is undoubtedly correct, as it is laid down in *Mandeville v. Welch* in the following language:

"Where the order is drawn, either on a general or a particular fund, for a part only, it does not amount to an assignment of that part, or give a lien as against the drawee, unless he consent to the appropriation by an acceptance of the draft; or an obligation to accept may be fairly implied from the custom of trade or the course of business between the parties, as a part of their contract. The reason of this principle is plain. A creditor shall not be permitted to split up a single cause of action into many actions without the assent of his debtor, since it may subject him to many embarrassments and responsibilities not contemplated in his original contract. He has a right to stand upon the singleness of his original contract, and to decline any legal or equitable assignments by which it may be broken into fragments. When he undertakes to pay an integral sum to his creditor, it is no part of his contract that he shall be obliged to pay in fractions to any other persons."

But the rule of law against "splitting up causes of action" has, obviously, no application to an equitable proceeding of this character. As is well said in the case of *Superintendent v. Heath*, 15 N. J. Eq. 22:

"The rule that, at law, assignment of part of a claim cannot be enforced, has no application in an equitable proceeding for the apportionment of a fund."

In *Bank v. McLoon*, 73 Me. 498, this language is used:

"In a court of equity, the objections to a partial assignment of a demand, which are formidable in a court of law, disappear. In equity, the interests of all parties can be determined in a single suit. The debtor can bring the entire fund into court, and run no risks as to its proper distribution. If he be in no fault, no costs need be imposed upon him, or they may be awarded in his favor. \* \* \* We think, upon reason and principle, partial assignments should be sustained in a court of chancery, in all cases where it can be done without detriment to the debtor or stakeholder, whenever equitable and just results may be accomplished by it."

See, to same effect, *Canty v. Latterner*, 31 Minn. 239, 17 N. W. 385.

In equity, the assignment of a part of a debt or fund is good, and will be enforced. *Grain v. Aldrich*, 38 Cal. 514; *O'Dougherty v. Paper Co.*, 81 N. Y. 496, 500; *Risley v. Bank*, 83 N. Y. 318; *Daniels v. Meinhard*, 53 Ga. 359; *Etheridge v. Vernoy*, 74 N. C. 800; *Lapping v. Duffy*, 47 Ind. 51; *Fordyce v. Nelson*, 91 Ind. 447; *Bower v. Stone Co.*, 30 N. J. Eq. 171; *Gardner v. Smith*, 5 Heisk. 256; *County of Des Moines v. Hinkley*, 62 Iowa, 637, 17 N. W. 915; *Bank v. Kimberlands*, 16 W. Va. 555; *Pom. Eq. Jur.* §§ 169, 1270-1285. Nor is the consent of the debtor necessary to an effectual assignment, in equity, of part of an entire debt. *James v. Newton*, 142 Mass. 368, 8 N. E. 122. The mere fact that the assignment is in the form of an order to pay does not make it any the less binding or enforceable in equity.

In *Christmas v. Russell*, 14 Wall. 84, the court say:

"An order to pay out of a specific fund has always been held to be a valid assignment in equity, and to fulfill all of the requirements of the law."

3 Pom. Eq. Jur. § 1280; 2 Story, Eq. Jur. §§ 1040-1043; 1 Am. & Eng. Enc. Law, pp. 834, 835, and cases there cited.

The rule is not different in the federal courts. *Savings Inst. v. Adae*, 8 Fed. 108; *Insurance Co. v. Glover*, 9 Fed. 529. It is to be observed, however, that there was no fund in existence when these assignments were made by Price to the respective assignees. He had not yet brought suit to enforce his demand for salvage, although he testifies that he filed his libel on the same day that he made these two assignments. As a matter of law, there could be no fund until the final adjudication and liquidation by the court of his claim. Indeed, it did not necessarily follow that there ever would be any fund in his favor. The assignments were, therefore, merely of a chose in action. But assignments of this character are recognized in equity, and will be enforced. Pom. Eq. Jur. § 1270 et seq.; Story, Eq. Jur. § 1040. In *Peugh v. Porter*, 112 U. S. 737, 5 Sup. Ct. 361, the supreme court upheld an assignment of part of a fund under circumstances closely analogous to those in the case at bar. There the assignment was of an interest in claims to be established against a foreign government in a mixed commission, in consideration of certain sums of money advanced to procure testimony to sustain said claims. It was held that such an assignment was valid in equity, although made before the establishment of the claim and creation of the fund, and would work a distinct appropriation of the fund in the assignee's favor to the extent of the assignment, within the rule laid down in *Wright v. Ellison*, 1 Wall. 16. The court say:

"Objection is made to a decree in favor of Peugh, on the ground that he has no equitable lien on the fund in controversy, within the decisions in *Wright v. Ellison*, 1 Wall. 16, and *Trist v. Child*, 21 Wall. 441, 447. The rule, as declared in the first of these cases, is that 'it is indispensable to a lien thus created that there should be a distinct appropriation of the fund by the debtor, and an agreement that the creditor should be paid out of it.' 1 Wall. 22. Here, as between Musser and Porter on the one hand, and Peugh on the other, there were words in the agreement of express transfer and assignment of the very fund now in dispute, though not then in existence, which, in contemplation of equity, is not material."

Counsel for Neumann, in citing this case, evidently mistake the word "creditor," in the passage above quoted, to mean the holder of the fund or person on whom the order is drawn. But a close reading of the opinion in *Wright v. Ellison*, from which the quotation is taken, will show that that word was intended to mean the person in whose favor the order is drawn or the assignment made. For example, in this proceeding, Price would be the debtor, Cofran and Neumann the creditors of Price, and the claimants of the ship and cargo the holders of the fund or salvage award. In other words, the parties occupy the same legal position as if a bill of exchange had been drawn, the only difference being that the orders

to pay in this proceeding are not negotiable paper. Price certainly had the right to assign any future interest which might accrue to him by virtue of a decree in his favor for the salvage services he had rendered the claimants of the ship and cargo, and such an assignment or assignments will be recognized in an equitable proceeding such as this is. This right to assign, as distinguished from the rule precluding the splitting up of causes of action at law, was clearly recognized in *Whittemore v. Oil Co.*, 124 N. Y. 577, 27 N. E. 244, 246. The court used the following language:

"The authorities that are cited hold simply that a creditor cannot split up a single cause of action without the consent of the debtor. The reason for this rule is that to permit a cause of action to be divided would subject the debtor to many embarrassments and responsibilities, not contemplated in his original contract. He has a right to stand upon the singleness of his original contract, and to decline any assignment which may be broken into fragments. *Mandeville v. Welch*, 5 Wheat. 277. But the rule goes only to the right to sue as assignee of part of a single cause of action. It does not deny the right to sell and transfer an undivided part of a demand."

The last contention of counsel for Neumann relates to the giving of notice. It may be conceded that the rule is as stated by counsel; that is, that, where there are two or more assignments from one person to several upon the same fund or debt, the assignee who first gives notice of his claim to the debtor or holder of the fund, the equities between the several assignees being otherwise equal, acquires the prior right to a satisfaction of his demand, although, as a matter of fact, his assignment is subsequent in point of time to that of other assignees. In other words, it is priority of notice to the debtor or holder of the fund, and not priority in point of time of the assignments, which gives preference, and determines the priority between successive assignees to the same debt or fund. The reason of the rule is well stated in *Methven v. Power Co.*, 13 C. C. A. 362, 66 Fed. 113, as follows:

"The question which of different assignees of a chose in action, by express assignment from the same person,—the one whose assignment is prior in time, or the one who first gives notice to the debtor,—will have the prior right, is one in respect to which there is much conflict of authority. \* \* \* In England, since *Dearle v. Hall*, 3 Russ. 1, and *Severidge v. Cooper*, Id. 30, it has been the settled doctrine that the assignee who first gives notice to the debtor obtains priority. This is in obedience to the general principle which requires that all transfers of property must be rendered as complete as the nature of the action will permit, in order to make them valid as against subsequent bona fide purchasers for value."

In 1 Am. & Eng. Enc. Law, p. 840, the rule is thus stated:

"If the assignee does not perfect his title by giving notice, a subsequent bona fide purchaser for value from the assignor of the same obligation, giving notice of his assignment, will thereby acquire priority. Between different assignees, the one who first gives notice to the debtor will, as a general rule, have the prior right."

See the cases there cited.

But it is not only necessary that a subsequent assignee should give prior notice; he must, also, be a bona fide purchaser for value. Otherwise, priority of notice will not avail to divest a prior as-

assignment or to supersede it. This qualification is clearly stated by Prof. Pomeroy in his work on Equity Jurisprudence (volume 2, § 695), as follows:

"The equities of the successive assignments being otherwise equal, the priority among them is determined by the order of the notices, rather than by the order of their dates. Giving notice is regarded as equivalent, or at least analogous, to the act of taking possession. The rule thus founded is applied to assignments of ordinary things in action by the creditor party, \* \* \* and to equitable assignments of a fund by the person entitled thereto, and the notice should be given, in the first class to the debtor, \* \* \* and in the third to the holder of the fund. It should be carefully observed, however, that to enable a subsequent assignee to obtain a priority in this manner, by giving the first notice to the debtor or legal holder, he must be an assignee in good faith and for a valuable consideration. If he parted with no consideration, he is a mere volunteer, and stands in the same position as his assignor. If he had notice of the earlier assignment, then he took subject thereto."

The author cites many cases in a note which fully confirm the views he expresses.

Neumann had no notice of Cofran's prior assignment. This is admitted by Price himself. Neumann claims that he first gave notice of his assignment to M. J. Brandenstein & Co., upon whom the order was drawn, and to the marshal and clerk of the court. But the question arises, and must be first determined before any prior notice by Neumann can operate to give him a better right to the salvage award than Cofran has, was he a purchaser for a valuable consideration? Is one who takes an assignment of a chose in action as security for a pre-existing debt, and in no way alters his substantial rights as a creditor, a holder for value? It must be remembered that we are not concerned, in this proceeding, with negotiable instruments. The assignments or orders to pay did not possess all the elements of negotiable paper. They were, in every sense, equitable assignments. A bona fide purchaser is one who, without notice of prior rights, purchases, in good faith, and for a valuable consideration. 2 Pom. Eq. Jur. § 745. A "valuable consideration means, and necessarily requires, under every form and kind of purchase, something of actual value capable, in the estimation of the law, of pecuniary measurement, parting with money, or money's worth, or an actual change of the purchaser's legal position for the worse." Id. § 747. "The conveyance of real or personal property as security for an antecedent debt does not, upon principle, render the transferee a bona fide purchaser, since the creditor parts with no value, surrenders no right, and places himself in no worse legal position than before." Id. § 749; *Cary v. White*, 52 N. Y. 138; *Hart v. Bank*, 33 Vt. 252; *Clark v. Flint*, 22 Pick. 231; *Buffington v. Gerrish*, 15 Mass. 156; *Mingus v. Condit*, 23 N. J. Eq. 313; *Ashton's Appeal*, 73 Pa. St. 153.

In the latter case, the court, on page 162, say:

"A creditor who takes a mortgage, note, or other chose in action only as security for a pre-existing indebtedness, and not for money advanced at the time, is not such a purchaser."

In *Depeau v. Waddington*, 2 Am. Lead. Cas. (5th Am. Ed.) p. 233, it is stated that:

"Whatever the rule may be in the case of negotiable instruments, it is well settled that the conveyance of lands or chattels as security for an antecedent debt will not operate as a purchase for value, or defeat existing equities."

Counsel for Neumann, in support of the contention that a pre-existing debt is a valuable consideration, cite the cases, in the supreme court of the United States, of *Swift v. Tyson*, 16 Pet. 1, and *Railroad Co. v. National Bank*, 102 U. S. 14, and, in the supreme court of this state, the case of *Payne v. Bensley*, 8 Cal. 260, and many cases in this state following the doctrine laid down in *Payne v. Bensley*. But the distinction between the questions involved in all of those cases and in the case at bar is that they concerned negotiable instruments, which is not the fact here. It is, unquestionably, the rule of the law merchant that a pre-existing or antecedent debt is considered as a valuable consideration to support a negotiable paper. But this rule does not apply to instruments of a non-negotiable character. The distinction is an important one, and should not be overlooked. It was fully explained in *Bank v. Bates*, 120 U. S. 556, 7 Sup. Ct. 679. That case, although relating to the priority of two mortgages, involved a state of facts strikingly analogous to those proved in this proceeding, and the law, as there declared by Mr. Justice Harlan, is decisive of the rights of the parties now before the court. That was an action of replevin, involving conflicting claims under two chattel mortgages executed by *Freeman Bros. & Co.* The first mortgage was executed by *Batès, Reed & Cooley* on February 7, 1881, to secure both past indebtedness and future liabilities which might be incurred. A second mortgage was executed to the *People's Savings Bank* on February 11, 1881, to secure certain demand notes, representing past indebtedness. It did not clearly appear whether the bank, before the mortgage to it was given, had actual notice of the prior mortgage to *Bates, Reed & Cooley*; but that is immaterial so far as the law there enunciated is applicable to the priority of the two assignments now before the court. The mortgage to the bank was the first one filed in the proper office in Detroit, in compliance with the statutes of Michigan relating to the recording of chattel mortgages. The mortgage to *Bates, Reed & Cooley* was filed shortly after. The court, after discussing questions not applicable here, said:

"This disposes of all the material questions in the case preliminary to the main inquiry whether the bank—the mortgage to it having been really given to secure past indebtedness of the mortgagors—is, in the meaning of the statute, a subsequent 'mortgagee in good faith.' If not, the mere filing of the mortgage of February 11, 1881, before that of February 7, 1881, did not give it priority of right over *Bates, Reed & Cooley*; and the mortgage that was in fact first executed and delivered must be held to give priority of right. In *Kohl v. Lynn*, 34 Mich. 360, 361, the supreme court of Michigan said that 'the statute, which makes a mortgage of chattels, which has not been recorded, void "against subsequent purchasers or mortgagees in good faith," uses those terms in the sense which has always been attached to them by judicial decisions.' Guided by this rule, which we deem a sound one, we concur with the court below in holding that the words 'mortgagee in good faith,' mean the same thing as 'mortgagee for a valuable consideration without notice.' It is insisted that the principles announced in *Swift v. Tyson*, 16 Pet. 1, and *Rail-*

road Co. v. Bank, 102 U. S. 14, sustain the proposition that the bank was a mortgagee in good faith, although the mortgage to it may be held to have been given merely as security for past indebtedness. The general doctrine announced in *Swift v. Tyson* was that one who becomes the holder of negotiable paper, before its maturity, in the usual course of business, and in payment of an existing debt, is to be deemed to have received it for a valuable consideration, and is therefore unaffected by any equities existing between antecedent parties. In that case, Mr. Justice Story said that the rule was applicable as well when the negotiable instrument was received as security for, as when received in payment of, a pre-existing debt. In *Railroad Co. v. Bank*, it was held, conformably to the recognized usages of the commercial world, that 'the transfer before maturity of negotiable paper as security for an antecedent debt merely, without other circumstances, if the paper be so indorsed that the holder becomes a party to the instrument, although the transfer is without express agreement by the creditor for indulgence, is not an improper use of such paper, and is as much in the usual course of commercial business as its transfer in payment of such debt. In either case, the bona fide holder is unaffected by equities or defenses between prior parties, of which he had no notice.' Page 28. Do these principles apply to the case of a chattel mortgage given merely as security for a pre-existing debt, and in obtaining which the mortgagee has neither parted with any right or thing of substance, nor come under a binding agreement to postpone or delay the collection of his demand? Upon principle, and according to the weight of authority, this question must be answered in the negative. The rules established in the interests of commerce to facilitate the negotiations of mercantile paper, which, for all practicable purposes, passes by delivery as money, and is the representative of money, ought not, in reason, to embrace instruments conveying or transferring real or personal property as security for the payment of money. At any rate, there is nothing in the usages of merchants, as shown in this record, or so far as disclosed by adjudged cases, indicating that the necessities of commerce require that chattel mortgages be placed upon the same footing in all respects as negotiable securities which have come to the hands of a bona fide holder for value before their maturity. Such a result, if desirable, must be attained by legislation rather than by judicial decisions."

After referring at some length to authorities which confirm the views expressed by the learned justice, such as *Morse v. Godfrey*, 3 Story, 364, 389, Fed. Cas. No. 9,856; *Dickerson v. Tillinghast*, 4 Paige, 215; *Rison v. Knapp*, 1 Dill. 186, 200, 201, Fed. Cas. No. 11,861; *Johnson v. Peck*, 1 Woodb. & M. 334, 336, Fed. Cas. No. 7,404; *Straughan v. Fairchild*, 80 Ind. 598; *Kohl v. Lynn*, 34 Mich. 360; *Stone v. Welling*, 14 Mich. 514, 525; *Boxheimer v. Gunn*, 24 Mich. 372, 379,—he thus concludes the opinion:

"Without further discussion of the authorities cited by counsel, all of which have been carefully examined, we are of opinion that the claim of the bank to be a subsequent mortgagee in good faith cannot be sustained, because the mortgage of February 11, 1881, although first filed, was not given in consideration of its having surrendered, or agreed to surrender, or to postpone the exercise of, any substantial right it had against the mortgagors, but merely as collateral security for past indebtedness. Under such circumstances, the mortgage which was prior in time confers a superior right."

See, further, on the same subject, *Gest v. Packwood*, 34 Fed. 368; *Bank v. Taylor*, 4 C. C. A. 55, 53 Fed. 855.

The legal position occupied by the bank in the case cited from the supreme court seems to be, so far as can be intelligently gathered from the established facts and the statements of counsel, the precise situation of assignee Neuman in this proceeding. He simply took the assignment or order to pay as additional security for the payment

of \$3,200 then owing to him by Price. He does not appear to have relinquished any right or remedy he had as creditor, or to have prejudiced in any way his rights to claim the payment of this sum from Price, should the order to pay prove unproductive of results. A novation does not seem to have taken place. Such being the facts, he was not a subsequent bona fide holder for value, and any prior notice which he may be deemed to have given the holder of the fund, or the person or persons from whom the money for the salvage services was due, could not give him priority over Cofran's earlier assignment. The latter's assignment, being first in time, is first in right. *Calisher v. Forbes*, 7 Ch. App. 109; *Judson v. Corcoran*, 17 How. 611. In this view of the law, it becomes unnecessary to consider the question as to the effect of notice by Neumann to the marshal and the clerk, or to Brandenstein & Co.

I am therefore of the opinion that the assignment to Cofran by Price should be preferred to that of Neumann's, for these reasons: (1) Cofran's assignment was first in point of time; and (2) Neumann's assignment, being, like Cofran's, for a pre-existing debt, did not constitute Neumann a subsequent bona fide holder for a valuable consideration. Therefore, any prior notice of his claim, given by him to the debtor or legal custodian of the fund, could not give him any priority over Cofran's earlier assignment. It follows that Cofran's claim should be allowed in full, to wit, in the sum of \$1,585.42; the remainder, after payment of costs, to go in part satisfaction of Neumann's claim of \$3,200. The exceptions of petitioner Neumann will be overruled, the report of the commissioner confirmed, and a decree drawn up and entered in accordance with these views.

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AMERICAN LOAN & TRUST CO. v. OLYMPIA LIGHT & POWER CO.

(Circuit Court, D. Washington, W. D. February 10, 1896.)

1. CHATTEL MORTGAGE—VALIDITY—WASHINGTON STATUTE.

Under the statute of Washington relating to the lien of chattel mortgages, such a mortgage, unless accompanied by the affidavit required by the statute, and properly recorded, is void as to creditors, though they have actual notice of its existence.

2. SAME—SUPPLYING DEFECTS.

The O. Co., a corporation organized and doing business in the state of Washington, made a mortgage of its real and personal property to secure a debt. The mortgage was recorded as a mortgage of real estate, but was not accompanied by the affidavit required in chattel mortgages by the statute of Washington, and was not recorded as a chattel mortgage. After its execution the O. Co. became indebted to one A.; but before A. secured judgment on his debt the necessary affidavit was attached to the mortgage, and it was recorded as a chattel mortgage. *Held*, that the mortgage thereupon became a valid lien upon the personal property of the O. Co., as against a judgment subsequently obtained by A.

J. B. Howe, for complainant.

Hudson & Holt, for intervener.

HANFORD, District Judge. T. N. Allen, a judgment creditor of the defendant, has filed a petition as an intervener in this cause, pray-

ing the court to direct payment of the amount of his judgment out of the proceeds of the personal property of the defendant, which is covered by the plaintiff's mortgage. The cause has been argued and submitted upon a demurrer to said petition. The material facts, and the points presented for consideration upon this demurrer, are as follows: After the attempted execution of the mortgage, and the filing of it as a real-estate mortgage, the petitioner in this case became a creditor of the mortgagor, and subsequently obtained a judgment against it. After the debt had been contracted, but before the judgment was rendered, the mortgagee commenced an action to foreclose its mortgage, and a receiver was appointed in that action to take possession of the mortgaged property. Petitioner obtained his judgment, and intervened in this action for the purpose of having the mortgage declared void as to him, and asks that the proceeds of the personal property in the hands of the receiver, if the same is sold, be applied to the payment of his claim. The right to intervene is based upon the general proposition that the property is in the custody of this court, which protects it against the levy of an execution, and that the petitioner, having a judgment, and being thus restrained from its enforcement, is entitled to protection and recognition by the court that has thus tied his hands. The petition contains no allegation of want of notice. The intervener, however, takes the position that our statute makes a distinction between creditors and subsequent purchasers and incumbrancers, and, while it protects only purchasers and incumbrancers "for value and in good faith" against the operation of a mortgage not properly executed and recorded, all classes of creditors come within its provisions. It appears from the petition that after the debt of petitioner had been contracted the mortgagor took the mortgage which it had attempted before to execute, and attached thereto the affidavit required by statute, and caused it to be properly recorded as a chattel mortgage. This was done before the commencement of this action, and before the petitioner had acquired his judgment. The intervener takes the position that this mortgage was void, as against the petitioner, when his debt was contracted, and that no subsequent attempt to cure the defects in it could dislodge, impair, or affect the rights of petitioner.

I sustain the first position taken by the intervener, and concur in the opinions in the several cases cited as authority, for the reason that the reading of the statute makes a plain distinction between creditors and subsequent purchasers and incumbrancers, and the words "for value and in good faith" were not employed in the statute to create a condition affecting the rights of creditors.

As to the second proposition, the petitioner's contention is supported by a decision of the supreme court of this state, in the case of Willamette Casket Co. v. Cross Undertaking Co., 40 Pac. 729. The facts in that case, however, are somewhat different; and the real point involved in this case does not appear, from the opinion of the court, to have received attention. In that case the mortgagor does not appear to have done anything, after contracting new indebtedness, to make the mortgage operative in favor of the mortgagee, and against debts contracted after its delivery. In the case



now under consideration the mortgagor and mortgagee have acted so as to show their mutual intention to adopt the mortgage under consideration, by supplying everything essential to make it a valid chattel mortgage. At the date of adding to it the affidavit required by the statute, the mortgagor could lawfully have devoted any part of its property to the payment of the mortgage, in preference to the petitioner, or could have created a valid lien to secure its indebtedness to the mortgagee. Now, if that could have been done by making and executing an entirely new instrument, there is not a single good reason for saying that the mortgage in question could not be made a valid lien on personal property, by adding to it the essential requisites of a chattel mortgage. I cannot bring my mind to assent to the proposition that this mortgage, for the lack of some of the essentials of a valid chattel mortgage, can be regarded as an unlawful thing, a soiled paper, or attained so that no power could give it validity and vitality. It is my conclusion, therefore, that the petition must be denied.

#### Application for a Rehearing.

I have given careful attention to the petition for a rehearing of this case, but without discovering that any of the facts were overlooked or misapprehended, and without being convinced of having erred in the decision. This new argument admits that, although the petitioner may have given credit to the mortgagor on the faith of its ownership of unincumbered personal property, the mortgagor could subsequently give a valid chattel mortgage upon said personal property to secure an older debt, and, while making this admission, denounces the mortgage in question as being void. The whole argument is a repetition of the petitioner's contention on the former hearing, namely, that, because the mortgage was void at the time of the credit given by the petitioner, it is impossible to make it valid by subsequent compliance with the requirements of the statute. The term "void" is regarded throughout the argument as being synonymous with "unlawful," and as if the effect of the statute was to stamp a void instrument as a guilty thing, like a counterfeit coin or treasury note, to be perpetually denied recognition in legal proceedings. In this I disagree with the petitioner and his counsel. This mortgage, as a lien upon personal property, at the time the mortgagor became indebted to the petitioner, was simply void as to creditors, for lack of an affidavit, and failure to have it recorded in a particular book. But a blank piece of paper would be void, not only as to creditors, but totally void as to everybody, and not in any sense to be regarded as possessing virtue denied to this incomplete and imperfect instrument. Now, the effect, as to the petitioner, of taking the imperfect instrument, and making it a valid mortgage, is precisely the same as to have taken a blank piece of paper,—a totally void thing,—and made a chattel mortgage, by supplying all of the requisites. The mortgagee took its chances with the general creditors until the instrument was made complete, so that in this material point the case differs from the case of *Willamette Casket Co. v. Cross Undertaking Co.* (Wash.) 40 Pac. 729. The decision heretofore given will be adhered to.

## MERCER COUNTY v. PROVIDENT LIFE &amp; TRUST CO. OF PHILADELPHIA.

(Circuit Court of Appeals, Sixth Circuit. March 3, 1896.)

No. 326.

## 1. RAILROAD AID BONDS—COMPLIANCE WITH CONDITIONS.

A provision, in an act authorizing an issue of county bonds in aid of a railroad, that they should not be valid obligations until the road is constructed through the county, so that a train of cars shall pass thereover, is not satisfied by the construction of the road from one boundary of the county to a point two miles short of the opposite boundary, where it connects with another road running outside the county.

## 2. SAME—ESTOPPEL TO QUESTION VALIDITY.

Act May 15, 1886, authorizing Mercer county to subscribe to the capital stock of a railroad company, the subscription to be paid in county bonds, provided that the county judge should, after ascertaining whether the election authorized the issue of bonds, prepare and execute them, and order their deposit with a trustee; the latter to hold them in escrow, and to deliver them to the company when it became entitled to them by the construction of its road through the county. *Held*, that the trustee holding these bonds in escrow had no power to deliver these bonds until the actual completion of the railroad through the county from one side to another or opposite side, and that in the delivery of the bonds so held in escrow, before that condition had been complied with, he did so in violation of his duty and without authority of law. *Held*, that a purchaser of such bonds is chargeable with notice of the terms, conditions, and requirements of the act under which these bonds were issued, and took them with notice that the recitals of the bonds must be referred to the acts which under that permissive statute were to precede the execution of the bonds and their deposit in escrow, and could not operate as a recital of facts which could not have existed when the recitals were made. The bonds contained, therefore, no recital implying the construction of the railroad. *Held* that, under the proper construction of this act, the county of Mercer had no power to issue bonds until the railroad had actually been constructed "through" the county, and neither the decision of the trustee in escrow that that condition had been complied with, nor the consent of county officers to their delivery, nor the subsequent payment of interest, operates as estoppel preventing the county from showing as a defense that the condition upon which its power rested to issue these bonds had never been complied with.

## 3. SAME—BONA FIDE PURCHASERS.

The fact that the bonds were in form negotiable securities, and were bought on the open market by purchasers innocent as to noncompletion of the railroad, does not give such purchasers the status of bona fide purchasers for value; the bonds containing on their face no recital implying the completion of the railroad in whose aid they were issued.

Error to the Circuit Court of the United States for the District of Kentucky.

This was an action by the Provident Life & Trust Company of Philadelphia against the county of Mercer, in the state of Kentucky, on certain county bonds. There was a judgment for plaintiff, and defendant brings error. Reversed.

The county of Mercer subscribed for stock in the Louisville Southern Railroad Company to the extent of \$125,000, and issued in payment therefor 125 bonds, each for \$1,000, dated January 10, 1887, payable in 30 years, with interest payable semiannually, at 5 per cent., for which coupons were attached. These bonds, with past-due coupons detached, were received by the railroad

company in August, 1888, and 100 of them subsequently came to the hands of the Provident Life & Trust Company. This suit was brought upon 400 coupons past due and unpaid. The county denied liability upon the bonds, and presented a number of defenses, which, so far as now insisted upon, will be hereafter stated. A jury was waived, and the decision of the law and facts submitted to the Honorable John W. Barr, district judge, holding the circuit court, who made a special finding of facts, upon which he gave judgment against the county, and for the plaintiff below. The bonds were in the usual form of negotiable county bonds. The only recital concerning the authority for their issuance is in these words:

"This bond is one of a series of one hundred and twenty-five bonds of even date herewith, all of the same denomination and tenor, and numbered, consecutively, from one to one hundred and twenty-five; the same having been issued pursuant to the authority conferred upon the said county by an act of the legislature of Kentucky entitled 'An act to authorize the county of Mercer to subscribe aid to the Louisville Southern Railroad Company,' approved May 15th, 1886, and pursuant to an order entered by the county judge of said county in conformity with said act, subscribing in behalf of said county for the capital stock of the said Louisville Southern Railroad Company in the sum of one hundred and twenty-five thousand dollars (\$125,000), which order was entered of record in said court on January tenth, A. D. eighteen hundred and eighty-seven (1887)."

The act granting power to subscribe for stock of the Southern Railroad Company, which is referred to in the recital above set out, was passed May 15, 1886. The first section of that statute authorized Mercer county to subscribe to the capital stock of the Louisville Southern Railroad Company, "as hereinafter provided," and that it might pay for same in the "negotiable coupon bonds of said county." The second section provided the method of applying for a subscription, and the manner in which a vote of the people should be taken upon the proposition for a subscription. The third and fourth sections were in these words.

"Sec. 3. As soon as may be thereafter, the county judge of such county shall determine if a majority of the legal votes cast at such election were in favor of such subscription, and if they were he shall thereupon enter an order subscribing in behalf of such county to the capital stock of the said railroad company in accordance with the terms of the proposition voted on, and he shall thereupon cause to be prepared and execute the negotiable bonds of such county as before mentioned, which shall be signed by him as county judge and attested by the county clerk, with his official seal affixed thereto, and the coupons shall be signed by said clerk.

"Sec. 4. The said bonds shall not be binding or valid obligations until the railway of the said company shall have been so completed through such county that a train of cars shall have passed over the same, at which time they shall be delivered to said railroad company in payment of the subscription of such county, and the county shall thereupon be entitled to receive certificates for the stock subscribed, and the county judge of such county shall order that such bonds shall be deposited with a trustee or trust company, to be held in escrow, and delivered to the said railroad company when it shall become entitled to the same by the construction of its road through such county: provided, however, that such trust company or trustee shall, before receiving such bonds, give bond, with good surety, approved by the county judge, for the faithful performance of his or its duty in the premises: and provided further, that no such subscription shall be binding unless such railroad shall pass to or through the corporate limits of the town of Harrodsburg."

Among the facts specifically found by the circuit court, and deemed essential to the proper decision of the questions now to be determined, are these:

(1) That all of the requirements, provisions, and conditions mentioned in sections 2 and 3 of the act of May 15, 1886, had been duly complied with.

(2) That one D. L. Moore was selected and appointed trustee by an order of the county court of Mercer county, and entered into bond for the faithful performance of his duty under the act aforesaid; the bond being payable to the state of Kentucky, for the use of Mercer county and the Louisville Southern Railroad Company.

(3) That thereupon the bonds of the county, duly signed and sealed, as provided by section 3 of the act, were deposited with him, to be held as provided in the act.

(4) That July 3, 1888, said Moore, being unable to satisfy himself as to the proper discharge of his duties, tendered his resignation, which was accepted; and on the same day one Isaac Pearson was appointed trustee by the Mercer county court, who gave bond of like character to that which had been required from Moore.

(5) Concerning the provision of section 3 of the act, that the bonds thus deposited in escrow should not be valid obligations "until the railway of the said company shall have been so constructed through such county that a train of cars shall have passed over the same," the court found that the Louisville Southern Railroad Company had constructed a line of railway from the boundary line between Anderson and Mercer counties, thence to Harrodsburg; that there was a railroad known as the "South-Western Railroad," which owned and operated a line between Harrodsburg and Burgin, in Mercer county, and that this piece of old road was consolidated with the Louisville Southern; at Burgin a junction was made with the Cincinnati Southern Railroad, an independent corporation, whose line extended from Cincinnati to Chattanooga, Tenn. The precise finding as to the location of Burgin, with reference to the nearest county line, was in these words: "The nearest point to Mercer county line from the South-Western Railroad is two miles. I think that the Louisville Southern Railroad did not run from one line of the county of Mercer through to the opposite or to another line of county, but that its railroad entered Mercer county on the line of said county next to Anderson county, and ran through said county fifteen miles to Harrodsburg, and from there to Burgin, where a junction was made with the Cincinnati Southern Railroad, making in all 19.72 miles of railroad in said county of Mercer; but this line of railroad did not reach the other or another line or boundary of the county, by about two miles from the nearest point. The railroad thus constructed gave a railroad connection by the Cincinnati Southern Railroad, either northeast to Cincinnati, Ohio, or southwest to Chattanooga, Tennessee. I find that about the time of the passage of a train of cars over said road from Louisville to Burgin, and for some time thereafter, there arose a question of whether the conditions precedent to the delivery of \$105,000 of the bonds of the county had been complied with by the Louisville Southern Railroad Company. There was some difference of opinion among the taxpayers in said county upon this question, and the trustee, Moore, had doubts as to whether he could properly deliver these bonds; but there was no formal demand made upon or refused by him, for his resignation as trustee. This question of whether the railroad must be built from one line of the county to another was publicly and generally discussed. While this discussion was going on, and before Pearson, trustee, had determined that the condition precedent had been performed, and that he would deliver \$105,000 of the bonds, the Louisville Southern Railroad prepared to extend its railroad toward and to the town of Danville, Boyle county, which was 7.47 miles distant from Harrodsburg, by acquiring the rights of way, with one exception, to the Mercer county line. There was a movement made to have the court of claims of said county instruct the trustee as to his duty in the premises, and that court, consisting of the county judge and the justices of the peace of said county, met on the 26th of June, 1888, and a full discussion was had before said court, which consisted of the county judge, Hon. John W. Hughes, and all of the justices of the peace of said county. The court, after argument, declined, as a court, to instruct the trustee as to his action; but, upon motion of one of the justices, they passed, and had spread upon the records, this resolution, viz.: 'G. J. Johnson, as justice of the peace of this county, offered into court the following motion, which is ordered to be noted of record, and is as follows: "The members of this court do not believe that they have any right to enter an order directing the trustee to deliver the bonds of this county to the Louisville Southern Railroad; but, as individuals, they are of the opinion that such delivery should be made, and the construction of the railroad not forced to the Boyle county line." And, said motion being seconded, the ayes and nays were taken, and resulted as follows: Ayes, 12; nays, none; not voting, two.'"

(6) The court found that thereafter "Pearson, trustee, decided that the conditions precedent had been performed by the Louisville Southern Railroad Company, and was entitled to the delivery of \$105,000 of the bonds of Mercer county."

(7) The court further found that in August, 1888, said 105 bonds were delivered to said railroad company in the presence of the county judge of Mercer county, who cut off and destroyed the past-due coupons thereon before delivery, and that there was then delivered to said county judge a certificate for \$105,000 of the capital stock of the railroad company, which was accepted and subsequently voted at two meetings of stockholders of said company, and that this stock had never been returned or tendered to said railroad company.

(8) The court further found "that said county of Mercer regularly levied an annual tax to meet the semiannual interest on said bonds, and paid interest thereon for the years 1889, 1890, and 1891, and the interest due January 1, 1892, and have not paid any interest on said bonds since that time.

(9) The court found that the plaintiff was a bona fide holder for value of the bonds mentioned, to the extent of \$100,000, with the coupons thereon, and had no knowledge or notice of any defects either in the execution or delivery of same, or of any defense the county has or might present to the recovery of same.

J. B. Thompson and Alex. P. Humphrey, for plaintiff in error.

Thos. W. Bullitt and Samuel Dickson, for defendant in error.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

LURTON, Circuit Judge, after making the foregoing statement of facts, delivered the opinion of the court.

The primary question which is to be decided is this: Were the bonds now held by the appellee corporation issued without authority of law, and in violation of the restrictions and conditions imposed by the act of May 15, 1886, heretofore set out, and under which they purport to have been issued? If they were issued in violation of the substantial provisions of the permissive act, they were void, unless they have fallen into the hands of an innocent purchaser for value, and the requisite circumstances exist to constitute an estoppel, precluding the county from showing that in fact they were issued in violation of law.

Passing for the present all the conditions precedent to the actual preparation and formal execution of the bonds under the third section of the enabling act, we shall consider the terms and conditions imposed by the fourth section, so far as the issuance of the bonds is affected by that section. Aside from the positive provision of the fourth section, it is evident, upon obvious principles of law, that these bonds, when prepared and formally executed according to the provisions of the third section, were invalid obligations, as lacking the essential element of delivery,—a step as necessary to the validity of a bond or other negotiable instrument as it is to the existence of a deed. 1 Daniel, Neg. Inst. § 63; Young v. Clarendon Tp., 132 U. S. 353, 10 Sup. Ct. 107. But whatever doubt might exist as to the obligatory character of these bonds while still in the hands of the county officials who had prepared and signed them, the fourth section, in clear terms, resolves. No power to made delivery of the bonds was conferred upon the county judge, or any other officer of the county, and all duty and power

intrusted to them terminated with their formal execution; the act itself declaring that the bonds, thus apparently the formal contracts of the county, "shall not be binding or valid obligations until the railway of the said company shall have been so completed through such county that a train of cars shall have passed over the same, at which time they shall be delivered to said railroad company." The duty of the county judge with reference to these incomplete instruments pending compliance with the condition upon which they might become vital obligations, by delivery, was to "order that such bonds shall be deposited with a trustee or trust company, to be held in escrow, and delivered to the said railroad company when it shall become entitled to the same by the construction of its road through such county." This last statutory duty was performed, and the bonds were "deposited" with a trustee, to be held in escrow and delivered when the condition authorizing delivery had been performed. That condition was that the railroad of the Louisville Southern Railroad Company should be completed "through" the county of Mercer, so that a train of cars should have passed over the same. The defense of the county is that the railroad was never constructed through the county, and that the trustee violated his duty, and delivered them before that condition had been complied with. The finding of fact touching immediately upon compliance with this condition was "that the Louisville Southern Railroad did not run from one line of the county of Mercer through to the opposite or to another line of the county, but that its railroad entered Mercer county on the line of said county next to Anderson county, and ran through said county fifteen miles to Harrodsburg, and from there to Burgin, where a junction was made with the Cincinnati Southern Railroad, making in all 19.72 miles of railroad in said county of Mercer; but this line of railroad did not reach the other or another line or boundary of the county by about two miles from the nearest point." This finding seems to conclusively settle the question that the railroad company did not construct its railroad through the county. The requirement was that the road should be completed "through" the county,—not through the county to Harrodsburg, or to Burgin, or to a junction with the Cincinnati Southern Railroad, but through the county entirely; that is, from one side or line to the opposite or another side or line. If the legislature had used the very common preposition "through" in any limited or unusual sense, it would appear in the context. That it was used with its ordinary meaning of "from one side to the opposite side" or another side, or "from one surface or limit to the other surface or limit," seems to us very plain, from the whole tenor of the statute. That it was not used in the sense of "to" and "into" is plain, from the proviso of the same act, which brings the prepositions "to" and "through" into apposition, in the provision that "the subscription shall not be binding" "unless such railroad shall pass to or through the corporate limits of the town of Harrodsburg." The argument that this was a substantial compliance with the condition does not meet with our assent. The object of the act was to

secure to Mercer county a railroad entirely through the county. To build to within two miles of the statutory requirement is not a substantial fulfillment of the provision. Whether this was an important or unimportant matter, it is not for us to say. The legislature had the undoubted authority to impose this condition, or any other it saw fit. Whether wisely or unwisely, the power to issue any bonds was made dependent on the performance of this condition. The provisions that they should not be valid until the performance of this condition, and that the stakeholder should not deliver them until this railroad should be constructed through the county, are imperative, and limit the power of the county and of this trustee to the issuance of bonds only when the requisite facts actually existed. These restrictions were intended to secure the actual completion of the railroad, and guard against the possible misapplication of the bonds to purposes not designed. Restrictions in acts of this kind, intended to guard the public from the negligence or crimes of their officials, and to secure exact compliance with the terms upon which the power of taxation may be exercised in aid of railroad construction, are entitled to favorable consideration. The utterances of the supreme court upon the effect of restrictions and limitations in such legislation have been uniform, and announce a wise public policy. In *Barnum v. Okolona*, 148 U. S. 393, 13 Sup. Ct. 638, Mr. Justice Shiras, for the court, said:

"That municipal corporations have no power to issue bonds in aid of railroads, except by legislative permission; that the legislature, in granting permission to a municipality to issue its bonds in aid of a railroad, may impose such conditions as it may choose; and that such legislative permission does not carry with it authority to execute negotiable bonds, except subject to the restrictions and conditions of the enabling act,—are propositions so well settled by frequent decisions of this court that we need not pause to consider them. *Sheboygan Co. v. Parker*, 3 Wall. 93-96; *Wells v. Supervisors*, 102 U. S. 625; *Claiborne Co. v. Brooks*, 111 U. S. 400, 4 Sup. Ct. 489; *Young v. Clarendon Tp.*, 132 U. S. 340-346, 10 Sup. Ct. 107."

In *Barnett v. Denison*, 145 U. S. 139, 12 Sup. Ct. 819, Mr. Justice Brown, in delivering the opinion of the court, said:

"The provisions of the statute authorizing them must be strictly pursued, and that the purchaser or holder of such bonds is chargeable with notice of the requirements of the law under which they are issued."

The conclusion we reach is that this condition has not been complied with, and that the trustee, in delivering these bonds, did so in violation of his duty, and acted without authority of law.

This brings us to the consideration of the question as to whether the county is estopped to make this defense. The learned trial judge found as a fact that the appellee bought in open market, for value, and with no actual knowledge that the conditions imposed by the enabling act had been in any way unperformed. That such a municipal corporation had no general authority to issue such negotiable securities, and that the purchaser is chargeable with notice of the terms, conditions, and requirements of the permissive statutes under which they purport to be issued, is

well settled. *Marsh v. Fulton Co.*, 10 Wall. 676; *McClure v. Township of Oxford*, 94 U. S. 429; *Northern Bank v. Porter Tp.*, 110 U. S. 609, 4 Sup. Ct. 254; *Barnett v. Denison*, 145 U. S. 139, 12 Sup. Ct. 819; *Barnum v. Okolona*, 148 U. S. 395, 13 Sup. Ct. 638; *Citizens' Sav. & Loan Ass'n v. Perry Co.*, 156 U. S. 701, 15 Sup. Ct. 547.

First, it is said that the recital in these bonds imports a compliance with all the restrictions and conditions of the enabling act, and that these recitals cannot be contradicted. The recital in the bond is that it was "issued pursuant to the authority conferred upon the said county by an act of the legislature of Kentucky entitled, 'An act to authorize the county of Mercer to subscribe aid to the Louisville Southern Railroad Company,' approved May 15, 1886." Looking to the act referred to, as the purchaser was bound to do, he discovered that these bonds were to be executed and deposited in escrow, and delivered only upon the completion of the Louisville Southern Railroad through the county of Mercer. By this provision he was advised that the recital that the bond "was issued pursuant to the authority" of the act referred to was a recital which, in the nature of things, could only refer to facts antecedent to the deposit of the bonds in escrow, and could not possibly operate as a recital covering the subsequent completion of the railroad through the county. The enabling act operated as notice to him that the bonds were not "binding and valid obligations" when placed in escrow, and would not become valid and legal securities "until the railway of the said company shall have been so completed through such county that a train of cars shall have passed over the same." The purchaser therefore bought with notice that the depository held the bonds "in escrow," and had no power to deliver them until the company should "become entitled to the same by the construction of its road through the county." The recitals in the bonds must therefore be referred to the acts which, under the permissive law, were to precede the execution and deposit of the bonds in escrow, and do not operate as a recital of facts which could not have existed when they were made. Where recitals are relied upon to cut off the defense that municipal bonds are in fact issued without authority of law, or in violation of law, they should be fairly and reasonably construed, and be such as to clearly indicate that the conditions and requisites of the law had been complied with. *Risley v. Village of Howell*, 12 C. C. A. 218, 64 Fed. 453; *Northern Bank v. Porter Tp.*, 110 U. S. 618, 619, 4 Sup. Ct. 254; *School Dist. v. Stone*, 106 U. S. 183-187, 1 Sup. Ct. 84. In the case last cited, Mr. Justice Harlan, for the court, concerning the construction of words in a bond claimed to operate as a recital estopping a municipality from showing that the bonds had been issued in violation of law, said:

"Numerous cases have been determined in this court in which we have said that where a statute confers power upon a municipal corporation, upon the performance of certain precedent conditions, to execute bonds in aid of the construction of a railroad, or for other like purposes, and imposes upon certain officers—invested with authority to determine whether such conditions have been performed—the responsibility of issuing them when such conditions have



been complied with, recitals by such officers that the bonds have been issued 'in pursuance of,' or 'in conformity with,' or 'by virtue of,' or 'by authority of,' the statute, have been held, in favor of bona fide purchasers for value, to import full compliance with the statute, and to preclude inquiry as to whether the precedent conditions had been performed before the bonds were issued. But in all such cases, as a careful examination will show, the recitals fairly import a compliance, in all substantial respects, with the statute giving authority to issue the bonds. We are unwilling to enlarge or extend the rule now established by numerous decisions. Sound policy forbids it. Where the holder relies for protection upon mere recitals, they should at least be clear and unambiguous, in order to estop a municipal corporation, in whose name such bonds have been made, from showing that they were issued in violation or without the authority of law."

There is therefore no estoppel by recital because there is no statement in the bonds implying that the Louisville Southern Railroad had been completed through the county, as required by the provisions of the enabling act. *Buchanan v. Litchfield*, 102 U. S. 278; *Carroll Co. v. Smith*, 111 U. S. 561, 562, 4 Sup. Ct. 539; *Lake County v. Graham*, 130 U. S. 674, 9 Sup. Ct. 654; *Citizens' Sav. & Loan Ass'n v. Perry Co.*, 156 U. S. 692-701, 15 Sup. Ct. 547. We have then to deal with bonds which contain no recital whatever implying that the most important of the conditions precedent specified in the enabling act, upon which the power to issue them depended, had been performed. In this respect the case is distinguished from cases where the recitals were such as to imply compliance with all precedent conditions, such as that they had been "issued pursuant" to a particular act, as in *Knox Co. v. Aspinwall*, 21 How. 540, or "by virtue of the law of the state entitled 'An act,' " etc., as in *Insurance Co. v. Bruce*, 105 U. S. 328, or "under and in pursuance of an act," etc., as in *Lewis v. Commissioners*, 105 U. S. 739, or "under authority of an act," etc., as in *Oregon v. Jennings*, 119 U. S. 74, 7 Sup. Ct. 124. This court, in *Cadillac v. Institution*, 7 C. C. A. 574, and 58 Fed. 935, 16 U. S. App. 545, held that, under an act authorizing the issuance of new bonds "to extend the time of payment of old bonds falling due," a recital that a bond was issued "for the purpose of extending the time of payment of bonds falling due" estopped the city from showing that the bonds thus refunded were void bonds. So in *Risley v. Village of Howell*, 12 C. C. A. 218, 64 Fed. 453, the bonds recited that they were issued under an act approved February 25, 1885, which act authorized the issuance of bonds "to raise money to make public improvements." It was held that it was not a defense to show that in fact the money obtained for the bonds had been expended under an ordinance, referred to in the bonds, for a purpose not a "public improvement," within the decisions of the supreme court of the state. On the contrary, the case falls distinctly within another class of cases, where the bonds either contained no recitals, or the recitals were made by one not intrusted with the duty of ascertaining and determining the facts recited. *Dixon Co. v. Field*, 111 U. S. 83, 4 Sup. Ct. 315; *German Sav. Bank v. Franklin Co.*, 128 U. S. 526, 9 Sup. Ct. 159; *Barnett v. Denison*, 145 U. S. 139, 12 Sup. Ct. 819; *Citizens' Sav. & Loan Ass'n v. Perry Co.*, 156 U. S. 701, 15 Sup. Ct. 547.

But it is argued that the Kentucky enabling act is peculiar, and that the absence of recitals in bonds issued thereunder is immaterial, inasmuch as the circumstances attending the execution of these bonds were such as that there could be no recitals on the face of the bonds importing performance of conditions which were to be complied with after their formal execution and deposit in escrow. This was the view entertained by Judge Barr, who, upon this ground, held that the decision of the trustee, before delivering them to the railroad company, that all precedent conditions had been complied with, precluded the county from contradicting that decision after the bonds had passed into the hands of innocent purchasers. To support this position it is necessary to construe this enabling act as not only empowering the trustee to ascertain and determine whether all conditions subsequent to such deposit had been performed, but that such determination should estop the county, as against an innocent purchaser of the bonds, although no such determination appeared on the bond, either through a recital or indorsement. Certainly none of the numerous opinions of the supreme court affords any express authority for such an interpretation of this act. A careful examination of the opinions of that court will, it is confidently believed, show that, where railroad construction bonds have been issued in violation of the law under which authority was granted, the municipality has never been held estopped to defend upon that ground, unless representations appeared on the bonds themselves importing full compliance with the conditions imposed by the enabling act. The estoppel has been a consequence of recitals or indorsements made by officials empowered to decide the facts recited, and which a purchaser was authorized to rely upon as speaking the truth. The rule which we deduce from the long line of the decisions made by that court as to the application of the doctrine of estoppel to municipal bonds is that where bonds are issued by a municipal corporation under a special and limited authority, imposing restrictions and conditions, but authorizing officials of such municipality to execute and issue such bonds when the conditions precedent imposed have been complied with, and it can fairly and reasonably be gathered from the act that the officials so authorized to execute the bonds were also empowered to ascertain and determine that the requisite facts and circumstances did exist, or all conditions precedent had been complied with, and this determination or decision has been embodied in the recitals of the bonds, a purchaser without other notice, and for value, would have a right to rely upon the truth of the representations appearing on the bond, and need make no further inquiry. *Coloma v. Eaves*, 92 U. S. 484; *Dixon Co. v. Field*, 111 U. S. 93, 4 Sup. Ct. 315; *German Sav. Bank v. Franklin Co.*, 128 U. S. 526, 9 Sup. Ct. 159; *Citizens' Sav. & Loan Ass'n v. Perry Co.*, 156 U. S. 701, 15 Sup. Ct. 547. The principle is that when bonds, on their face, affirmatively import a compliance with the conditions upon which they might lawfully issue, a defense based upon a contradiction of the

recitals thus made by an official empowered by the law to decide the facts recited will not be permitted, when the bond has come to the hands of a bona fide holder for value. This doctrine does not apply as between a railroad company receiving such bonds in violation of law, and the municipality itself; nor has it ever been applied in favor of a holder who was not an innocent purchaser for value. *Dill. Mun. Corp.* § 519; *Chambers Co. v. Clews*, 21 Wall. 317-321. False recitals have never been held conclusive as between the original parties, or in favor of purchasers with notice, for the obvious reason that an essential element to an estoppel in pais is that the representation should mislead and deceive one who had a right to rely upon the truth of the representation. It would seem to follow, from the reasons upon which an estoppel is said to arise, that if bonds are issued without recitals, but in violation of law or authority, there exists no reason why they should not be open to defense when action is brought even by one who bought without actual knowledge that they had been issued without performance of precedent conditions. In such case the purchaser buys at his peril, and cannot rely upon his mere ignorance, nor upon the mere fact that the bonds had been issued, and were found in circulation. *Marsh v. Fulton Co.*, 10 Wall. 676; *Buchanan v. Litchfield*, 102 U. S. 278; *Merchants' Exch. Nat. Bank v. Bergen Co.*, 115 U. S. 384, 6 Sup. Ct. 88; *Daviess Co. v. Dickinson*, 117 U. S. 657, 6 Sup. Ct. 897; *German Sav. Bank v. Franklin Co.*, 128 U. S. 526, 9 Sup. Ct. 159; *Carroll Co. v. Smith*, 111 U. S. 556, 4 Sup. Ct. 539; *Chambers Co. v. Clews*, 21 Wall. 317-321; *Citizens' Sav. & Loan Ass'n v. Perry Co.*, 156 U. S. 701, 15 Sup. Ct. 547; *Barnett v. Denison*, 145 U. S. 135, 12 Sup. Ct. 819.

The mere fact that the bonds have been issued, and are, in form, negotiable securities, if entitled to any significance whatever, would only raise a presumption that they had been delivered to the railroad company by the trustee in compliance with the terms of the law. Such a presumption would not be conclusive, and the county would not be estopped, even as against one who bought in actual ignorance of the true facts. This seems the well-settled rule, established by *Buchanan v. Litchfield*, *Daviess Co. v. Dickinson*, *German Sav. Bank v. Franklin Co.*, and *Citizens' Sav. & Loan Ass'n v. Perry Co.*, heretofore cited. In the case last cited this precise point was urged. Justice Harlan, for a unanimous court, in answer, said:

"But it is urged that, the bonds having been executed and issued by those whose duty it was to execute and issue them whenever that could be rightfully done, the county is estopped to plead their invalidity, as between it and a bona fide purchaser for value. This argument would have force if the material circumstances bringing the bonds within the authority given by law were recited in them. In such a case, according to the settled doctrines of this court, the county would be estopped to deny the truth of the recital, as against bona fide holders for value. But this court, in *Buchanan v. Litchfield*, 102 U. S. 278-292, upon full consideration, held that the mere fact that the bonds were issued, without any recital of the circumstances bringing them within the power granted, was not in itself conclusive proof, in favor of a bona fide holder, that the circumstances existed which authorized them to be issued."

Does the act under which these bonds were issued so far depart from the statutes construed in the cases cited as to warrant us in holding that a purchaser need make no further inquiry than would lead him to information that the trustee had made such a decision as that found by the circuit court, and that, if he buys without any inquiry, he is only obliged to prove by evidence extraneous to the bond that such a decision was in fact made? Unless this act can be construed as making the power of the county to issue these bonds dependent, not on the actual construction of this railroad through the county, but upon the decision of this trustee that it had been so constructed, the whole foundation for the argument disappears. This is the test to be applied to every case, even where recitals are relied upon to defeat a defense. In the leading case of *Dixon Co. v. Field*, 111 U. S. 93, 4 Sup. Ct. 315, the rule for construction of such enabling act is thus stated by Mr. Justice Matthews:

"But it still remains that there must be authority vested in the officers, by law, as to each necessary fact, whether enumerated or nonenumerated, to ascertain and determine its existence, and to guaranty to those dealing with them the truth and conclusiveness of their admissions. In such a case the meaning of the law granting power to issue bonds is that they may be issued, not upon the existence of certain facts, to be ascertained and determined whenever disputed, but upon the ascertainment and determination of their existence by the officers or body designated by law to issue the bonds upon such a contingency. This becomes very plain when we suppose the case of such a power granted to issue bonds, upon the existence of a state of facts to be ascertained and determined by some persons or tribunal other than those authorized to issue the bonds. In that case it would not be contended that a recital of the facts in the instrument itself, contrary to the finding of those charged by law with that duty, would have any legal effect."

It is to be observed at the outset that it is significant that while the act provides, in very plain language, that the requisite facts antecedent to the preparation and deposit of the bonds with the trustee shall be ascertained and determined by the county judge, no such explicit statement is found regarding the determination of the subsequent precedent conditions by this trustee. If he is empowered to make any determination whatever, the power is only inferentially granted. So it is significant that no provision is found requiring an indorsement of such decision on the bonds, or the making of some other permanent record that so grave a determination had been made. The very failure to provide in clear terms for a determination by this trustee of the existence of conditions which could only arise after the county judge had parted with the bonds and lost all control over them, and to provide for some method of certifying that determination, affords a strong presumption against the interpretation now contended for. Especially is this noticeable in view of the very well defined distinction between bonds with and without recitals. But it is said that the act authorized the making of "negotiable bonds," and that it ought not to be presumed that the legislature intended that "negotiable bonds" should be forever open to the defense that the railroad had never been completed as required by the act, and that we ought, therefore, to infer that the trustee was authorized to

decide as to whether there had been a compliance with this condition, and that his decision should be conclusive. Undoubtedly, the commercial value of such bonds would be much improved if the mere fact of their issuance should, in favor of innocent holders, be conclusive evidence of both the authority to issue them and the regularity of the exercise of that power. This, however, is not the law. If the legislature, by providing that these bonds should be negotiable, meant to cut off all defenses, by the decision of the county judge as to facts antecedent to the deposit in escrow, and by the decision of the trustee as to all facts subsequent to such deposit, it is most remarkable that it did not provide for some indorsement of that decision on the bonds. As it is, the fact that he ever made such a decision depends upon evidence in pais, and is subject to all the dangers of such evidence. The argument based on the inconvenience of making proof, in every action on such bonds, of the fact of the completion of the railroad, amounts to little, in arriving at the meaning of this act, if the litigant in such a suit is driven to make proof of a decision by the trustee by evidence equally difficult to preserve. But this provision authorizing the issuance of "negotiable bonds" must not be construed alone, nor merely in connection with the provision that the trustee should deliver them when the railroad was completed. There are many considerations which lead us to the conclusion that, while it was undoubtedly the duty of this custodian to inform himself as to the existence of the facts which would justify him in making a delivery of these bonds, yet that information was only for the purpose of enabling him to prudently discharge his duty, and protect himself and the parties interested from the consequence of an illegal and unauthorized delivery. The power of this depository to receive, hold, and deliver these bonds came from the enabling act alone. He was not constituted the agent of either the railroad company or the county, though he was designated by an order of the county judge. This depository need not have been a person at all. A corporate trust company might have been designated. Neither residence, citizenship, nor interest in or knowledge of the locality was essential to the competency of the appointee. The relation, therefore, that this depository bore to the county, is not of such a character as to lead to the presumption that it was intended that he should conclude the county through any agency for or relation to it. The bonds were not to be "delivered" to him, but "deposited" with him. Delivery is just as essential to the existence of a bond, note, or other negotiable instrument as it is to a deed. 1 Daniel, Neg. Inst. § 63 et seq.; *Young v. Clarendon Tp.*, 132 U. S. 353, 10 Sup. Ct. 107. Though they had been prepared and signed, they were absolute nullities until delivered, and they could not take effect as bonds until an authorized delivery. When prepared and signed by the county judge and clerk, and sealed, the power of these officials ceased. They could not perfect them by delivery, because the statute gave them no such power. What the county judge then did was to deposit them with the depository provided under the statute. This was not a delivery, and the

bonds continued imperfect obligations until a delivery which could only be made by the custodian when the railroad was completed. The power to perfect them as bonds arose only when the condition mentioned had been performed. A delivery before the railroad was begun would not have completed the making of these bonds, for the power was to deliver them when it was finished, and the act itself provided expressly that until then the bonds should not be valid, thus affirming the imperfect character of the bonds until a delivery was lawfully made. *Young v. Clarendon Tp.*, cited above. The imperfect character of the bonds, until the condition precedent had been performed, is further made manifest by the direction of the act that they should "be held in escrow and delivered to the said railroad company when it shall become entitled to them by the construction of its road through such county." This term, "in escrow," is one strictly applicable to deeds; and a direction that such imperfect obligations, executed subject to conditions and restrictions, by a maker having no general authority to issue such paper, should be held in escrow, implies that the term was used just as it would be used if the subject-matter of the deposit was a deed. As used, the term implied the state or condition of a deed conditionally held by a third person, to be delivered and to take effect upon the happening of a condition. *Bouv. Law Dict.*; *Black. Law Dict.* When a deed is delivered as an escrow, nothing passes by the deed, unless the condition is performed. *Calhoun Co. v. American Emigrant Co.*, 93 U. S. 124; 6 Am. & Eng. Enc. Law, 867; *Taylor v. Craig*, 2 J. J. Marsh, 449.

Counsel have very ably argued that a distinction exists between the effect of a delivery in violation of the conditions, where the thing in escrow was negotiable paper, and has come to the hands of an innocent purchaser without notice, and for value. 1 *Daniel*, Neg. Inst. §§ 68, 855, 856; *Taylor v. Craig*, 2 J. J. Marsh, 449. Possibly such distinction is sound, though if the purchaser bought with notice that the paper had been held in escrow, and that the trustee had no power to deliver until a condition had arisen, of which the purchaser likewise had notice, he could hardly be regarded as a bona fide holder. Every one dealing with an agent assumes all the risk of a lack of authority in the agent to do what he does. Negotiable paper is no more protected against this inquiry than any other. The purchaser of these bonds bought with notice that they had been held in escrow. The authority of the custodian was not a secret. Herein is the distinction between this case and that class of cases where paper is fraudulently issued by an agent who is authorized to make and issue negotiable paper in the business of his principal, and the question whether the paper issued is in the business of the principal is peculiarly within the knowledge of the agent, and not known to the world or a stranger. In such cases the agent is impliedly authorized to represent the existence of the fact upon which his agency depends. *Farmers' Nat. Bank v. Sutton Manuf'g Co.*, 6 U. S. App. 312, 332, 3 C. C. A. 1, and 52 Fed. 191. It is difficult to see why one who takes such bonds as those in suit is not just as much obliged to look to the authority of the

trustee to deliver as if the subject of the escrow had been a deed. We are to remember that these bonds were imperfect obligations, there having been no delivery when placed in escrow. The question first presented to an intending buyer is this: Have these bonds become executed, valid obligations, by delivery? The authority of this trustee to make delivery depended upon the same principles that determine such authority in other contracts, "and is not aided by the doctrine that, when once lawfully made, negotiable paper has a more liberal protection than other contracts in the hands of innocent holders." *The Floyd Acceptances*, 7 Wall. 666-680. "The authority to contract must exist, before any protection as an innocent purchaser can be claimed by the holder." *Marsh v. Fulton Co.*, 10 Wall. 683. But, aside from any distinction between the effect of a wrongful delivery of a deed and of commercial paper upon the title of an innocent purchaser, it seems very clear that the express declaration of the fourth section of the act that these bonds should not be valid obligations until the railroad had been completed through the county, and by the further provision that they should be held in escrow until that event, settles conclusively that the legislature did not mean that the power of the county to so obligate itself should depend upon the mere opinion of the custodian, but upon the actual, objective existence of the requisite fact. The whole scope and tenor of the act leads to the conclusion that the legislature intended to protect the county against any misapplication of these bonds, and therefore limited its power so that the bonds only became its obligations when the contract between the railroad company and the county should become complete. The machinery devised indicates that the purpose was that the railroad should not part with its stock certificates until it had received payment therefor. And, to secure the county against failure to complete the road, all power to issue bonds was made dependent upon its actual construction. To secure the railroad in obtaining the bonds when actually earned, it was provided that when a favorable vote had been cast, and the subscription made, the bonds should be prepared and formally executed, and placed in the hands of a stakeholder, to be delivered when the railroad company had performed its agreement. To secure the county against the possible breach of duty by this custodian, his holding was to be in escrow, and his power to deliver withheld until the actual performance of all precedent conditions. To further protect the county against an unauthorized delivery of the bonds, the act, in plain terms, provided that they should not be valid obligations until the completion of the road. That the custodian was required to give a bond for the due discharge of his trust by no means implies that the county was to look to this bond in case of an unauthorized delivery. The bond was no more for the benefit of one party than the other. A wrongful delivery, or a fraudulent use of them, might, irrespective of a defense, if sued upon the bonds, involve a costly litigation. It was eminently reasonable that the custodian of such securities, negotiable in form, should give security to protect both parties against negligence,

conversion, embezzlement, or any willful refusal to faithfully perform the trust.

It is next insisted that the county should be held responsible upon the principle that, whenever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it. This principle can have no application here, for two reasons: First, the holders of these bonds cannot be regarded as innocent purchasers, inasmuch as they are constructively chargeable with all that inquiry would have disclosed; and, second, the bonds, as bonds of a municipal corporation, are invalid, for want of power to issue them until the actual completion of the railroad in whose aid they were authorized. Neither are the bonds validated because of the payment of interest for a time after their issuance. The question here is not one of mere irregularity in the method of exercising a power. The defense presented goes to the power of the county. There was no authority to issue bonds in aid of the railroad until the road had been constructed through the county. That condition having never been complied with, neither the county court nor the county judge could, by any act of omission or commission, waive its performance. Neither could the county court or any of the county officials validate them by subsequent acts of ratification. If the power to issue them did not exist when they were issued, no payment of interest, or resolution to adopt them, can operate to make them valid contracts. Ratification can only be effective when the party ratifying possesses the power to perform the act ratified. *Marsh v. Fulton Co.*, 10 Wall. 676-684; *Norton v. Shelby Co.*, 118 U. S. 425-451, 6 Sup. Ct. 1121. In *Doon Tp. v. Cummins*, 142 U. S. 366-376, 12 Sup. Ct. 220, the court, through Mr. Justice Gray, said:

"A ratification can have no greater effect than a previous authority, and debts which neither the district nor its officers had any power to authorize or create cannot be ratified or validated by either of them, by the payment of interest, or otherwise."

That the county still holds the railroad stock received when these bonds were delivered is no reason for holding these bonds valid. By proper proceedings the railroad company can recover this stock, or compel payment for its value. Justice would demand the return of the stock, or compensation for its value. No such question exists in this case. *Norton v. Shelby Co.*, 118 U. S. 454, 6 Sup. Ct. 1121. The judgment must be reversed and remanded, with direction to render judgment in accordance with this opinion.

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WARAX v. CINCINNATI, N. O. & T. P. RY. CO. et al.

(Circuit Court, D. Kentucky.)

1. REMOVAL OF CAUSES—DIVERSE CITIZENSHIP—FRAUDULENT JOINDER OF DEFENDANT.

In order that the joinder of a defendant should be regarded as fraudulently made for the purpose of avoiding the jurisdiction of the federal court, it must appear, by allegation and proof, not only that it was made for



that purpose, but also that the averments upon which the right to join such defendant is claimed are so unfounded in fact and incapable of proof as to justify the inference that they were not made in good faith with the hope and intention of proving them, or else that they do not state a joint cause of action. The mere fact that an action, since discontinued, was once brought for the same tort against one of the defendants, without joining the other, is not sufficient.

2. NEGLIGENCE—MISFEASANCE AND NONFEASANCE.

When the engineer of a railroad train starts such train, without giving warning, while he knows or ought to know that a switchman is between the cars of the train, engaged in uncoupling them, in consequence of which the switchman is injured, the engineer's act is misfeasance, not nonfeasance.

3. SAME—MASTER AND SERVANT—JOINT AND SEVERAL LIABILITY.

When a master is made liable for the negligent or wrongful act of his servant solely upon the ground of the relationship between them, under the doctrine of respondeat superior, and not by reason of any personal share in the negligent or wrongful act, by his presence or express direction, he is liable severally only, and not jointly with the servant.

This is a motion by the plaintiff in the above-entitled cause to remand the case to the state court, where it was begun. Plaintiff's cause of action against the defendant railway company and its codefendant is stated in the petition as follows:

"On March 2, 1892, on said railway, and in the railway yard thereof at Somerset, plaintiff was the servant of the corporate defendant, employed by it as a switchman, and as a member of the crew of a yard locomotive engine and tender then and there belonging to the corporate defendant, and used by it in operating said railway; and defendant Charles Snyder was then and there also the servant of the corporate defendant, employed by it as a member of said crew, and as the engineer of said locomotive engine, and he then and there, as such engineer and servant of the corporate defendant, ran and operated the same. At the time and place aforesaid, defendants had attached to said locomotive engine and tender a train of five freight cars, and defendants then and there ordered and directed plaintiff to uncouple the three rear cars of said train; and thereupon plaintiff engaged in the work of executing said order and direction of defendants, and while plaintiff was so engaged in the work of executing said order and direction of defendants, the defendants, with full knowledge that plaintiff was engaged in said work, and without notice or warning to plaintiff, with gross and wanton negligence, suddenly and violently started the cars of said train forward with and by means of said locomotive engine, and so moved, ran, and operated said locomotive engine, tender, and cars of said train that then and there, by said gross and wanton negligence of defendants, plaintiff was thrown under the cars of said train; and then and there, by reason of said gross and wanton negligence of defendants, plaintiff's left leg was run upon and over by the cars of said train, and so injured that the same had, soon thereafter, to be amputated above the knee, and near the body, and he was otherwise severely and permanently injured in his person. By his said injuries plaintiff was made, and long continued, ill therefrom. He suffered, and long will continue to suffer, great mental pain and physical anguish. Thereby he was made a helpless cripple for life, and his capability to labor and earn money was greatly and permanently impaired, all to his damage in the sum of twenty-five thousand dollars. In the doing of said wrong defendant Snyder was the servant and agent of his codefendant, and said gross and wanton negligence was the joint gross and wanton negligence of both the defendants."

The railway company filed its petition for removal, setting out the various jurisdictional grounds, and, among others, the following:

"That there is, in said suit, a controversy wholly between citizens of different states, which can be fully determined as between them; that is to

say, between your petitioner, the Cincinnati, New Orleans & Texas Pacific Railway Company, defendant in said suit (who avers that it was at the commencement of this suit, and still is, a corporation organized under the laws of the state of Ohio, and of no other state, and that it was then, and still is, a citizen and resident of the state of Ohio, and of no other state, and that it was not then, and is not now, either a resident or citizen of the state of Kentucky), and plaintiff, Eugene R. Warax, who sues by his next friend, John L. Rich. Your petitioner says that both the said Warax and John L. Rich were at the commencement of this suit, and still are, residents and citizens of the state of Kentucky. Your petitioner further shows that heretofore, to wit, on the 13th day of December, 1892, a suit was instituted upon the same claim as in plaintiff's petition herein set out against this defendant, in the circuit court of Pulaski county, Kentucky, to recover of this defendant the sum of ten thousand dollars damages for the same injuries alleged to have been sustained by the said plaintiff, Eugene R. Warax, as in his petition herein set out. Your petitioner further shows that it filed the proper proceedings in said suit so pending in the Pulaski circuit court, Kentucky, to remove said suit to the circuit court of the United States for the district of Kentucky, because said controversy was a controversy existing between citizens of different states, and that such proceedings were had that the said suit was removed from the said Pulaski circuit court to the circuit court of the United States for the district of Kentucky, and that the jurisdiction of said suit wholly vested in said circuit court of the United States for the district of Kentucky, and the said suit pended, undisposed of, in the said circuit court of the United States for the district of Kentucky, until the 12th day of December, 1894, when the plaintiff dismissed said suit from the said circuit court of the United States for the district of Kentucky, and immediately after said dismissal brought this proceeding in this court to recover for the same injuries, from this defendant, the said sum of twenty-five thousand dollars. Your petitioner further shows that, in this suit, said plaintiff has fraudulently and improperly joined as a codefendant with your petitioner herein one Charles Snyder, who is a citizen of the state of Kentucky, and who is a resident of the county of Pulaski, in the state of Kentucky; and your petitioner says that the said Charles Snyder has been fraudulently and improperly joined as party defendant with your petitioner in this cause, from the fact that he is a resident and citizen of the state of Kentucky, and for the sole purpose of defeating the jurisdiction of the United States court. And your petitioner says that the injury to the plaintiff, Eugene R. Warax, happened on the 3d day of March, 1892, in the town of Somerset, county of Pulaski, and state of Kentucky, and said injury did not happen or occur in the county of Kenton, in the state of Kentucky. And your petitioner says that the plaintiff, Eugene R. Warax, resides in Pulaski county, Kentucky, through which county your petitioner's road passes, and that the chief office and place of business of your petitioner in the state of Kentucky is in the city of Lexington and county of Fayette."

Plaintiff filed an answer to the petition for removal in this court, denying that there was, in this suit, a controversy wholly between citizens of different states, which could be fully determined between them, and denying that Snyder was joined as a party defendant for the sole purpose of defeating the jurisdiction of the United States court. It appeared by evidence and admission that a previous suit had been brought and dismissed as averred in the petition for removal.

Wm. Goebel, for plaintiff.

Edward Colston and C. B. Simrall, for defendant.

Before TAFT and LURTON, Circuit Judges.

TAFT, Circuit Judge (after stating the facts as above). Plaintiff's petition seeks to hold the railroad company and Snyder, its

engineer, as joint tort feassors. If, on the statements in the petition, he is able to do so, then the cause is not removable (*Railroad Co. v. Wangelin*, 132 U. S. 599, 10 Sup. Ct. 203; *Pirie v. Tvedt*, 115 U. S. 41, 5 Sup. Ct. 1034, 1161; *Sloane v. Anderson*, 117 U. S. 275, 6 Sup. Ct. 730; *Plymouth Consol. Gold Min. Co. v. Amador & S. Canal Co.*, 118 U. S. 264, 6 Sup. Ct. 1034; *Hedge Co. v. Fuller*, 122 U. S. 535, 7 Sup. Ct. 1265), unless it be made to appear, to the satisfaction of the court, that one of the defendants was fraudulently joined for the purpose of defeating the jurisdiction of the federal court. In order that such joinder should be regarded as fraudulent, it must appear, by allegation and proof, not only that it was made for the purpose of avoiding the jurisdiction of the federal court, but also that the averments of the petition upon which the right to join the defendants is claimed are so unfounded and incapable of proof as to justify the inference that they were not made in good faith with the hope and intention of proving them, or else that they do not state a joint cause of action. No proof is offered in this case, except the fact that suit was once brought on the same cause of action against the railroad company without joining Snyder, the engineer. This may be regarded as a circumstance tending to show that the purpose in joining Snyder was to avoid the jurisdiction of the federal court, but it does not show, or have any tendency to show, that the averments of the petition with respect to Snyder, upon which the right to join Snyder is asserted, were unfounded in fact. One who has a real cause of action for joint tort against two persons cannot be deprived of the right to bring his action against both, and to retain both in the case, and to have the case heard with both as defendants, merely because he joined them for the purpose of avoiding the jurisdiction of the federal court. If the right exists, the motive for its exercise cannot defeat it. It should be said, however, that where, as in this case, there is manifested a desire to prevent a removal by the unusual course of joining a locomotive engineer with a railroad company, the court will not be astute, by any strained construction, to make the averments of the petition support the plaintiff's right to join the defendants.

This brings us to the second ground upon which the plaintiff claims a right of removal; that is, that no cause of action is stated against the engineer. It is contended that the failure of the engineer to give notice to the plaintiff of his intention to move the train while the plaintiff was between the cars was a mere act of nonfeasance, for which the plaintiff must look to the master, and not to the servant. This contention cannot be supported. Conceding, without deciding, the rule to be that, for mere nonfeasance, the servant of the master cannot be made responsible to third persons injured thereby, we are clearly of opinion that the act of the engineer in backing the engine voluntarily without giving notice was misfeasance, instead of nonfeasance; that the knowledge he had, or ought to have had, of the presence of the plaintiff between the cars, made his movement of the train without giving notice a direct trespass or wrong committed by him against plaintiff, without regard to the relation existing between each of

them and the railway company. No case has been cited to us in which such an act of a servant in the business of his master has been held to be nonfeasance. The last case, and one most fully considered, is *Osborne v. Morgan*, 130 Mass. 102, where the supreme judicial court of Massachusetts, speaking by Chief Justice Gray, held that a servant who attached a block and tackle to the ceiling in the course of his employment, and did not sufficiently secure it to prevent its falling, was liable in a direct action of tort to a fellow servant who was injured thereby. This case is a stronger case than that, for here the act of the servant directly injured his fellow servant.

We come, therefore, to the third ground upon which the defendant railway company rests its right to remove, which is that no joint tort is stated in the averments of the petition against both defendants. Taking the averments of the petition together as a whole, especially the last averment, in which it is stated that, in moving the engine, the engineer acted as the agent and servant of the defendant, and that the injury was caused by the defendant by the movement of the engine, we think that the petition must be construed to mean that the acts of negligence which were complained of in the movement of the engine were acts of the defendant, because committed by and through its agent and servant, the engineer, and that the conclusion that the acts were the result of the joint negligence of the defendant railroad company and the engineer is a mere conclusion of law, based on the proposition that, where the engineer, through his negligence, does an injury in the scope of his employment, he and his principal are jointly liable in one action therefor. If plaintiff intended to charge that the defendant was present by any corporate or superintending officer, so as to constitute what would be a personal interference in the acts complained of by the master, he should have made his petition specific upon this point. In his failure to do so, he must rest alone on the proposition of law above stated to justify his joinder of the company and the engineer. The question whether the master and the servant can be joined, as the perpetrators of a joint tort, for the injury inflicted by the negligence of the servant, without the presence of the master, and without his express direction, is one upon which the authorities do not agree. The affirmative of the proposition is supported by the cases of *Wright v. Wilcox*, 19 Wend. 343; *Suydam v. Moore*, 8 Barb. 358; *Montfort v. Hughes*, 3 E. D. Smith, 591; *Phelps v. Wait*, 30 N. Y. 78; *Wright v. Compton*, 53 Ind. 337; *Greenberg v. Lumber Co.* (Wis.) 63 N. W. 93; *Newman v. Fowler*, 37 N. J. Law, 89. It is contended that the case of *Martin v. Railroad Co.*, 95 Ky. 612, 26 S. W. 801, is also an authority in support of this contention. An examination of the case, however, will show that the question was not decided. The case was one where suit was brought against three defendants as joint tort feorsors, and the court below held that, on the undisputed evidence, the defendants were none of them liable, and directed a verdict for the defendants. The plaintiff brought the case up on error, and the decision of the court was

that there was evidence tending to support a cause of action against one of the railroad companies and its engineer; but the court did not discuss the question whether they could be joined, and there is nothing in the opinion to indicate that it was considered.

The cases which support the view that the master cannot be joined as defendant in the action against his servant for negligence, where the master is not personally concerned in the negligence, either by his presence or express direction, are as follows: *Parsons v. Winchell*, 5 Cush. 592; *Mulchey v. Religious Soc.*, 125 Mass. 487; *Clark v. Fry*, 8 Ohio St. 358, 377; *Seelen v. Ryan*, 2 Cin. R. 158; *Campbell v. Sugar Co.*, 62 Me. 553; *Beuttel v. Railway Co.*, 26 Fed. 50; *Page v. Parker*, 40 N. H. 47, 68; *Bailey v. Bussing*, 37 Conn. 349, 351. It is to be observed that, if this were a mere question of procedure, one that had nothing to with the real basis of liability, and did not grow out of the character of the wrong complained of, we ought, perhaps, to examine with some degree of care the procedure in the state courts of Kentucky. There is no statute, however, in Kentucky, which attempts to vary the procedure from that at common law. In fact, it will be found that in none of the Codes has any attempt ever been made with respect to the liability for torts as to their joint and several character. *Bliss*, Code Pl. §§ 82, 83. The rule which permitted a plaintiff injured by the joint act of defendants to join them in one action was rested originally on the theory that they were to be held as conspirators, and that each, having knowingly embarked on the unlawful venture, was liable for all that the other did, and that therefore they could be held as partners in wrong. Joint trespassers were held on the same principle, and finally, where two persons were guilty at the same time of mere acts of negligence, operating together to cause injury to a third person, it was held that they must be regarded as acting in concert, and that each must be held liable for the entire damage, as for a joint tort. The advantage which this gave the defendant in actual trials was very considerable. Under the old rule, which forbade parties to testify, it prevented one defendant from using the other as a witness. It enabled the plaintiff to take a joint judgment against both, and to enforce it against either. The election which the plaintiff had to sue one or more of the joint feorsors grew out of the assumed concert of action which he charged against them all. Hence, the question is whether, when a master is held liable for the negligence of his servant in his absence, which negligence he did not direct, he can be said to have acted in concert with the servant to produce the injury in such a way as that he and the servant can be held liable in the joint action. Clearly not. His liability does not arise from any common purpose that he had with the servant, or from any actual unity of action between them, in point of time and effect, or otherwise. His liability arises simply and solely from the policy of the law, which makes him responsible for the acts of his servant, done in the discharge of his business. The rule by which he is held is usually referred to as the rule of re-

spondeat superior, which, says Mr. Pollock, in his work on Torts (4th Ed., p. 70), "is a dogmatic statement, not an explanation." The learned author continues:

"It is also said, 'Qui facit per alium facit per se.' But this is in terms applicable only to authorized acts, not to acts that, although done by the agent or servant 'in the course of the service,' are specifically unauthorized, or even forbidden. Again, it is said that a master ought to be careful in choosing fit servants; but, if this were the reason, a master could discharge himself by showing that the servant for whose wrong he is sued was chosen by him with due care, and was in fact generally well conducted and competent, which is certainly not the law. A better account was given by Chief Justice Shaw of Massachusetts. 'This rule,' he said, 'is obviously founded on the great principle of social duty, that every man, in the management of his own affairs, whether by himself or by his agents or servants, shall so conduct them as not to injure another, and, if he does not, and another thereby sustains damage, he shall answer for it.' This is, indeed, somewhat too widely expressed; for it does not, in terms, limit the responsibility to cases where at least negligence is proved. But no reader is likely to suppose that, as a general rule, either the servant or the master can be liable where there is no default at all. And the true principle is otherwise clearly enounced. I am answerable for the wrongs of my servant or agent, not because he is authorized by me or personally represents me, but because he is about my affairs, and I am bound to see that my affairs are conducted with due regard to the safety of others. Some time later the rule was put by Lord Cranworth in a not dissimilar form: The master 'is considered as bound to guaranty third persons against all hurt arising from the carelessness of himself or of those acting under his orders in the course of his business.'"

Mr. Pollock quotes from a French writer, M. Sainctelette, on the subject, saying:

"Responsibility of the agent for the principal is not a fiction invented by the positive law. It is an exigency of the social order."

It will thus be seen that the master is not held on any theory that he personally interferes to cause the injury. It is simply on the ground of public policy, which requires that he shall be held responsible for the acts of those whom he employs, done in and about his business, even though such acts are directly in conflict with the orders which he has given them on the subject. The liability of the servant, on the other hand, arises wholly because of his personal act in doing the wrong. It does not grow out of the relation of master and servant, and does not exist at all, unless it would also exist for the same act when committed, not as the servant, but as the principal. Liabilities created on two such wholly different grounds cannot and ought not to be joint. The question is most fully examined in the case of *Parsons v. Winchell*, 5 Cush. 592, in an opinion by Judge Metcalfe, wherein all the cases are examined. This was followed by the case of *Mulchey v. Religious Soc.*, 125 Mass. 487, in which Chief Justice Gray used this language:

"If there was any negligence in the agents, Barber and Sleeper, for which they could be held liable, their principal, the society, would be responsible, not as if the negligence had been its own, but because the law made it answerable for the acts of its agents. Such negligence would be neither in fact nor in legal intentment the joint act of the principal and of the agents, and therefore both could not be jointly sued. It is not like the case of a willful injury done by an agent by the command or authority of his principal, in which both are, in law, principal trespassers, and therefore liable jointly."

The same rule is followed in Ohio in the case of *Clark v. Fry*, 8 Ohio St. 358, 377. Suit was there brought to recover damages against the owner of property which caused an excavation to be built in front of his house, which had been negligently and wrongfully allowed to remain in an unfenced condition by his servant. Said the court:

"But whether the liability to the defendant in error, if any existed, attached to Freeman alone, or to Clark for the negligence of his servant or agent, or to Clark and Freeman as joint tortfeasors, depended upon a legal question arising upon the relation between Clark and Freeman in respect to the transaction alleged as the occasion of the injury. If the excavation had been ipso facto unlawful, as an unnecessary encroachment on the street, Clark and Freeman would have been liable, if any liability existed, jointly as wrongdoers. But if there was nothing in the work that Clark had required by the contract to be done which was in itself unlawful, or which, properly done, could be the occasion of an injury to any one, and Freeman, wholly free from the control of Clark as to the manner of doing the work, had by his own wrongful and negligent conduct been the cause of the injury, he alone would be liable. If, however, Freeman, acting under the control and direction of Clark, as his servant or agent, had negligently and wrongfully allowed the excavation to be in an unfenced or otherwise dangerous condition, whereby the injury was sustained, Clark would be liable, although not jointly, with Freeman. In this last instance supposed, either Clark or Freeman might be sued separately; but, inasmuch as Clark, although he could not excuse himself on the ground that the nuisance had been occasioned by the negligence of Freeman, would have a right of action against Freeman for the recovery of such damages as he might be compelled to pay by reason of his negligence, he (Clark) could not be joined in the same action with Freeman. This doctrine was expressly ruled in *Parsons v. Winchell*, 5 Cush. 592, and it appears to rest upon a reason which is entirely satisfactory."

In *Campbell v. Sugar Co.*, 62 Me. 553, suit was brought against a corporation which owned a wharf, and against their agents who had control of the wharf, for an injury sustained, through a failure to repair the wharf, by a person lawfully upon it. In this case the court said:

"The corporation is answerable for its constructive negligence, or, perhaps (to speak more exactly), on the principle of respondeat superior, and must be held, as Lord Kenyon remarked (1 East, 108), 'to make a compensation for the damage consequential from the employing of an unskillful or negligent servant.' The other defendants, who were the general agents of the corporation, and had the care of this wharf, and who, through their senior partner, had agreed with the lessees to make all needful repairs, are certainly in no better position than their principal. It is the actual, personal negligence of the agents which constitutes the constructive negligence of the corporation. The corporation acts through and by them, and they act for the corporation; and when their acts or neglects result in injury to third parties, they are equally responsible with their principals. But it does not thence follow that they are jointly responsible. The question whether they may be so held is a somewhat nice one, but we think there are substantial reasons, assigned in *Parsons v. Winchell*, 5 Cush. 592, why the principal and agent should not be charged jointly in such a case. It is not, properly speaking, their joint act or neglect which causes the injury. The proper adjustment of the final responsibility as between themselves cannot well be affected if one who has distinct grounds of action against them—against the agents for their own negligence, and against the principal because the law makes them responsible for the negligence of their servants—is permitted to recover against both in one suit. The distinction between actions on the case arising from negligence and actions of trespass, where the wrong is inflicted at the command of the superior, in this respect, is well marked, and goes somewhat deeper than mere form."

In *Page v. Parker*, 40 N. H. 47-68, it was sought to hold the principal in a contract of sale liable in tort for the fraudulent misrepresentations of his agents in the sale of property, although he had no knowledge of and took no part in the misrepresentation. It was held that he could not be sued jointly with his agents in such an action. Say the court, on page 68:

"In an action *ex delicto*, the act complained of must be the joint act of all the defendants, either in fact or in legal intendment and effect. But the act of a servant or agent is not the act of the master or principal, even in legal intendment or effect, unless the master or principal previously directs or subsequently adopts and ratifies it. *Parsons v. Winchell*, 5 Cush. 593. There is no contribution among joint wrongdoers, and if David M. Parker could be found guilty as a joint conspirator and defrauder with the other defendants, solely upon evidence of the unauthorized fraudulent acts and representations of his agent and the person employed by him to aid in effecting a sale, and he should be compelled to satisfy the judgment recovered against all, he would be entirely without remedy for reimbursement, or even contribution against the other defendants, however utterly unauthorized and disapproved those fraudulent acts and representations might have been. Unless, therefore, the plaintiff be able to show the joint participation of David M. Parker in the alleged fraudulent purpose and design of the other defendants, it would be manifestly unjust that he should be holden liable with them in the present action, even though he might be clearly liable, if sued separately, for the damage resulting from the unauthorized fraud of the agent employed by him to sell his property, since it is well settled that a principal has a remedy over for damages he may be compelled to pay in consequence of the unauthorized misfeasance and malfeasance of his agent."

The whole line of authorities holding a contrary doctrine was rested on the language of Judge Cowen in the case of *Wright v. Wilcox*, 19 Wend. 343:

"In a case of strict negligence by a servant while employed in the service of his master, I see no reason why an action will not lie against both jointly. They are both guilty of the same negligence, at the same time, and under the same circumstances,—the servant in fact, and the master constructively, by the servant, his agent. Mr. Hammond lays down the rule in this way: 'Whether the principal and inferior may be charged jointly depends on whether the inferior is liable as a trespasser *vi et armis*, or in case only. If the latter, they may be sued together, but otherwise if the former; it being held, how justly may be questioned, that a principal is liable for his agent's misconduct only in case.' *Ham. Parties*, 85, 86. The rule is, in the main, doubtless, right, but seems to be shaken by *Moreton v. Hardern*, 6 Dowl. & R. 275, in respect to the quality of the servant's act. There were, in that case, three proprietors of a coach. One was driving, and ran against the plaintiff's cart. All three were sued in case, and several judges thought either trespass or case would lie against the driver, though the mischief arose from mere negligence, but all agreed that case only would lie against the other two who were absent; yet the action was maintained against all three."

The English case of *Moreton v. Hardern*, above cited, is not at all in conflict with the view taken of the cases in Massachusetts, and other cases cited above, in which it is held that a master is not jointly liable with the servant for mere negligence. In that case the three owners of the coach were held liable jointly for the act of one of them. In that case the three were all principals, and were responsible for the act of the one who was the servant. The fact, therefore, that they were jointly sued, and the suit was maintained, did not at all establish the principle that, if the one through whom the injury had been inflicted was not a principal with the



other two, a suit against the three could have been sustained. This distinction is pointed out by Judge Metcalfe in *Parsons v. Winchell*, *supra*. It is an incorrect statement to say that the master contributes in any sense to the injury inflicted by the mere negligence of his servant in his absence. Where he commands or directs such an injury, he, of course, aids or abets its commission, and does, therefore, in this way, contribute directly to it, and is jointly liable with his servant; but, where he is liable although he may have expressly commanded the servant not to do that which results in injury, it seems a contradiction in terms to say that he jointly acted with the servant to cause the loss. The subsequent cases, which follow that of *Wright v. Wilcox*, do not discuss the principle, but refer only to that of *Wright v. Wilcox*. It should be said that Judge Cowen's remark in *Wright v. Wilcox* was not necessary to the decision of the case, and was an obiter dictum.

In all cases where the master could have been held liable in trespass for the act of the servant at common law, a joint action would lie against them for trespass. Such actions against a master were limited to cases where he personally interfered, or where he directed his agent or servant to do something which would naturally result in the injury for which recovery was sought. The distinction is clearly brought out by Baron Parke in the leading case of *Sharrod v. Railway Co.*, 4 Exch. 580. That was an action against a railroad company to recover damages for injury to sheep that had been struck by a railway train of the defendant. The sheep had come upon the track in consequence of defective fences. The train was an express train, the engineer of which had directions to drive at a certain rate per hour. It was suggested that, in going at this rate, in the dusk of the evening, when the accident happened, the driver could not have seen the sheep in time to avoid the collision. It was objected that the form of action was improper, it being trespass, while it should be case. Baron Parke used the following language:

"The immediate act which caused the damage to the plaintiff's cattle was the impact of a machine which was under the control of a rational agent, the servant of the defendants; not so much so, indeed, as a horse, or carriage drawn by horses, or propelled by mechanical power along an ordinary highway, would be, in which cases both the direction and the speed of the machine are under government, but still in such a degree as to make the cases similar for the purpose of deciding the present question. We may treat the case, then, as if the damage had been done by an ordinary carriage drawn by horses; and, it being now settled that an action of trespass will lie against a corporation, we may consider, for the present purpose, the defendants as one natural person, and the carriage under the care of his servants. Now, the law is well established, on the one hand, that whenever the injury done to the plaintiff results from the immediate force of the defendant himself, whether intentionally or not, the plaintiff may bring an action of trespass; on the other, that if the act be that of the servant, and be negligent, not willful, case is the only remedy against the master. The maxim, '*Qui facit per alium facit per se*,' renders the master liable for all the negligent acts of the servant in the course of his employment; but that liability does not make the direct act of the servant the direct act of the master. Trespass will not lie against him. Case will, in effect, for employing a careless servant; but not trespass, unless, as was said by the court in *Morley v. Gaisford*, 2 H. Bl. 442, the act was done by his command,—that is, unless either the

particular act which constitutes the trespass is ordered to be done by the principal, or some act which comprises it, or some act which leads by a physical necessity to the act complained of. The former is the case when one, as servant, is ordered to enter a close to try a right or otherwise; the latter, when such a case occurs as *Gregory v. Piper*, 9 Barn. & C. 591, where the rubbish ordered to be removed, from a natural necessity, fell on the plaintiff's soil; but, when the act is that of the servant in performing his duty to his master, the rule of law we consider to be that case is the only remedy against the master, and then only is maintainable when that act is negligent or improper. And this rule applies to all cases where the carriage or cattle of a master is placed in the care and under the management of a servant, a rational agent. The agent's direct act or trespass is not the direct act of the master. Each blow of the whip, whether skillful and careful, or not, is not the blow of the master. It is the voluntary act of the servant. Nor can it, we think, be reasonably said that all the acts done in the skillful and careful conduct of the carriage are those of the master, for which he is responsible in an action of trespass, to the same extent as if he had given them himself, because he has impliedly ordered them, but those that were careless and unskillful were not, for he has given no order, except to use skill and care. Our opinion is that, in all cases where a master gives the direction and control over a carriage or animal or chattel to another rational agent, the master is only responsible, in an action on the case, for want of skill or care of the agent,—no more. Consequently, this action cannot be supported."

Though the question in the case cited concerned forms of procedure, the distinction there mentioned goes deeper than mere form, and is a distinction between those acts in which the master is really a co-actor with the servant, and those in which his responsibility is based merely on the rule of law that makes him liable for the negligence of his servant in and about his business. It does not explain away the effect of the decisions in *Massachusetts*, *New Hampshire*, *Maine*, and *Ohio*, above quoted, to say that they merely went to the question of whether you could unite an action on the case with an action for trespass, because, under the procedure in nearly all of them, case and trespass could be united in one action, and the distinction between them as forms of action had been abolished. On principle, we have no hesitation in taking the view so logically upheld by the *Massachusetts* courts, and in deciding that a suit against a principal and the agent, by the mere negligence of the agent, in the absence of the principal, is a misjoinder, and that the causes of action are not joint, but several.

The conclusion thus reached may be somewhat at variance with some remarks which were made incidentally in the cases of *Powers v. Railway Co.*, 65 Fed. 129, and *Hukill v. Railway Co.*, 65 Fed. 138, and which were not necessary to the conclusions there announced; but the question of joint liability of master and servant, fully argued and considered in this cause, was but little considered there, and the right of a plaintiff to join them in every case of negligence by the servant alone was assumed rather than decided.

The engineer in this case was improperly joined as a defendant with the railway company, the railway company has the right to have the suit against it tried in this court, and the motion to remand the same is denied.

## WAYDELL et al. v. GABRIELSON.

(Circuit Court of Appeals, Second Circuit. February 20, 1896.)

## LIMITATIONS—NEW ACTION AFTER DISMISSAL—NEW YORK STATUTE.

The New York statute (Code Civ. Proc. § 405) providing that "if an action is commenced within the time limited therefor, and a judgment therein is reversed on appeal, without awarding a new trial, or the action is terminated in any other manner than by a voluntary discontinuance, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff \* \* \* may commence a new action for the same cause, after the expiration of the time so limited," does not apply to a case where a judgment for the plaintiff has been reversed on appeal, and a new trial awarded, and, upon the coming on of the action for such new trial, the complaint is dismissed, without objection from the plaintiff's counsel, whereupon a judgment is entered reciting the dismissal of the complaint by default, and adjudging costs against the plaintiff.

In Error to the Circuit Court of the United States for the Eastern District of New York.

This is a writ of error by the defendants in the court below to review a judgment for the plaintiff entered upon the verdict of a jury.

Benedict & Benedict (Robert Benedict, advocate), for plaintiffs in error.

G. P. Gordel, for defendant in error.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. We are of the opinion that the trial judge erred in not ruling that the New York statute of limitations was a bar to any recovery by the plaintiff upon the first cause of action set forth in his complaint, and consequently that the assignment of error impugning that ruling is well founded. That cause of action is for an assault and battery which was committed upon the plaintiff more than two years before the present action was commenced, and is explicitly within section 384 of the Code of Civil Procedure, which provides that an action to recover damages for assault and battery must be commenced within two years after the cause of action has accrued.

It was shown at the trial that in February, 1889, the plaintiff brought suit against the defendants for the same assault and battery in the superior court of the city of New York, which was contested by the defendants, and, after a trial, resulted in a judgment for the plaintiff; that, upon an appeal by the defendants to the court of appeals of New York, that court reversed the judgment of the superior court (31 N. E. 969), and ordered a new trial; that the action came on again for trial in the superior court, when, counsel for both parties having appeared, and the counsel for the plaintiff making no objection thereto, the court dismissed the complaint, with the costs of the suit; and that February 24, 1893, a judgment reciting that the complaint stand dismissed by default, and adjudging a recovery of the costs against the plaintiff, was

duly entered of record in the action. It is insisted for the defendant in error that upon these facts the present action is excepted from the bar of section 384 by force of the provisions of section 405 of the Code. This section reads as follows:

"If an action is commenced within the time limited therefor, and a judgment therein is reversed on appeal, without awarding a new trial, or the action is terminated in any other manner than by a voluntary discontinuance, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff \* \* \* may commence a new action for the same cause, after the expiration of the time so limited, and within one year after such a reversal or termination."

It is the manifest purpose of this section to preserve to a plaintiff who has begun his action within the statutory period, and endeavored to prosecute it to a recovery, but has been defeated, an opportunity for one year to bring a new action, notwithstanding the cause of action under other circumstances would be barred by limitation. One of its provisions embraces actions in which the plaintiff has obtained a judgment, but it has been reversed on appeal; the other provisions embrace actions in which a judgment has not been obtained, but the action has not been terminated by a judgment on the merits, or by the consent, express or implied, of the plaintiff. In actions brought in some of the inferior courts in which the plaintiff has obtained judgment and there has been a reversal on appeal, no venire de novo is awarded by the appellate court in this state, and the only recovery of the plaintiff, if he desires to further prosecute his claim, is to bring a new action. *Wooster v. Forty-Second St. R. Co.*, 71 N. Y. 471. It would be manifestly unjust, when a plaintiff has been defeated because of some technical error upon the trial, or upon some ground not necessarily involving the merits of his cause, or not fatal to an ultimate recovery, to deny him a reasonable opportunity for a new trial; and this would result when the appellate court does not, upon reversing the judgment, grant a new trial if in the meantime the statute of limitations has run against his cause of action. The first provision is intended to obviate the mischief. The other provisions are intended to remove the hardship which would attend a plaintiff who, notwithstanding he has diligently prosecuted his action, has been defeated upon some point not involving the merits, and would lose the remedy of a new action because in the meantime his cause of action had become barred. The statute embraces two classes of plaintiffs,—one, those who have obtained a judgment which has been reversed upon appeal, without awarding a new trial; and the other, those who have not obtained judgment, but who have not been defeated on the merits, and whose action has not been terminated by their own volition. If a plaintiff has obtained a judgment, he is in the category of the first class, and the provisions applicable to the second class do not apply to him. Unless this is the meaning of the statute, the provision in respect to plaintiffs whose judgments have been reversed is wholly inoperative and unnecessary, and, if omitted, the other provisions would relieve all classes of plaintiffs embraced within its lan-

guage. A plaintiff who has obtained a judgment which has been reversed upon the merits of the cause does not derive any benefit from either of the provisions, and, if the first provision were omitted, the other language of the section would permit a plaintiff who has obtained a judgment which has been reversed, but not upon the merits, to bring his new action within the year. In order to give due effect to the several provisions, the section must be construed as not applying to plaintiffs who have obtained a judgment which has been reversed on appeal with an award of a new trial. Such a plaintiff has no occasion to bring a new action, and cannot invoke the benefit of the section.

Even if the section were applicable to a case like the present, where, upon a reversal, the appellate court ordered a new trial, it would be contrary to the spirit, and, as we think, to the true meaning, of the statute, to construe it as embracing an action in which the plaintiff has consented to a dismissal of his complaint. What took place in the present case was equivalent to a voluntary discontinuance of the action or to a dismissal of the complaint for neglect to prosecute. Such a construction was given to the statute by the judgment of the appellate branch of the supreme court in *Hayward v. Railway Co.*, 52 Hun, 383, 5 N. Y. Supp. 473. In that case the plaintiff, upon the trial of his action, was permitted to withdraw a juror, upon the condition that he pay the trial costs within a specified time. The payment was not made, and thereafter the action was dismissed for "failure to pay said costs," and final judgment thereon entered. The court decided that this was, in effect, a dismissal of the complaint for failure to prosecute the action, and accordingly held that section 405 did not relieve the plaintiff from the bar of the statute of limitations, although his new action was brought within a year after the dismissal of his complaint in the former suit.

We conclude that, in any view of the section, it does not reach the present case, and that the trial judge should have directed a verdict for the defendants as to the first cause of action. This conclusion renders it unnecessary for us to consider questions which have been raised by the other assignments of error.

The judgment of the circuit court is reversed, with instructions to grant a new trial.

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#### BLOCK v. WALKER.

(Circuit Court of Appeals, Sixth Circuit. February 4, 1896.)

No. 329.

#### BROKERS—RIGHT TO COMMISSIONS.

One W., a distiller, employed B., as broker, to effect a sale of whisky made by him. Nothing was said about B.'s negotiating an option for the sale of the next season's product, but, when B. brought W. and an intending purchaser together, he told W. that the purchaser might demand an option. W. at first refused to give such option, but was finally induced by B. to do so, and a contract was drawn up for the sale of the whisky already made, with an option to the purchaser to buy a large

part of the next season's product. W. paid B. his commission on the sale of the whisky already made, and when the purchaser's option was afterwards exercised, and more whisky, of the next season's manufacture, sold to him, B. demanded commissions thereon. *Held*, that he was not entitled to such commissions.

In Error to the Circuit Court of the United States for the District of Kentucky.

The plaintiff in error, Block, a commission broker, brought this action against the defendant in error, Walker, a distiller, to recover commissions which he claims are due upon a sale of whisky made through his procurement to J. & A. Freiberg, dealers in whisky. The facts are that on the 3d of December, 1891, by a written contract of that date, the defendant in error sold to J. & A. Freiberg 2,500 barrels of whisky, of designated brands, at an agreed price. This contract closed with a provision that, "in consideration of 2,500 barrels purchased of me by J. & A. Freiberg, I hereby give them the option to purchase from me 2,000 barrels of the J. H. McBrayer, to be made during the distilling season of 1893, at 27½ cents per proof gallon, in bond, cash, and also 1,000 barrels of Rock Castle, at 25 cents per proof gallon, in bond, storage, etc. It is, however, understood that this option expires unless accepted by them on or before the first of November, 1892." This contract contains other provisions, not necessary to notice, both in reference to the sale and the option. On the 24th day of October, 1892, they reduced this option to the form of a contract of sale, in writing, similar to that of the original sale, and closed it with another option for 2,000 barrels of the McBrayer whisky, to be distilled in 1894. Under this last contract the Freibergs took, not only the 3,000 barrels of whisky of the 1893 distilling, but 2,000 barrels additional. The plaintiff in error, as the broker negotiating the original contract, was paid by the defendant in error an agreed commission of 25 cents per barrel upon the original sale, and, when the option was completed by acceptance, he claimed an additional commission, first upon 1,500 barrels, and afterwards upon the whole 5,000 barrels of 1893 whiskies. Payment being refused, this suit was brought to recover the commissions. At the trial the court directed a verdict for the defendant, and the case comes here by writ of error from the judgment entered upon that verdict. The other necessary facts will appear in the opinion of the court.

Max B. May, for plaintiff in error.

D. W. Lindsay and Jonas B. Frenkel, for defendant in error.

Before TAFT and LURTON, Circuit Judges, and HAMMOND, J.

HAMMOND, J. (after stating the facts). The assignment of errors, and the argument made in support of it, proceed so entirely upon what we conceive to be a misconception of the nature and character of the contract, that we should first state our determination as to its true nature, and the facts which lead us to that conclusion. The first appearance in the proof of any circumstance relating to the option for which the commissions are claimed is in the testimony of the plaintiff in error himself, when he states that, at some time during the initial conversation between him and the Freibergs about Walker's whisky, he "suggested that the Freibergs should take an option on succeeding crops." It is conceded that, in the dealings between the principal and his broker, nothing whatever had been said between them about any option for future crops, and that, even after Walker came to Cincinnati to carry out the negotiations with the Freibergs, nothing was said between them about such an option, or between Walker and the Freibergs, during all of the protracted conversations about the price

and conditions for the sale of the original whisky. Walker and the Freibergs could not agree about the terms of sale, and separated. The plaintiff in error thereupon urged the defendant in error to accept Freiberg's offer of prices, and, in order to induce him to do so, agreed to abate the ordinary commission of 50 to 25 cents per barrel, to which he finally assented. Up to this time, except by the suggestion already referred to of the plaintiff in error to Freiberg, no mention had been made between any of the parties in relation to any option for future sales. Block had never suggested it to Walker, nor had Walker conceived the idea of employing Block to procure such an option. They returned to Freiberg's office, after the abatement of commissions, with a view of accepting the prices of Freiberg, with a draft of a contract, prepared by Block himself, in which there was still no mention of any option; but, on the way, Block told Walker that "Freiberg might demand an option." When Freiberg read the draft of the contract prepared by Block, he refused to sign it unless an option on the succeeding crop of 1892-93 should be granted, to which Walker refused his assent. Thereupon "Block called Walker aside, and advised him to consent to give an option provided the price for the McBrayer brand was fixed at 27½ cents per gallon, and the price of the private brand at 25 cents per gallon, and provided, further, that a grain clause was inserted in the contract in order to protect Walker against a rise in the grain market, and provided that no less than 3,000 barrels were made under the option." This was an advance in the price of future sales over that which the Freibergs had previously offered. Walker reluctantly consented to this, and the contract already mentioned was executed. This all appears in the proof of plaintiff in error himself. It is further explained by the testimony of Freiberg. Referring to Block, he is asked:

"Q. What was said about any option, if any? A. He said the option was worth something for us. Q. Is it not a fact that he said to you that he wanted to protect you against the next season's crop, and therefore you should take the option? A. That was the idea of it. Q. Did Mr. Block say anything to you about Mr. Walker's agreeing to give you an option at that time? A. Not in the first conversation. Q. Did he say at any time prior to the execution of that contract? A. Yes, sir. Q. What did he say to you? A. He said, by taking the option, it was worth some money to us."

A good deal appears in the record about Block's desire to introduce Walker's whisky in the market at Cincinnati, and about his desire to effect this sale, and to such an extent was he anxious that he was willing to reduce his commissions, which he did. But there is no proof of any circumstance of that nature which is not entirely complete in its application to the accomplishment of the original sale that Block was evidently anxious to make, nor can any of the facts or circumstances be held to relate at all to any desire or effort on his part to induce the Freibergs to accept any option from Walker. The whole proof shows that Walker did not have in contemplation, as a part of his purpose, the giving of this option. He was reluctant to grant it, and there is no sug-

gestion in the proof, as we look at it, of any service to him in the matter of procuring for him, and for his benefit, an option from Freiberg. On the contrary, the proof all shows, conclusively, that this feature of the contract was inserted for the benefit of Freiberg. When it was first mentioned to Walker, he was told by Block that it might be demanded of him,—not that he should offer it or try to get it in his own interest, as would have been the natural language if the purpose were that of the broker or the principal to push a sale of the option. Indeed, in any impartial view of the circumstances, it was a condition precedent imposed by Freiberg upon Walker for his agreement to take the whiskies of 1891–92. Whatever part Block took in bringing about this state of mind on the part of Freiberg was not in furtherance of any such offer of an option by Walker, who was neither desirous of selling options nor employing agents to negotiate them, as clearly appears from his reluctant attitude in the matter, nor of any advantage to him then in contemplation by him or Block. If the latter had any purpose at that time of reaping his commissions for the sale of an option, he concealed it from Walker, and at a time, too, when they were engaged about fixing the commissions. Whether Freiberg's demand was brought about by Block's suggestion or not, it having been determined upon by Freiberg as a condition without which he would not deal with Walker in relation to the main sale, the struggle which Block had with Walker to induce him to give the option, and the suggestion by him of better terms and protective conditions, did not make the transaction any less a condition imposed upon Walker. That which he wanted was a straight sale to Freiberg of the whiskies of 1891–92, and it was such a sale that Block was employed to make.

Now, on this state of facts, one of two results must follow, as it seems to us: Either all that Block did was covered by his commission of 25 cents per barrel of the straight sale, or there is not necessarily to be implied a promise on the part of a principal to pay his broker commissions for inducing himself, unwillingly, to assent to what was to him an undesirable condition attached to a sale which he had employed the broker to make, and which the broker himself was so desirous to effect that he had persuaded the purchaser to secure the condition as an inducement to his purchase. In the New Jersey case of *Runyon v. Wilkinson*, 31 Atl. 390, it was held that one employed to make a sale could not claim commissions, where that which was procured was only an option to purchase, tendered by the other contracting party. But that position would probably have been met in this case by the proof that was offered that it was customary in this trade for a broker to receive commissions when the option had ripened into a sale, if the case had gone to trial upon that issue, which properly it did not. We do not, therefore, put our judgment on that ground, but rest it upon the ruling made in the case of *Harnickell v. Mining Co.*, 22 N. E. 1079, 117 N. Y. 644. There the defendant company desired to sell its copper ore, and the smelting firm of Pope, Cole & Co. wished only to smelt it. The negotiations carried on



and executed by the plaintiff as the broker resulted in a contract with the smelting company for not only the smelting of the ore, but the purchase of the product. He was paid by the smelting company his usual commissions for negotiating smelting contracts for them, but he claimed also commissions from the defendant company for negotiating a sale of their copper. He was evidently, in a certain sense, the broker for both parties; but, in his employment for the smelting company, he found himself confronted with the determination of the mining company that they would not engage the smelting without the sale of the product. His efforts were to induce his principal—the smelting company—to make the purchase, which he did; and the court held that this position was entirely inconsistent with the idea that he could be the agent of the mining company in effecting a sale of the copper product, and his right to commissions was denied. So we say here that if the plaintiff in error was not the broker of the Freibergs in procuring, for their protection, an option from Walker, he certainly was not Walker's broker, to induce himself to assent to a contract to which he was averse. His labors, as shown by this proof, were confined to a persuasion of Walker, the vendor, to agree to grant the option, and were not exercised in Walker's behalf, to induce Freiberg to take that option, and it is a perversion of this proof to so treat the case. The very language of the written contract itself shows that the option was a part of the consideration and inducement to a purchase by Freiberg of the first whiskies, and not a separate feature, or independent and supplemental sale of future whiskies, nor a single contract for a larger amount. It was a bonus demanded of and granted by Walker to effectuate the main sale. Freiberg declines to say in his testimony whether he would have made the contract without that inducement; but, certainly, Walker's broker should not be allowed to recover commissions for making a sale which, as a matter of fact, he could not have made without yielding to the purchaser that inducement and advantage. In other words, this was a sale of so many thousands of barrels of whisky on the condition that the purchaser should have an option to purchase some other thousands of barrels of whisky in the future, and the broker, knowing all the circumstances at the time, and engaged especially about the business of fixing and regulating his commissions by a definite agreement, neglected to have it specifically understood what compensation he should receive in relation to this feature of the contract as it was made; and, having received his commissions upon a basis of what was actually sold, he now seeks to recover additional commissions for that which was not actually sold, but only optionally bargained for, upon the theory of a quantum meruit, and implied contract to pay these additional commissions.

Much proof was offered and rejected tending to show that, in the trade at Cincinnati in which these parties were engaged, it was customary to make contracts for present sales of whisky, with options attached, like that made in this case, for future sales, and that, when these options had ripened into delivery sales, the

broker would receive of the seller the customary commissions. The petition in this case does not, in terms, base the claim for these commissions upon any such custom or implied contract, but rather counts upon a special employment to make the contract for option, and an implied promise to pay the usual commissions. The proof offered does not even tend to show any such employment, nor that of a general agent, whose contracts, at least upon acceptance and ratification, might be binding. On the contrary, it conclusively shows that the employment was to make a particular sale that was absolute and complete in itself, having no feature of any option about it. In the progress of negotiations for that kind of sale, this element of a contract for an option was introduced, not primarily at the request or by the wish, or for the benefit and in behalf, of the broker's principal, but of the other side to the contract, and the whole argument in behalf of the broker overlooks that fact. It is a fact applying especially to the circumstances of this case, and arising out of its own peculiarities. The ultimate benefit, if any, to the principal; the fact that he made a profit, if he did; that he did not lose anything, but was so pleased that he gave another option for the next year,—if these be facts, cannot advance the broker's claim for commissions in any just view. This right depends upon the contract, express or implied, for the payment of commissions, and not upon any consideration of profit or loss to the principal. It may be that under other circumstances a broker negotiating for his principal at his request, express or implied, an option sale, or a general sale with an option attached, would be entitled to recover customary commissions; but it is another thing to say that a broker employed to make a particular sale, in which the element of an option for other sales was confessedly not included, is entitled to recover commissions when his principal is forced by the proposed purchaser to add the option for that purchaser's benefit. This being our view of the case, it is not at all necessary to consider the interesting questions of the law of agency in its relation to the employment of factors that have been argued on both sides in support of and against the claim that is set up for this brokerage commission. Neither do we think that the doctrine of the ratification or adoption of an unauthorized contract made by the agent in behalf of his principal is involved in this case. Having found the fact as we do on the proof that the broker, not being specifically authorized to make an option contract in behalf of his principal, submitted to the option as an exaction from him and his principal by a purchaser who demanded it as a part of the consideration for the original sale, the assent of Walker became only an agreement to the exaction, and his conduct cannot be treated as a ratification of the broker's theory that he was making a beneficial option contract for and in behalf of his principal, for which he was entitled, impliedly, to a commission for procuring the purchaser to make such a contract. That which the purchaser imposes as an exaction cannot be thus perverted into a yielding to the persuasive inducements of the broker, for which

alone the broker should be paid. The direction by the trial court of a verdict for the defendant was correct, and the judgment should be affirmed.

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In re WILSON.

(District Court, S. D. California. February 24, 1896.)

No. 845.

IMPRISONMENT—SENTENCE TO PRISON OUT OF JURISDICTION.

One C. was sentenced by a court of the territory of Arizona to imprisonment in "the territorial prison at Y., Arizona territory." He subsequently sought to be discharged from imprisonment by habeas corpus, upon the allegation that the prison at Y., being the only territorial prison, was not in fact in the territory, but about 500 feet beyond its boundary, and in the state of California. It was not alleged that California claimed the land where the prison stood, and it appeared that Arizona was in possession thereof, and the town of Y. claimed that it was within its limits. *Held*, that the prisoner's confinement was not illegal, and the writ should be denied.

Calvert Wilson, for petitioner.

WELLBORN, District Judge. This is a petition for a writ of habeas corpus by Calvert Wilson, on behalf of Evaristo Chavez, and alleges as follows: That the latter is unlawfully restrained of his liberty by one Thomas Gates, under a judgment of the district court of the Fourth judicial district of the territory of Arizona, a territorial court having the same jurisdiction as is vested in the circuit and district courts of the United States, sentencing said prisoner to 13 months' imprisonment in "the territorial prison, at Yuma, Arizona territory"; that said Gates is the superintendent of the prison where said Chavez is confined, and that said prison is the only territorial prison of Arizona, and was established by section 2417, Rev. St. Ariz., locating the same in the town of Yuma, county of Yuma, in said territory; that said prison, in point of fact, is not within the territory of Arizona, but is about 500 feet, more or less, from the boundary line of said territory, and within the state of California. There is no allegation, however, that California is now making, or has ever made, any claim whatever to the land upon which the prison stands, but, on the contrary, Arizona is now in possession of said prison, and exercises authority over the same, and has no other territorial prison; and said prison is claimed by the town of Yuma to be within its corporate limits and subject to its municipal authority. The sole ground upon which the petitioner asserts illegality in the afore-said imprisonment is the alleged fact that said prison is outside of the territory of Arizona. Whether or not, from mistake or other cause, Arizona has built its prison a few hundred feet outside the boundaries of the territory, and within the state of California, is an inquiry upon which the court, in this proceeding, ought not to enter. That part of the sentence indicating the place of imprisonment, to wit, "the territorial prison at Yuma, Arizona

territory," is merely descriptive of, and intended to identify, the prison, and the petition shows beyond question that the place where Chavez is confined is the prison designated in the sentence. Even were the state of California asserting claim to the land on which the prison stands, it would then simply be a question of disputed boundary, and on a writ of habeas corpus the court would not undertake to determine where the exact line is situated, but, finding Arizona in possession of, and exercising authority over, the disputed ground, and using the same as its prison, would assume, for the purposes of this application, the locality in question to be within the limits of said territory. However, were this not so, and conceding said prison to be within the state of California, there is still another reason why the writ of habeas corpus should not be issued on this application. There is no law requiring prisoners convicted and sentenced to imprisonment by the courts of Arizona to be confined within the territory, but, on the contrary, it is expressly provided in paragraph 10 of the act of congress entitled "An act making appropriations for the sundry civil expenses of the government for the fiscal year ending June 30, 1881, and for other purposes," approved June 16, 1880:

"That the legislative assemblies of the several territories of the United States may make such provision for the care and custody of such persons as may be convicted of crime under the laws of such territory as they shall deem proper, and for that purpose may authorize and contract for the care and custody of such convicts in any other territory or state, and provide that such person or persons may be sentenced to confinement accordingly in such other territory or state, and all existing legislative enactments of any of the territories for that purpose are hereby legalized." 1 Supp. Rev. St. p. 299.

The writ is denied.

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Ex parte LOEB.

(Circuit Court, D. South Carolina. March 9, 1896.)

1. INTERSTATE COMMERCE—INTOXICATING LIQUORS—POLICE POWER.

Intoxicating liquors are a legitimate subject of commerce, and burdens upon interstate commerce therein cannot be justified under the police power of a state.

2. SAME.

The negotiation of sales of goods which are in another state, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce, and a state statute which attempts to prohibit the solicitation, within the state, of orders for such goods, though their sale within the state is prohibited by an exercise of the police power, is a burden upon interstate commerce, and is void.

Cothran, Wells, Ansel & Cothran, for petitioner.

Wm. A. Barber, Atty. Gen., contra.

SIMONTON, Circuit Judge. This case comes up on application for a writ of habeas corpus and the return thereto. The petitioner, a representative of a dealer in intoxicating liquors, doing business at Atlanta, in the state of Georgia, has been arrested for soliciting orders from citizens of this state on his house in Atlanta for intoxicating liquor. The petitioner avers that these orders were

for liquors for the personal use and consumption of the parties ordering, and not for sale by them. The petitioner was arrested and in custody by virtue of a warrant issued by a trial justice of Greenville county, in South Carolina. The arrest is under section 41 of the dispensary act (21 St. at Large S. C. 745). The section is in these words:

"Sec. 41. That it shall be unlawful for any person to take or solicit orders, or to receive money from other persons, for the purchase or shipment of any alcoholic liquors for or to such other persons in this state, except for liquors to be purchased and shipped from the dispensary, and any person violating this section, upon conviction, shall be deemed guilty of a misdemeanor, and shall be punished by imprisonment for a term of not less than three months nor more than twelve months, or by a fine of not less than one hundred dollars nor more than five hundred dollars."

The petitioner claims that, in so far as the statute has been made to apply to the representative of a dealer in another state, soliciting orders on his house in this state, this construction makes the statute a burden on interstate commerce, and to that extent null and void.

In *Cantini v. Tillman*, 54 Fed. 969, decided in 1893, this court, after examination of the dispensary law of that year, held that it was not in conflict with the constitution and laws of the United States except so far as it interfered with interstate commerce, and that question was reserved.

In *Donald v. Scott*, 67 Fed. 854, it was held that, if the dispensary law be construed to prohibit a person in this state from purchasing liquors abroad for his own personal use and consumption, to this extent it burdens interstate commerce, and is void.

There can be no doubt that the state, under its police power, can control and regulate the liquor traffic, either by prohibiting it altogether or by permitting its sale only on certain prescribed limitations and conditions. Nor can this power be controlled by any law of the United States. The importation of liquor into this state, and its sale in this state, either to the importer or to any one else, come within this provision. And, as the state has forbidden it, such sale is illegal and void. So, even, when one imports for his own use and consumption, if the packages come C. O. D., or to order, notify, or under a bill of lading attached to a draft or in any other way by which the price is paid on or as a condition of the delivery of the goods in this state, this is unlawful, and the sale thus consummated is void. The question now is, is the solicitation of orders preliminary to such importation also void? Is it within the police power? And just here it is not enough that it was intended as the exercise of the police power. "It does not follow that everything which the legislature of a state may deem essential for the good order of society and the well-being of its citizens can be set up against the exclusive power of congress to regulate the operations of foreign and interstate commerce." *Crutcher v. Kentucky*, 141 U. S. 47, 11 Sup. Ct. 851. It goes without saying that, if this section 41 was intended to prevent the solicitation of orders in a legitimate subject of commerce by res-

idents and citizens of other states, or to impose a penalty therefor, it is a burden on interstate commerce, as much as—indeed, more than—the imposition of a license tax would be, in proportion as the penalty is the more severe. *Robbins v. Taxing Dist.*, 120 U. S. 489, 7 Sup. Ct. 592; *Asher v. Texas*, 128 U. S. 129, 9 Sup. Ct. 1; *Stoutenburgh v. Hennick*, 129 U. S. 141, 9 Sup. Ct. 256; *McCall v. California*, 136 U. S. 104, 10 Sup. Ct. 881; *Brennan v. City of Titusville*, 153 U. S. 289, 14 Sup. Ct. 829.

The question, then, is, are intoxicating liquors subjects of commerce? This is answered by Chief Justice Taney in *Peirce v. State*, 5 How. 554, adopted in *Leisy v. Hardin*, 135 U. S. 116, 10 Sup. Ct. 681, by Chief Justice Fuller:

"Spirits and distilled liquors are universally admitted to be subjects of ownership and property, and are, therefore, subjects of barter, exchange, and traffic, like any other commodity in which a right of property exists."

Is it a legitimate subject of commerce? It is certainly so unless the dispensary law of South Carolina has changed its character. This dispensary law itself recognizes its commercial character within this state under certain limitations. It is bought by the dispensary authorities within the state from abroad at their pleasure. It is sold freely at the multitude of dispensaries established all over the state to any one who may apply, except minors and habitual drunkards. The leading newspapers of the state contain advertisements inviting the purchase of liquors from these dispensaries. It is not sold for purposes of prime necessity, mechanical, medicinal, or sacramental, but as a beverage, the use of which is not hurtful unless abused. This same section permits the solicitation of orders from the dispensary. In the case of *South Carolina v. Seymour*, 153 U. S. 356, 14 Sup. Ct. 871, an appeal was taken to the supreme court from the refusal of the commissioner to register a trade-mark adopted by the state for chemically pure distilled liquors. The application of the state was verified by the oath of Governor Tillman, stating, among other things, "that the said trade-mark is used by the said state in commerce with foreign nations or Indian tribes, and particularly with Canada." And it appeared in the evidence that the trade-mark had been adopted by the state board of control, and that the state had sold in Canada a case of liquors with this trade-mark. This is a recognition of the commercial character of spirituous liquors by the highest authority in the state. Besides this, the dispensary law operates only in South Carolina. It can have no operation outside of the state. It forbids the manufacture, sale, barter, or exchange, receipt, acceptance, delivery, storing, and keeping in possession within this state of any spirituous, malt, fermented, brewed, or other liquors containing alcohol, and used as a beverage, and the transportation of it in any way within this state, excepting always such liquors purchased by or from the dispensary. The solicitation or giving of orders upon a dealer outside of the state does not come within any of this category. The nonresident dealer has the right to receive the order and to fill it, and to transport it to this state. If the order is filled abroad, and the price paid there, so that the liq-

uor becomes the property then and there of the party ordering, the transaction is perfectly legitimate; nor does it affect the legality of that transaction if the liquor is not to be paid for until it reaches its destination, provided the sale be consummated abroad. Outside of the limits of the state of South Carolina her laws cannot be said to be violated. When it reaches its destination, then it comes within the province of the state, subject to the provisions of the police power when lawfully exercised. The transaction is perfectly legitimate up to and until the liquor is placed within the control of the authorities of the state. There is a mass of authorities bearing on this question. One from a prohibition state is quoted. In *Durkee v. Moses* (N. H.) 23 Atl. 793, it was held that the General Laws of New Hampshire (chapter 109, § 18), making penal the soliciting or taking orders for intoxicating liquors in the state for delivery in another state, with knowledge or reasonable cause to believe that they are to be brought within the state and sold in violation of the laws thereof, is a regulation of commerce among the states without provisions of congress, and therefore void. The Wilson act itself does not relax the interstate commerce law with regard to intoxicating liquors until their arrival within the state, thus recognizing them as an article of commerce, legitimate until operated upon after arrival by the police power. The distinction is clearly brought out in *Emert v. State*, 156 U. S. 319, 15 Sup. Ct. 367:

"When goods are sent from one state to another for sale, or in consequence of a sale, they become part of its general property, and amenable to its laws, provided no discrimination be made against them as goods from another state. \* \* \* But to tax the sale of such goods, or to offer to sell them, before they are brought into the state, is a very different thing, and seems to us clearly a tax on interstate commerce itself. The negotiation of sales of goods which are in another state for the purpose of introducing them into the state in which the negotiation is made is interstate commerce."

The prisoner is in custody for exercising a right secured to him by the constitution and laws of the United States, and should be discharged. Let him go hence without day.

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#### MAITLAND v. ARCHER & PANCOAST CO.

(Circuit Court, S. D. New York. March 10, 1896.)

#### PATENTS—ELECTRIC LIGHT FIXTURES.

The *Stieringer* reissue, No. 11,478 (original No. 259,235), for an electrical fixture, held void as to claims 4 and 5 (following *Maitland v. Gibson*, 11 C. C. A. 446, 63 Fed. 840, which held certain claims of the original patent invalid). But held, further, that claim 1 of the reissue, which covers a combination consisting of (1) a metallic fixture for electric lights containing insulated conducting wires; (2) an insulated joint at the upper or inner end of the fixture, and having metallic coupling portions and an intermediate section of insulating material; and (3) the grounded gas piping of the house by which the chandelier is supported,—covers an invention of considerable merit, being the first practical device for utilizing the existing gas-pipe systems for the purpose of electric lighting.

#### Final Hearing in Equity.

This action is founded on reissued letters patent, No. 11,478, granted March 12, 1895, to Luther Stieringer, assignor to complainant, for an improvement in

electrical fixtures. The original, No. 259,235, was dated June 6, 1882, and was applied for March 15, 1882. Claims 1, 7, 8 and 9 of the original were before the court in the Eastern district of Pennsylvania in *Maitland v. Gibson*, 63 Fed. 126, and were held to be invalid. The decision of the circuit court was affirmed by the circuit court of appeals for the Third circuit upon the opinion of the circuit judge. 11 C. C. A. 446, 63 Fed. 840.

The first claim of the original patent was as follows: "A fixture for electric lights, supported from the piping of a house and electrically insulated therefrom, substantially as set forth." The court held that this claim contained three elements. First, a fixture for electric lights, second, the piping of a house, and, third, means for electrically insulating the fixture from the piping. That the third element included every kind of insulating device by which two conducting bodies may be mechanically united and yet electrically separated and that the claim was too broad and, therefore, void. Claims 7, 8 and 9 were held to be subsidiary and void as mere aggregations plainly obvious to the skilled workman.

The opinion contains the following allusions to the Stieringer joint: "The patentee, in his specification, fully and particularly described a particular insulating joint, and to it, I think, he must be restricted. \* \* \* The utmost which it can plausibly be contended Stieringer did, which had not been precisely done before,—and the assumption of this, except for the argument's sake, the ferryboat exhibit repels,—was to insert an insulating joint between the piping of a house and a fixture for electric lights. This is the essence of his asserted combination. But similar insulation in analogous situations had been extensively practiced before, and apart from his peculiar joint, which it may be conceded was new, I am unable to perceive that his alleged invention amounted to anything more than electrically parting, while physically connecting, two pieces of metal, by a use of the familiar expedient of insulation. \* \* \* As has already been said, his title to the specific joint may be admitted; but when he seeks protection for a combination, irrespective of the kind of joint comprised in it, it is not enough for him to show that his peculiar joint was invented prior to the conflicting use. He should show an earlier date for the combination alleged and this he had utterly failed to do." The complainant construed this decision as saving the insulating joint, if limited to the precise combination shown, and, upon this theory, applied for the re-issue.

So far as relates to the present controversy the object of the patentee, as stated in the specification, was to utilize the support afforded by the gas pipe of a house for sustaining metallic fixtures for electric lighting containing insulated conducting wires so arranged that the proper connections can be cheaply and conveniently made. He accomplishes this object by carrying the conducting wire from the ceiling, by proper connections, down through the main stem and arms of the chandelier, which may be used also for gas lighting; and is provided with two or more arms and an ornamental shell which hides the wires and connections from view. At the upper end of the chandelier is an insulated joint which separates the chandelier, electrically, from the grounded piping of the house. The electrical insulation of the fixture from the supporting pipe is as applicable to wall brackets as to chandeliers. The claims, read in connection with the foregoing, sufficiently describe the improvements.

The claims involved are 1, 2, 4 and 5. They are as follows:

"(1) A fixture for electric lights constructed wholly or largely of metal and provided with insulated conducting wires for conveying current to and from the lamps carried thereby, in combination with a joint or section having metallic coupling portions and an intermediate section of insulating material electrically insulating the metallic coupling portions from each other, such joint being located at the upper or inner end of the fixture and serving to electrically insulate the fixture from the grounded piping of a house by which it is supported, substantially as set forth.

"(2) In a fixture for electric lights adapted to be supported from the grounded piping of a house, the combination with the hollow metal stem, of insulated conducting wires passing therethrough for conveying current to and from the lamps carried by the fixture, a joint or section located at the upper or



inner end of such hollow metal stem, comprising metallic coupling portions and an intermediate section of insulating material electrically insulating the metallic coupling portions from each other and provided with lateral openings for permitting the said conducting wires to pass out of the hollow stem for connection with the ceiling wires, substantially as set forth."

"(4) In an electric light fixture, the combination with the hollow main stem, a distributing body and open section supported thereby, and two or more lamp-carrying arms supported by said distributing body, of insulated main conducting wires passing through such hollow main stem and through said open section, a pair of insulated arm wires passing through each of said lamp-carrying arms, said main and arm wires being directly connected together, and a central support from said open section for sustaining ornamental parts of the fixture, substantially as set forth.

"(5) In an electric light fixture adapted to be supported from the grounded piping of a house, the combination with the hollow main stem, a distributing body and open section and lamp-carrying arms, constructed of metal, of insulated main conducting wires passing through said main stem and through said open section, a pair of insulated arm wires passing through each of said lamp-carrying arms, said main and arm wires being directly connected together, an open and insulating joint or section at the upper or inner end of said main stem comprising metallic coupling portions and an intermediate section of insulating material, adapted to connect the fixture mechanically with, and to electrically insulate it from, the grounded piping of a house and permitting the said main conducting wires to pass out of said hollow main stem for connection with the ceiling wires, and a central support from said open section for sustaining ornamental parts of the fixtures, substantially as set forth."

The defenses are noninfringement, want of novelty and invention and invalidity of reissue as being for a different invention from the original.

Richard N. Dyer and Daniel H. Driscoll, for complainant.  
Hector T. Fenton, for defendant.

COXE, District Judge (after stating the facts as above). The court cannot consider this controversy *de novo*. Many of the questions which are now debated were decided in the Pennsylvania case. 63 Fed. 126; *Id.*, 11 C. C. A. 446, 63 Fed. 840. As to these the doctrine of *stare decisis* is applicable.

Claims 4 and 5 of the reissue need not be considered anew. As to them the discussion is closed, certainly so far as this court is concerned. No one can read what is said regarding claims 7, 8 and 9 of the original without being convinced that the claims now under consideration would have shared the same fate had they been before the court. As to these claims nothing was reserved. They were held invalid because they were mere aggregations and contained nothing which would not have occurred to any one familiar with the art of electric lighting. I am inclined to think, too, that this reasoning applies to the second claim of the reissue which is the same as the first except that the insulating joint is provided with lateral openings to permit the wires to pass out of the stem and connect with the wires in the ceiling. It will very much simplify this discussion if it be confined to the first claim of the reissue which contains the essence of Stieringer's invention. The fact that the patent has been reissued, that the original patent has been construed by the court, that in the various proceedings in the courts and the patent office arguments have been advanced on both sides not wholly consistent with present contentions; all this, in connection with the voluminous

record and multitude of exhibits, makes the case a most bewildering and perplexing one at best. If the paramount and fundamental issue can be rescued from this maze of disputed propositions it will be a long step towards arriving at the ultimate rights of the parties. The discussion of subordinate questions may then become unnecessary, at least at the present time.

It may fairly be said that the questions relating to the combination of the insulating joint, the house piping and the metal gas fixture are left open by the decisions in the Pennsylvania circuit. Even this is disputed, but the language of the court is susceptible of an interpretation in consonance with complainant's view, which, it would seem, is more consistent than the one contended for by the defendant, which limits the patent to a Chinese reproduction of the joints shown. It is impossible to limit the patent to one form of joint because the drawings show three forms differing from each other as widely as the defendant's joint differs from some of them. If the joint shown at Fig. 8 is the equivalent of the one at Fig. 4 it is not easy to see why the defendant's joint is not also an equivalent. To restrict the patent to the precise form of joint covered by the third claim of the reissue is to defeat it for all useful purposes, because a mere tyro in electric lighting would know enough to change the joint in some minute particular and thus escape infringement. No patent should be strangled by such a harsh construction unless the prior art compels it. Nothing in the present record requires such a construction. If Stieringer did nothing more than improve an old joint and put it back in its well-known environment he is wholly out of place in this court; but to assert this is, according to my understanding of the record, to proceed upon an entire misapprehension of Stieringer's achievement. The Pennsylvania court had before it a claim broad enough to cover any form of insulating joint and any form of fixture, and it decided, in view of what had been done before, that this claim was invalid. It does not follow that a claim limited to cover what Stieringer actually did is invalid or would have been held invalid in the Gibson Case. Such a claim was not before the court and was not passed upon.

Proceeding, then, upon the hypothesis that the first claim, assuming the reissue to be properly granted, is still open to discussion, the questions to be answered are: Did the conception of an insulating joint for the purpose indicated originate with Stieringer? Did this involve invention? Does the defendant infringe? A study of this record has convinced me that Stieringer was the first to make the use of gas chandeliers a practical success in the art of electric lighting. The prior structures were not only dangerous, but awkward and ungainly. Stieringer's is absolutely safe, and, at the same time, the symmetry and graceful contour of the fixture is preserved. When the conditions surrounding the genesis of electric lighting are remembered it can hardly be denied that the man who yoked the new art to the old, and fully developed the art of electric lighting was something more than a mechanic. It is plain that he who utilized for electric lighting the expensive and intricate gas-pipe systems then existing and the fixtures which embodied a multitude of graceful designs took

a long forward step. He made electric lighting cheap, convenient, simple and safe. Of course it is not pretended that Stieringer was the first to use gas piping and fixtures in this art, but it is thought that he was the first to make the use of an internally wired metal fixture absolutely safe. If any one did this before Stieringer the record does not disclose his name. The defendant hardly does justice to Stieringer's achievement when it is asserted that it involved merely the use of an insulating joint. Grant that with the idea of putting insulation at the ceiling joint of an internally wired fixture clearly before him, it required nothing but ordinary skill for the workman to carry out the idea, can it be said that it required no exercise of the inventive faculties to conceive and carry out the idea? A number of accomplished inventors were at work on this very problem. They accomplished nothing. Stieringer succeeded. His combination is in use to-day precisely as he embodied it. There have been some incidental mechanical changes, but the substance is the same. It is not an unreasonable presumption that one who succeeds in doing what so accomplished an inventor as Edison failed to do, is on a distinctly higher plane than a mechanic. Not only did Edison fail himself, but he was among the first to recognize the merits of the invention practically as well as theoretically, for his firm took a license under Stieringer's patent. So did the defendant in the Pennsylvania case, the defendant in this case and afterwards, substantially, the entire art. The importance of the patent was conceded and acquiescence was well-nigh universal. All this is wholly inconsistent with the theory that the patentee's contribution was perfectly obvious and without patentable merit. The history of the art from 1882 is a refutation of this proposition. Stieringer's joint located at the ceiling seems to be regarded as one of the absolutely essential features where an internally wired metal fixture is used. If not essential why should the defendant and all other manufacturers be so strenuous about its use? They can omit it, or locate it elsewhere in the system, with perfect impunity. It is not pretended that any of the prior patents anticipates; many of them, though relating generally to electric lighting, do not deal with the heavy and dangerous currents from the dynamo, but with feeble currents in branches of the art entirely distinct from the one now under consideration. Aggregated they would not show a skilled workman how to utilize the existing gas fixture. The ferryboat exhibit is unquestionably the best of defendant's references. Irrespective of the question whether it was prior to the conception of Stieringer's invention, and of this there is grave doubt, it is thought that it can only be regarded in the light of an experiment that was tried, proved to be an utter failure and was abandoned. If this had been the only contribution to the art, electric lighting, in the particulars mentioned, would not have advanced a step. It was dangerous and inefficient. It accomplished nothing. After a trial of two or three months it was abandoned. During this time the joints leaked gas and broke in two. The chandelier was held by the wires alone and was in danger of dropping on the heads of the passengers. Some of the very dangers which Stieringer sought to avoid were inherent in this structure. Perhaps its principal vice

was the employment of the metal of the chandelier as part of the conducting circuit. It was a one-wire system. The witness who wired the fixture, who was then a machinist and is now a butcher, describes it fully and accurately. He says, among other things, that it was wired "partly inside and partly out. One wire was inside from the ball joint at the top, the ground wire was soldered onto the pipe; it came through the upper deck overhead and was soldered just below the insulating joint, and that ended it. The other wire ran alongside the pipe and inside the casing from the wooden canopy down to this other wooden bell and then out through and around the wooden bell and then the branch wires were soldered onto the main wire down to the lamp." It is not surprising that such a structure was a complete illustration of "how not to do it." It was an embodiment of irredeemable inefficiency. Short circuits were formed, a wire would ground on the gas pipe and the lights would go out. The pipe was burned, a hole was burned through the brass canopy, the wires were burned off in the tubing and the joints were wholly inadequate. The structure proved an utter failure, the joints were discarded and the wires placed on the outside. A meritorious invention should not be defeated upon such proof. In fact, the ferryboat fixture is an indirect tribute to the value of Stieringer's invention. It exhibits the kind of work to be expected of a skilled mechanic even after the insulating joints were placed in his hands. The mechanic failed. The inventor succeeded. In short, I cannot resist the conclusion that Stieringer made an invention of considerable merit, and, this being so, the court, of course, is anxious to give him protection commensurate with his achievement. To confine the invention to some specific form of joint is, as before stated, tantamount to saying that the inventor has done nothing at all. He was not working to improve an insulating joint. He was working to improve the art of electric lighting by cutting off electrically the piping of the ceiling from the metal of the chandelier. To do this he required an insulating joint to be sure, but it was only one of the elements, which, when inserted at the ceiling made the combination successful. It was this conception which made the valuable contribution to the art. The shops might have been filled for years with joints of this character and the art would not have progressed a step. What did advance the art was placing a joint having these characteristics at the ceiling in the manner described. When that was done a combination was created where every element acts upon every other and all are necessary to produce the desired result; in short, a combination having the *per my et per tout* characteristics. The combination is a limited one, it is true; much more so than the claim of the original patent, but it is properly covered by the first claim of the reissue. That claim is for a combination having the following elements: First. A metallic fixture for electric lights containing insulated conducting wires. Second. An insulated joint located at the upper or inner end of the fixture and having metallic coupling portions and an intermediate section of insulating material. Third. The grounded piping of a house by which the chandelier is thus supported. The elements, broadly speaking, are the fixture, the joint and the piping, but the

limitations are important and clearly distinguish this claim from the first claim of the original. The fixture must be metallic in whole or in part, it must contain the conducting wires, which are to be covered with insulation and hidden from view. The joint must be of three parts; two metal coupling portions and an intervening washer of insulation. It must be located at the upper or inner end of the fixture. The piping must be grounded. The claim so limited is no broader than the invention. That the claim so construed is infringed by the defendant's fixtures is not disputed. Noninfringement is only based upon a construction which limits the complainant to a joint like that covered by claim 3, and, as already stated, such a construction cannot be given without manifest injustice to the complainant.

The only other question relates to the reissue. Still confining the discussion to the first claim it seems too plain for argument that it is much narrower than the first claim of the original. None of the limitations above referred to is in the latter. The claim of the reissue is fully sustained by the original specification and drawings. As soon as the complainant was informed by the final decision of the court that his claim was too broad he applied for a reissue limiting it to what he thought the court had left in his possession. Of course no structure would infringe the claim under consideration that would not infringe the broad claim of the original, and no intervening equities have arisen. In such circumstances I know of no authority compelling a ruling that the reissue is void. It follows that as to the first claim of the reissue the complainant is entitled to the usual decree.

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ANDREWS v. LANDERS et al.

(Circuit Court, D. Connecticut. February 17, 1896.)

No. 408.

1. PATENTS—LIMITATION OF CLAIM—FAUCETS.

The Andrews patent, No. 193,840, for an improvement in faucets, construed, and held to consist of a combination comprising a nozzleless, L-shaped body, with an open, projecting screw plug, and oblong lateral orifice, as specifically claimed.

2. SAME—LICENSES.

A manufacturer who had a license to make articles "containing the patented improvement," and who had made articles of a particular pattern, and paid the license fees thereon, for several years, held estopped to allege that such device did not contain the patented improvement. Contra, however, as to devices of a different pattern, which he had been making and selling for 20 years prior to taking the license, and which he never offered to account for, and never, by stamping or otherwise, represented to be made under the patent.

3. SAME—EVIDENCE—PRIOR STATE OF THE ART.

In an action to recover royalties under a contract granting defendants the right to make devices "containing the patented improvement," evidence may be given of the prior state of the art, not to invalidate the patent, but to explain the meaning of these words, and as bearing on the situation of the parties, and their object in making the contract.

This was an action by Thomas A. Andrews against Landers, Frary & Clark, to recover royalties under the following contract:

"This agreement, made this 23d day of April, 1881, between Thomas A. Andrews, party of the first part, and Landers, Frary & Clark, party of the second part, witnesseth: That whereas, letters patent of the United States for an improvement in faucets were granted to the party of the first part, dated Augt. 5th, 1877; and whereas, the party of the second part is desirous of manufacturing faucets containing said patented improvement: Now, therefore, the parties have agreed as follows: (1st) The party of the first part hereby grants the party of the second part the exclusive right (Peck Bros. & Co. excepted) or license to manufacture at their factory in New Britain, Ct., to the end of the term for which said letters patent were granted, faucets containing the patented improvement, and to sell the same within the United States. (2) The party of the second part agrees to make full and true returns to the party of the first part, upon honor or under oath, upon the first days of January, April, July, & October in each year, of all faucets containing the patented improvement manufactured by them. (3) The party of the second part agrees to pay to the party of the first part twenty-five cents per dozen as a license fee upon every doz. faucets manufactured by said party of the second part, containing the patented improvement. (4) In consideration of the small royalty paid, and the exclusive right in the premises (Peck Bros. & Co. excepted) the party of the second part agrees to give the general introduction of said faucet special attention, and crowd the same on the market, to the end of the term of said contract. (5) Upon failure of the party of the second part to make returns or to make payments as herein provided or named, the party of the first part may terminate this license by serving a written notice upon the party of the second part, but the party of the second part shall not thereby be discharged from any liability to the party of the first part for any license fee due at the time of the service of said notice. (6) In case any parties (Peck Bros. & Co. excepted) shall make this faucet, or any infringement of the patent rights of said Andrews, the said party of the first part, said Andrews, agrees to take legal measures to protect said patent, on being notified in writing by the party of the second part; and, upon failure of the party of the first part for a period of six months from date of said notice to cause said infringers to cease the manufacture of said faucet, then the party of the second part shall be released from any royalty obligations until such time as the party of the first part shall cause said infringers to cease the manufacture of said infringing faucet. In witness whereof the parties above named have hereunto set their hands this day and year first above written.

T. A. Andrews.

"Landers, Frary & Clark.

"C. S. Landers."

The case was tried to the court under a stipulation waiving a jury. Certain requests and admissions were also incorporated in said stipulation, which is as follows:

"For the purpose of a trial of this cause, it is admitted, and the parties stipulate, that the following may be found true by the court in its finding, if it make one, and be made a part of the record herein: (1) That the averments of the complaint in regard to the citizenship, residence, and incorporation of the respective parties are true. (2) That the defendant has heretofore, and prior to the commencement of this action, and since the execution of the contract, Exhibit A, manufactured faucets, of which the Exhibit Andrews Faucet is a sample, and for which the defendant has accounted to the plaintiff regularly down to and including the 4th day of October, 1894, and for which the defendant has paid to the plaintiff the royalties agreed upon in Exhibit A of the complaint as it has accounted for the same. (3) That the defendant has also manufactured, since the execution of the said agreement, faucets, of which Exhibit Safety Faucet is a specimen, the exact number of which is to the plaintiff unknown, and has never paid royalties upon the same. But the defendant reserves the right to object, and will object, that said 'safety faucets' are not within the claim of said letters patent to said Andrews, and are not within the contract, Exhibit A, upon which this suit is brought; and this admission as to the manufacture of said 'safety faucets'

is made expressly subject to such reservation and objection; and the parties hereto unite in the request that the court, in its finding, if it makes one, will rule upon the question whether or not said 'safety faucets' are within the claims of said letters patent to said plaintiff, and said contract, Exhibit A, upon which this suit is brought. (4) That the defendant has also manufactured, since the execution of this agreement, faucets, of which Exhibit Compression Faucet is a specimen, the exact number of which is unknown to the plaintiff, and has never paid royalty upon the same. But the defendant reserves the right to object, and will object, that said 'compression faucets' are not within the claim of the letters patent to said Andrews, and are not within the contract, Exhibit A, upon which this suit is brought, and this admission as to the manufacture of said 'compression faucets' is made expressly subject to such reservation and objection; and the parties hereto unite in the request that the court, in its finding, if it makes one, will rule upon the question whether or not said 'compression faucets' are within the claims of said letters patent to the plaintiff, and said contract, Exhibit A, upon which this suit is brought. (5) It is further stipulated by the plaintiff, in the event the court shall rule that evidence is admissible to show that faucets like Exhibit Fenn Faucets, Nos. 1, 2, and 3, were manufactured and sold and used in the United States prior to the date of the said patent, No. 193,840, and that the Exhibit Russell & Erwin Catalogue, at page 339, was printed in 1861, and that faucets like said Exhibits Fenn Faucets, Nos. 1, 2, and 3, have been manufactured and sold by the defendant continuously since 1865, that he admits, without proof by the defendant, that such faucets were manufactured and sold and used in the United States long prior to the date of said patent No. 193,840, and have been manufactured and sold by the defendant continuously since 1865, and that said Exhibit Russell & Erwin Catalogue was printed and circulated in the trade in 1861. But the plaintiff reserves the right to object, and will object, at the trial of the case, that such evidence, nor any part thereof, is admissible, and this admission as to the manufacture, use, and sale of such faucets, and that said catalogue was printed and circulated in the trade in 1861, is made expressly subject to said objection and reservation; and the parties hereto unite in requesting the court, in its finding, if it makes one, to rule upon the question whether such evidence is admissible. (6) The plaintiff has never been notified by the defendant of any infringement of the plaintiff's rights in and to his said patent No. 193,840. (7) Patent-office copies of the drawings and specifications of letters patent shall be admissible wherever certified copies of the same would be entitled to be received by the court, and to the same force and effect. (8) It is further stipulated and agreed that in the event that it shall be determined and adjudged herein that said defendant is liable to the plaintiff for royalties upon said 'safety faucets' and the said 'compression faucets,' as claimed by the plaintiff, the question as to the quantity of such 'compression' and 'safety' faucets so manufactured by the defendant, and the amount of the defendant's liabilities to the plaintiff thereon, shall, if the court approve, be referred to and be determined by a committee or auditor to be hereafter determined by the court, and that no proof of the amount of damages shall be required to be made until the question of the defendant's liability has been determined by the court in the manner aforesaid. It is understood that nothing herein is to prevent either party from offering any testimony admissible within the issues, not contrary to the foregoing. It is further understood that the defendant does not admit by anything herein that Exhibit Andrews Faucet is within the claim of the Andrews patent, or within the license sued on."

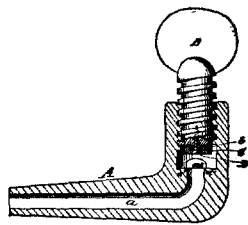
Edwin H. Rogers, for plaintiff.

Mitchell, Hungerford & Bartlett, for defendants.

TOWNSEND, District Judge. Upon all the evidence, I find the following facts:

The defendant, since the execution of said agreement, has manufactured and sold a certain style of faucets, under the name "Andrews Faucet," for which it has regularly accounted to the plaintiff, and on

which it has paid royalties as agreed. It has also manufactured and sold, during the same period, two other similar styles of faucets, known, respectively, as the "Safety Faucet" and "Compression Faucet," for which it has neither accounted nor paid royalties. "The plaintiff has never been notified by the defendant of any infringement of his rights in and to his said patent No. 193,840," referred to in said contract; he has never terminated said contract; and he has never demanded any royalty, either on said "safety" or "compression" faucets. The plaintiff claims that said faucets contain the improvements covered by said patent. The defendant denies said claim. The object of the Andrews invention, as stated in his specification, "is to provide a faucet which is inexpensive in its construction, easily repaired, and efficient in operation." It is illustrated and described as having an L-shaped body, A, internally threaded to receive a screw, B, and containing an enlarged passage, a, which forms a valve seat, a<sup>1</sup>. In the body, A, is a lateral oblong aperture, a<sup>2</sup>, for the escape of liquid from the faucet. The screw, B, is provided with a handle or thumbpiece, and its inner end has a square projection, b, fitted with packing. The body of the faucet is tapered so as to be easily forced into the vessel in which it is used. The advantages of this construction are "that it may be more cheaply manufactured, is more easily repaired, and is perfectly secured against leakage." The original claim was as follows:



"A faucet consisting of a body, A, having the passage, a, valve seat, a<sup>1</sup>, lateral aperture, a<sup>2</sup>, the screw, B, having the square projection, b, the packing disk, C, and screw, D, substantially as herein shown and described."

This was rejected on references to patents No. 183,445, granted to W. & R. Bentley October 17, 1876, and No. 189,760, granted to P. Lyons April 17, 1877. Each of these patents shows a lateral orifice. Thereupon said claim was amended so as to read as follows:

"The combination of internally threaded, L-shaped body, A, having valve-seat, a, and oblong aperture, a<sup>2</sup>, the screw, B, having the projection, b, and the elastic packing secured to screw, B, as and for the purpose specified."

And upon this claim said patent was granted.

The general features of this construction were old. The Fenn faucet, for example, which is manufactured by defendant, and which has been on the market for more than 20 years, has the ordinary tapered body, and the internally threaded body, and screw provided with a handle, the valve seat and packing, and a nozzle or spout. It does not have the oblong lateral orifice, or the L-shaped body, of the Andrews patent. Other prior constructions show the elements of the Andrews combination in connection with other elements which altogether make a more elaborate and more costly faucet. Andrews dispensed with said other elements, substituted said lateral aperture for the spout, and thereby made the simpler and cheaper device to which he finally limited himself by the above claim. This combination consists of "the nozzleless, L-shaped body, with the open and



projecting screw plug, and the lateral orifice at the valve seat, whose greatest length is parallel to the valve seat." "In other words, the Andrews patent purports to make a complete faucet, with just that simple, L-shaped body, and the screw plug, that projects so you can operate it with the hand; and by making the faucet so simple, and by leaving off these parts, is the only way that the Andrews patent could be distinguished from the prior art." The "safety" and "compression" faucets are not L-shaped, but have the ordinary body and nozzle of the prior art. They do not have the screw plug integral with a thumbpiece, and accessible to the hand, but require, for their operation, separate cranks or keys. They have a cover screwed on, which is open to receive a key. Instead of the oblong aperture of the Andrews patent, they have a nozzle or spout. In other details they depart from the Andrews combination, and follow the prior art. But the faucets manufactured, stamped, and accounted for as Andrews faucets are also unlike the Andrews patent. In fact, their construction is not substantially different from that of the "safety," and "compression" faucets, except that the former are more cheaply made, and do not have a cover screwed onto the body.

By the contract to pay for faucets containing the patented improvement, the defendant agreed to pay for the faucets made by it, which, by reason of the omission of such unnecessary details of construction as the Adams patent dispensed with, were of a simpler and less expensive construction, such as the Andrews patent sought to secure. The "safety" and "compression" faucets do not differ from the prior art in these respects. They do not contain the patented improvements of Andrews, which consisted in a combination comprising the nozzleless, L-shaped body, with open, projecting screw plug, and oblong lateral orifice, specifically claimed by Andrews. As already stated, they differed from the Andrews faucet made by defendant in having a top piece screwed onto the body of the faucet, which covered the screw piece so that it could only be reached by a lever, and was not accessible to the hand. As to the so-called "Andrews Faucets," I hold, as matter of law, that defendant, having stamped said faucets with the Andrews patent, and having accounted and paid for the same, is estopped to deny that they do not contain the patented improvement of Andrews. I further hold, as a matter of law, that the defendant is not estopped to deny that the "safety" and "compression" faucets do not contain the patented improvement, because similar faucets had been manufactured and sold by it for more than 20 years; because said faucets do not have the L-shaped body, the oblong lateral aperture, or the handle or thumbpiece of the Andrews patent; because the defendant neither sold, stamped, nor represented them as containing the patented improvement; and because it does not appear either that, by any act or omission on the part of the defendant, plaintiff was led to believe that said faucets were within the patent, or that the defendant represented them as such, or that the position of the plaintiff was in any way altered to his prejudice by any representations, acts, or omissions on the part of defendant; and, furthermore, because there is no evidence to contradict the evidence of the expert for defendant that said "safety" and "compression"

faucets do not contain the patented improvement of Andrews. While plaintiff has accepted royalties on the Andrews faucets for several years, he never made any claim on account of the sale of said "safety" and "compression" faucets, until just before the bringing of this suit; although it does not appear, otherwise than by the stipulation that "he has never been notified by defendant of any infringement of the plaintiff's rights," that he did not know, or might not have known, of the manufacture of said "safety" and "compression" faucets, which have been extensively advertised and sold to the trade. It does not appear that the defendant, at the time the contract was made, agreed to treat such "safety" and "compression" faucets as within the contract, or that the parties at that time adopted any standard or accepted any sample whereby the question was determined as to what faucets should be considered as containing the patented improvement. As to the evidence offered to show the prior state of the art, I rule that the same is admissible, not to invalidate the Andrews patent, but to explain the latent ambiguity in the language, "containing the patented improvement," and as bearing upon the situation of the parties, and their object in making said contract. Let judgment be entered for defendant in accordance with this opinion.

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L. SCHREIBER & SONS CO. v. GRIMM et al.

(Circuit Court of Appeals, Sixth Circuit. March 3, 1896.)

No. 299.

1. PATENTS—INVENTION—APPLICATION OF OLD DEVICE.

The use of a ball and socket joint between the saddle and seat of a cask support, so as to enable the saddle to rock laterally and longitudinally, and thereby adjust itself to the surface of the cask, is a mere application of mechanical skill, and not such an extension of an old contrivance into a new and remote field of usefulness as rises to the dignity of invention. 65 Fed. 220, affirmed. *Potts v. Creager*, 155 U. S. 597, 15 Sup. Ct. 194, and *Electric Co. v. La Rue*, 139 U. S. 601, 11 Sup. Ct. 670, distinguished.

2. SAME—DIFFERENT FORMS OF INVENTION.

Where the drawings and specifications show two different forms of the invention, but the parts are numbered alike in both, and are designated in the claims by reference numbers, without distinction, it must be held that the difference is immaterial, and that either form answers the requirements of the invention.

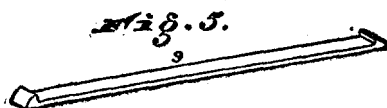
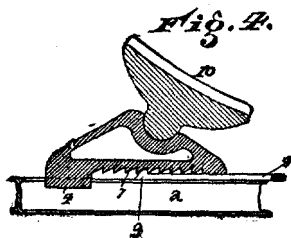
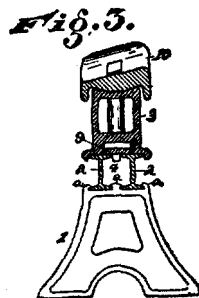
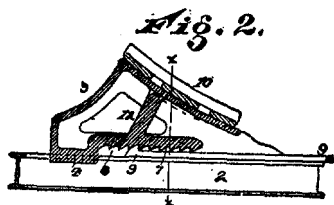
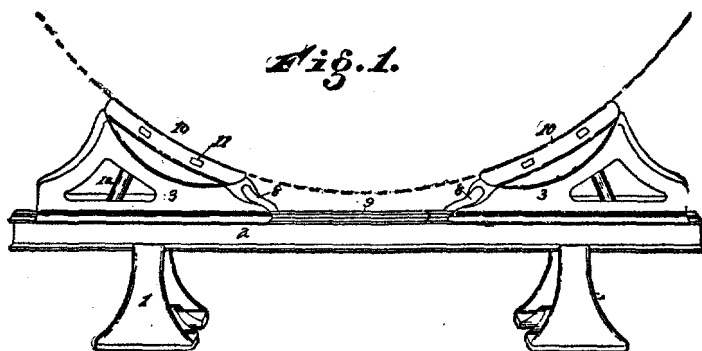
3. SAME—CASK SUPPORTS.

The Schreiber patent, No. 396,372, for an improvement in cask supports, is void for want of invention. 65 Fed. 220, affirmed.

Appeal from the Circuit Court of the United States for the Southern District of Ohio.

This is a suit by bill in equity, instituted by the above-named appellant, to obtain an injunction against the infringement of letters patent No. 396,372, issued to Charles C. Schreiber, January 15, 1889, for a supposed new and useful improvement in cask supports. The object of the invention covered by the patent was "to provide a support for heavy casks or barrels that is strong, durable, and readily adjustable to any sized cask." The means proposed by the inventor were: (1) A beam running crosswise under the cask, and near the end of it, and resting upon chairs or benches which stand upon

the floor. Ways are constructed lengthwise of the beam upon the upper surface. (2) Two shoes mounted upon the beam, which are adapted, at the lower surface, to move along the ways above mentioned. Provision is made by projecting flanges for holding the shoes to the beam while moving along the ways or when at rest. The shoes respectively stand, when in use, under each side of the cask, opposite each other. The upper faces of the shoes are inclined so as to make a general conformity to the surface of the barrel opposite. A depression is made in the face of the shoe in the form of a shallow socket, adapted to receive the ball or convex projection on the saddle next to be mentioned. (3) Saddles resting upon each of the shoes, the upper inclined surfaces of which are made in a concave circular form, so as to conform to the circle of the cask which rests upon it. There is a projection upon the bottom of the saddle, which is round or nearly so, like the side of a ball; and this projection, being placed in the socket above mentioned, makes, with the latter, a joint which allows the saddle to rock, and to so adjust its surface to the cask that the latter shall rest centrally and evenly upon it. (4) A tie rod resting on the beam between the ways, having hooks at each end turned upwardly, which catch behind teeth on the under surface of the shoe provided for that purpose. Thus, the shoes are prevented from spreading under the burden of the cask. One set of the apparatus above described is set under each end of the cask. All the parts of the support are made of iron. Some change has been made by the complainants, who are the owners of



the patent, in the supports for the shoes, but that is in regard to a part of the construction not now involved. Six claims are founded upon the specifications. The sixth is the one of which the complainant alleges the infringement. It is as follows: "(6) In a cask support, the shoe 3, provided with a concave seat in combination with the self-adjusting saddle 10, supported in said seat, substantially as specified." The defendants set up several defenses, among them that Schreiber was not "the original and first inventor of the said alleged invention shown." A great number of former patents and publications were set forth in the answer in support of that defense. They were not put in evidence, however. Another defense was that there was no invention shown or discovered in the patent. The court below was of the opinion that the latter defense was well taken, and dismissed the bill. 65 Fed. 220. The complainants bring the case here on appeal.

E. E. Wood, for appellants.

Jas. Moore, for appellees.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

SEVERENS, District Judge, having made the foregoing statement of the case, delivered the opinion of the court.

The controversy between these parties turns upon the question whether patentable invention is shown by the device of the combination covered by the sixth claim of the complainants' patent. That claim is for a combination in a cask support of a shoe having a concave seat, with a self-adjusting saddle, supported by the seat, both constructed substantially as specified. For while some effort has been made, upon the employment of the word "saddles" in this claim, to construe it widely enough to include the co-operative relation of this combination with a duplicate thereof by means of other elements not mentioned in the claim, we think it clear that it was not intended by the patentee to make the claim so broad. Nor would its language justify such an extension. The "shoe" is mentioned in the singular number, which balances the effect of the word "saddles" in the plural; and, what is quite significant in this regard, the previous claims spread over the various elements in the construction of the entire cask support in combinations and in their relation and co-operation with each other. It is obvious that the duplication of the structure devised for the support of one end of the cask, for the purpose of supporting the other end, would not be invention. Whether the combination shown in this particular claim, when used with a duplicate of itself in combination with other elements not stated, would exhibit a patentable invention or not, we need not determine.

The question for our inquiry is reduced to the one stated; that is to say, whether the combination of the seat and saddle, for the purpose mentioned, shows such invention as entitles the complainant to the monopoly accorded by the patent laws. And we agree with the learned judge who decided the case at the circuit in his conclusion that it does not. Much of the argument of the counsel for the appellant devoted to the purpose of demonstrating the novelty and utility of the device of this claim is founded upon the assumption that we are to take into account the co-relation of this part of the cask support with the other parts, and estimate the invention by the function it performs in combination and co-operation with such other

parts,—a proposition which, as we have already explained, we think cannot be supported. Substantially, this combination is nothing more than the ball and socket joint, a very old mechanical contrivance, employed in the anatomy of the animal creation and innumerable compositions of mechanism in human art. But it is urged, and it appears to us to be the most plausible contention that can be advanced for the appellants, that there was invention in carrying, with a small change in other instrumentalities, this old device to a new use. And the doctrine is invoked, of which the recent case of *Potts v. Creager*, 155 U. S. 597, 15 Sup. Ct. 194, is an important illustration, that there may be invention in extending into a new and comparatively remote field of usefulness an old contrivance with even slight changes, such as are called for by the requirements of the new use. This is the substance of the rule applied also in *Electric Co. v. La Rue*, 139 U. S. 601, 11 Sup. Ct. 670. In *Potts v. Creager* the patent was for a cylinder bearing steel bars set in grooves longitudinally along its surface, and slightly projecting therefrom, which, operating with an abutting roller, was used for disintegrating clay, and, by the peculiar shredding of that substance which it effected, proved a very useful piece of machinery. The cylinder which was brought forward as an anticipation of it was much like it in form, but the longitudinal bars were of glass, and it had been used for the polishing of wooden surfaces,—a use in which it failed after a short trial. The patent was sustained upon these two considerations: First, the change of the material of the bars to adapt them to the new use, a kind of insight which it was said was sometimes, though not always or generally, evidence of invention; but, secondly, and mainly, because the new use was so widely different and remote from the former one, which was special and limited, as to indicate an inventive discovery of means, rather than such an obvious transfer as would occur to a mere mechanic. Perhaps a more strictly accurate statement of the decision in that case would be to say that it was a conclusion drawn from the blending of both those two features of the patent, the discovery of the applicability of the old means to a widely different use, and the perception of the changes required to produce a new and useful result. In the case of *Electric Co. v. La Rue* the patent was for the combination of a torsional spring with the lever of a telegraph key pivoted upon it, and adjusting screws for regulating the movement. Flat springs had been used in similar combinations with telegraph keys, and torsional springs had been used in clocks and on doors; but it was held that the promotion of the old device of a torsional spring to a new office, in which it performed a new function (as it did in the operation of the key), with the provision of the necessary appliances, involved invention. But the present case is widely different from those. The ball and socket joint was a common construction, and was in universal use in mechanics wherever the requirements indicated its utility. In this instance the requirement was for a joint between the saddle and its seat, which would permit the saddle to rock laterally and longitudinally, so as to permit the surface of the saddle to adjust itself to the surface of the casks. The ordinary hinge susceptible of only one of these movements would not

answer the purpose. It would seem that it would be obvious to a mechanic fairly skilled in his business to meet the requirement by interposing the ball and socket device. Again, no new appliances are here provided which affect the operation of the joint. That is perfect for all the functions that are required of it, and there is no new result substantially distinct in its nature. It is simply the case of an employment for a new use, and nothing more, and falls within the general doctrine of those cases in which it has been so many times held that the mere extension of a well-known device into another field of usefulness, where the transfer does not involve the faculty of inventive genius, will not support a patent. *Tucker v. Spalding*, 13 Wall. 453; *Brown v. Piper*, 91 U. S. 37; *Ansonia Brass & Copper Co. v. Electrical Supply Co.*, 144 U. S. 11, 12 Sup. Ct. 601; *Manufacturing Co. v. Cary*, 147 U. S. 623, 13 Sup. Ct. 472,—where many of the previous cases are collected. In the case of *Electric Co. v. La Rue*, above cited, it was held upon that branch of the case relating to infringement that the use by the defendant of the complainant's torsional spring combination, in connection with the sounder, an instrument employed at the receiving office for the purpose of enunciating the message, was merely an employment for another use, and so was an infringement.

Since the combination of the sixth claim does not, as we think, produce any new mechanical result, the other cases cited by complainants' counsel upon the consequences resulting from devices which do produce them, with old elements modified, have no application. These are: *Topliff v. Topliff*, 145 U. S. 156, 12 Sup. Ct. 825; *The Barbed Wire Patent*, 143 U. S. 275, 12 Sup. Ct. 443, 450; *Sessions v. Romadka*, 145 U. S. 29, 12 Sup. Ct. 799.

Another point deserves attention. In figures 1 and 2 of the drawings, and which are referred to in the specifications, the concavity of the seat is prolonged up and down, and the convexity of the corresponding part of the saddle is suited thereto. This would admit of a sliding movement also, so that, in certain positions of the cask, it is said the ball member may slide in the socket until the surfaces of the cask and saddle come to coaptation. We infer that this feature was not deemed material, for the patentee in figure 3 shows his invention in the form of a ball and socket simply, without any modification such as is last mentioned, and in his specifications refers to this as one of the forms of his invention. In both forms the parts are numbered alike, and the claims refer to the number of the figures or their references in the specifications without distinction. In these circumstances, we must hold that the difference is not material, and that either form answers the requirements of the invention. *Trimmer Co. v. Stevens*, 137 U. S. 423, 435, 11 Sup. Ct. 150; *Wells v. Curtis*, 13 O. C. A. 494, 66 Fed. 318, 323. It is proper to add that the difference was not adverted to on the hearing; but, in the brief of the appellant, some parts of the discussion seem to refer to the capacity of the combination for such adaptations as are mentioned in the references of the specifications to the first two figures in the drawings; and for that reason we have given the matter due consideration.

We conclude the decree of the court below dismissing the bill should be affirmed. It is so ordered.

## THE COLERIDGE.

## SAUNDERS v. THE COLERIDGE.

(District Court, E. D. New York. March 3, 1896.)

## 1. SHIPPING—MASTER AND SERVANT—NEGLIGENCE—ACCIDENT.

Injury to a workman engaged in repairing a tank on shipboard, by the falling of a carpenter's tool from a scaffold overhead, in consequence of some unexplained inadvertence on the part of the carpenter, is a simple accident, which involves the ship and her owners in no legal responsibility.

## 2. SAME—FELLOW SERVANTS.

Where one employed to do repair work on shipboard by day's labor sends his servant to do the work in his place, the servant is to be regarded as the fellow servant of the ship's carpenter, in respect to an injury to him resulting from alleged negligence of the carpenter.

This was a libel by Thomas F. Saunders against the steamship Coleridge to recover damages for personal injuries.

Charles J. Patterson and John F. Clark, for libelant.

Edward L. Owen and George H. Gilman, for claimant.

BROWN, District Judge. In the afternoon of the 1st of February, 1894, while the libelant was engaged in making some repairs upon the tank in the hold of the steamship Coleridge, his foot was cut by the fall of a chopper belonging to the carpenter, who was at work on the tank upon a platform or scaffold 22 inches wide, and about 6 feet above the bottom of the tank. The wound was a somewhat serious one, and disabled the libelant for work for several months.

The libelant did not belong to the ship, but was in the employ of Mr. White, a boiler maker, by whom he had been sent to make preparation for putting a patch upon the tank. The carpenter belonged to the ship, and he was employed in repairing the tank by fitting some wooden casings about the place of the patch. The testimony is contradictory between the libelant and Luce, the carpenter, as to whether the libelant was at the time actually engaged in doing his own work upon the tank, or whether he was doing nothing about that work, but assisting the carpenter from time to time in passing the boards up and down in the course of fitting. The libelant testifies that at the time he was hit he was cleaning lead out of some holes in the place where the patch was to go on.

There is no evidence showing any imperfection or fault on the part of the ship, her tackle, or equipment, nor any fault on the part of the owners in employing a suitable person as carpenter. Nor is any fault or defect found with the platform, either in its kind, or the arrangements for using it; nor is there any evidence showing how the chopper came to fall off the platform. It was an ordinary tool, belonging to the carpenter. He had used it, as he says, about five minutes before the accident, in chopping off a piece of one of the boards, and had laid it down upon the platform a few feet from him. In what manner or why it got off the platform and fell is not known. The first the carpenter knew of its fall was when the libelant said he was hurt. It fell, presumably,

in consequence of some unexplained inadvertence on the part of the carpenter, either in stepping about on the platform, or in handling the boards or other tools upon the platform. Inadvertence of that kind is an ordinary incident of such work, of which all workmen working on the same job, or working near each other, take the risk, as one of the risks of their vocation. Such cases are to be, moreover, regarded, I think, as simple accidents rather than as legal negligence, involving ship and owners in responsibility.

From what the carpenter testifies as to the position of the libelant when hurt, it would seem that the latter could not have been at work upon the holes, as he claims. For a part of the time certainly he was not occupied with his own separate work. From his previous work there, and his aid given to the carpenter, it is impossible also that he should not have known of the presence and use of the chopper and other tools, and of the liability of such tools to be knocked off the platform in the course of the work that was going on. And if the case were to be treated as one not of simple accident, but as involving presumed negligence, I think, in the entire absence of any specific proof how the chopper got off, there was presumptively as much negligence in the libelant in remaining unnecessarily where any fall of tools would be likely to hurt him, as can be imputed to the carpenter himself by mere presumption.

I further think, also, that if the case is to be considered as one of presumptive legal fault, the libelant must be deemed a fellow servant with the carpenter, and on that ground precluded from recovery. The authorities cited in his behalf are all cases in which the accident arose from some defect in the ship, or in her tackle, equipment, or loading, and where there was a breach of some implied duty owed by the owners. Here, as I have said, there is no actual fault of any kind attributable to the owners, unless they are to be legally held as warranting against any inadvertence on the part of the carpenter in the handling of his tools, or in his motions while at work. I do not think any such legal warranty exists. The two workmen were engaged upon the same common job,—the repair of the tank,—in the immediate view and presence of each other. The libelant at times voluntarily assisted the carpenter. The negligence, if there was any, on the part of the carpenter was in his personal carriage, or the handling of his tools, or of the boards. Had he himself inadvertently fallen from the platform and injured the libelant, could the latter have recovered from the ship? Accidents from such causes are, as I have said, a risk of the vocation.

The fact that the libelant was a servant of Mr. White does not change this aspect of the case; nor the fact that the carpenter may have been paid by the month, and Mr. White, or the libelant, by day's work. Both were substantially in the employ of the ship-owners, and subject to their control. The work was apparently done in the usual way, by day's work; no independent contract is indicated in the evidence. Had Mr. White, who was employed to do the libelant's part of the repair, done the work with his own hands, and been injured in this way, both would clearly have been



in the same common employment of the ship, and fellow servants. I do not see that the case is changed by the fact that Mr. White, instead of doing the work himself, sent the libellant as his servant to do the same work. The case in that respect is similar to the frequent cases of longshoremen employed by a stevedore, who are injured through some negligence of men furnished by the ship engaged in some part of the common employment. See *Butler v. Townsend*, 126 N. Y. 105, 112, 26 N. E. 1017; *Quinn v. Lighterage Co.*, 23 Fed. 363; *The Harold*, 21 Fed. 428; *The Servia*, 44 Fed. 943; *The Ravensdale*, 63 Fed. 624; *The Bolivia*, 59 Fed. 626. These cases are not precisely parallel; but they involve the same principle, and the cases of *Killea v. Faxon*, 125 Mass. 485; *Tube Co. v. Bedell*, 96 Pa. St. 176; and *Ewan v. Lippincott*, 47 N. J. Law, 192,—seem to be indistinguishable.

The libel is dismissed, but without costs.

#### THE GREAT NORTHERN.

#### BELGIAN AMERICAN MARITIME CO. v. THE GREAT NORTHERN.

(District Court, E. D. Virginia. March 2, 1896.)

1. SALVAGE—TOWAGE ON HIGH SEAS.

Towing a disabled vessel on the high seas, owing to the latent danger from the multiform accidents to which ships are constantly liable, is always a salvage service.

2. SAME—VALUE OF SALVAGE SERVICES.

The value of a salvage service consisting in a towage upon the high seas is to be estimated by the circumstances of the two vessels, and by the conditions of wind and sea prevailing at the time the service is entered upon, and by the casualties which experience teaches practical seamen are liable to happen in the ordinary course of events while the service continues; and the fact that the weather and sea afterwards prove favorable is not a reason for diminishing the award.

3. SAME—AMOUNT OF COMPENSATION.

\$10,000 awarded to a whaleback steamship of about 2,300 gross tonnage, worth \$100,000, bound from Tampico, Mex., to New York, with a cargo worth about \$137,000, for towing to Newport News a steamship of over 3,000 gross tonnage, in ballast, worth \$100,000, which was found with a broken propeller shaft about 14 miles northeast of Cape Hatteras; the service being commenced in a rough sea, and the hawsers of the towed vessel being got aboard of the whaleback with great difficulty and danger; the service lasting nearly 24 hours, and delaying the towing vessel two days on her regular trip.

This is a libel by the owners and crew of the steamship *Sagamore* against the steamship *Great Northern* for an award of salvage.

The *Sagamore* is a steamship of the whaleback type, of about 2,300 tons gross, and 1,801 tons net, with triple expansion, vertical engines of 1,400 horse power indicated, and nominal horse power 350, English register. Her home port is Antwerp, in the kingdom of Belgium, and her owner is the Belgian American Maritime Company. She is built of steel. Her length is about 315 feet, beam about 38 feet, and depth about 25 feet. Her highest carrying capacity is about 3,600 tons; her registered tonnage, English measurement, is 1,379 tons; and she was two years old September 23, 1895. Her speed was about 10 or 11 knots per hour, loaded as she was. On May 25, 1895, while bound from the port of Tampico, Mexico, to New York, with a valuable cargo, she sighted the *Great Northern* off Cape Hatteras, bound from Philadelphia

to Port Royal, S. C., in ballast. The Great Northern is a steel screw steamship, built in December, 1892, of about 3,022 gross, and 1,951 net tonnage, with engines of about 276 horse power. Her length is 322 feet, her beam 41 feet 6 inches, and depth 24 feet. She had two tri-sails, two stay-sails, and a jib. The height of her main tri-sail, which was her largest, was 38 feet. She had only fore and aft sails, and no yards. The Great Northern was in ballast. The Sagamore was loaded with bullion, lead, hides, skins, fustic (a sort of dye wood or log wood), and Mexican fibre; and her cargo was worth \$246,459.39 in Mexican dollars, or \$136,921.88 United States currency; her freight, \$4,211; and the vessel, by agreement, was worth £20,000, or \$100,000. The value of the Great Northern is fixed at £20,000, by agreement for the purposes of this suit, or \$100,000. She was, however, worth more than this amount. At or about the time the Sagamore first sighted the Great Northern, the latter broke her shaft in pieces between the after bulkhead and the stern, and had become disabled. She had dropped one anchor, and was blowing off steam heavily, and had hoisted her signal for assistance when the Sagamore sighted her. The Great Northern was first sighted at about 4 p. m. (Sagamore's time) of the 25th May, and at about 4:15 p. m. was flying signals about 2 points on the starboard bow of the Sagamore, at a distance from the Sagamore of 2½ miles. At about 4:30 p. m., the Sagamore spoke the Great Northern, and began to make arrangements to take her in tow. She had passed Cape Hatteras abeam at 4 p. m., about 10 miles off. After arriving at the Great Northern, and learning that she wished to be towed to the Chesapeake, and declined to be towed to New York, the master of the Sagamore, with her officers and crew, began to make arrangements to take the Great Northern in tow, about 4:30 p. m. (Sagamore's time). There was prevailing at the time a heavy swell from the northeast and east to the southwest. The sea was confused and dangerous. On the 24th there had been a strong gale off this coast, but the wind had moderated on the morning of the 25th, leaving, however, a heavy swell. The weather was pretty rough, and the sea was running pretty high. The wind was northeast to east; say, moderate from the northeast. Although the Sagamore commenced making preparations to take the Great Northern in tow about 4:30 p. m., the conditions of sea and wind were such that she did not get the lines fastened and commence towing until 7:30 p. m.; these preparations taking three hours. There are many reasons shown for this long delay, only some of which will be here set out. The weather was rough, and the sea heavy. It was difficult, in the sea and weather prevailing, to get a vessel of the conformation of the Sagamore in position, or keep her there. Both vessels rolled heavily, and every precaution had to be exercised to prevent collision, which would have endangered the safety of both vessels. The Sagamore is a whaleback, with round deck. She is built to allow the waves to wash over her, and they did wash over her on this occasion. She is not a towing vessel, was not built for that purpose, and was not provided with hawsers for towing. In order to take the Great Northern in tow, all her aft sails and stanchions as far forward as her turret had to be unshipped, and this took time, and exposed her crew to extra danger in working on her deck, because, in the rolling of the ship and against the washing of the seas, they had nothing to catch hold of except the capstan and towing rail. Both her derricks had to be unshipped, and one lashed to the side; and the other across the whaleback, to keep the two hawsers clear of the propeller. This involved time, trouble, skill, and danger. At times the crew working on the deck were in danger, and had to run to the turret for security. The hawsers used in the towing service were those of the Great Northern. There was risk and trouble in hauling the two hawsers aboard the Sagamore, in consequence of their being twisted, and requiring time, labor, and skill in getting them untwisted for use. It took about three-quarters of an hour for this work on the hawsers to be accomplished, all hands, firemen and sailors, being engaged in the work. In endeavoring to get the hawsers to the Sagamore, the port lifeboat of the Great Northern was smashed, and there was great difficulty, after the starboard lifeboat was launched, in getting the hawser lines aboard. When the Sagamore reached her, the Great Northern was anchored, with one anchor laid, at a point about 14 miles from, and to the north and east of, Hatteras. Her tail end shaft was broken in the stern tube. The tube also was broken, and the propeller was firmly fixed against the rudder post. She

was not in a condition to navigate after the breaking of her shaft, had come to anchor, and was flying her signal of distress. The place where she was anchored off Hatteras was on the most dangerous part of the Atlantic coast. She was rolling heavily, and was in ballast, and was therefore the more exposed. She lay high above the water, with 15 feet of free board. She could not be navigated in her condition, with the sails she had. These were not sufficient to give her steerage way. The service consumed nearly 24 hours, and delayed the Sagamore 2 days on her regular trips. The distance towed was 125 miles. It took her 125 to 150 miles out of her way, her destination being New York. It was a service along the Atlantic coast, dangerous at all times to such a tow. The hawsers used were about 70 fathoms in length. During the towing, the Great Northern yawed considerably, and there was always danger of the towing lines fouling the propeller of the Sagamore, which was prevented by lashing one of the derricks across the tow rail. During the towing, a fog was encountered, so dense that the Great Northern could not at times be seen from the Sagamore. The engines of the Sagamore were put to a great strain, and, while no injury of great moment actually happened to them, it required the utmost caution and care to prevent it. All this was prevented by the skill and attention of the officers and crew on board the Sagamore. There was nothing omitted that ought to have been done by them to prevent disaster to both vessels during the towing. Extracts are inserted from the logs of the two ships:

From the engineer's log of the Great Northern:

"May 25th, 1895. At 4 p. m. Strong wind and high sea, running on port bow; engines racing badly, and ship diving and rolling. Basted steam back 10 lbs. Wind and sea increasing, and engines racing very badly; short stop valve down, and stood by throttle valve constantly. At 4:30 p. m. wind moderated slightly, but very high sea still running. At 4:55 p. m. the engines raced away at terrific speed, giving evidence at once of some part shafting having broken. The steam was shut off as quickly as possible; the gear run over; and the engines thereby stopped. This was not done before engines had received a terrible shaking. We very soon ascertained that tail end shaft was broken, the shaft protruded right out of stern tube, and bore up against rudder. The propeller was badly damaged, all blades being broken by coming in contact with curved parts of aperture. On examination in funnel, I found stern gland broken, bulkhead plates buckled around flange of stern tube, and flange of tube sprung right away from bulkhead. The two after-lengths of shafting were found to be lifted hard up against bearing keeps, also after-bearing badly sprung away from seating, and bolts of same very much strained. The tail shaft was broken midway between the two brass liners. I also found that the part of the tube between fractures turned round  $\frac{1}{2}$  a turn, and one had worked underneath another end of tube, and thereby jamming the shaft and tube very tightly together. There was also a piece of the shaft broken clean off about 8 in. long, 5 in. broad, and 4 in. deep, lying in the bottom of tube. This piece showed plainly by the way it was marked that it had been jammed between shaft and tube, and most likely was the sole cause of the damage to tube."

Extract from Sagamore's log:

"May 24th. 4 a. m., strong breeze and high sea; ship rolling heavily, and shipping water fore and aft. 8 a. m., strong breeze, with very rough confused sea; ship rolling, and shipping heavy water fore and aft. Noon, similar weather throughout. 4 p. m., strong breeze and rough sea; shipping much water. 8 p. m., strong gale and squally, with high sea; ship rolling heavily, and shipping large quantities of water fore and aft. Midnight, no alteration in the weather."

"May 25th. 4 a. m., strong gale and heavy sea, with hard squalls and rain; ship laboring heavily, and shipping much water fore and aft. 8 a. m., weather moderating; sea still very confused. 10 a. m., less wind and sea. Noon, fresh breeze and cloudy, with rain at intervals; ship rolling considerably in a confused cross sea. 3:45 p. m., sighted Hatteras light house. 4 p. m., abeam; distant ten miles; variable winds and hazy, with confused sea; ship rolling heavily. 4:15 p. m., signaled by S. S. Great Northern, for assistance, her shaft being broken. 4:30 p. m., bore alongside, and prepared to tow her to Chesapeake. 7:30 p. m., having passed hawsers and cleared away gear on after

whaleback, proceeded to tow; Hatteras light bearing S. W. by W.  $\frac{3}{4}$  W.; distant 14 miles; sea very rough and confused; both ships rolling heavily; much lightning to the eastward. 11:45 p. m., a small schooner fouled our tow. \* \* \*

"May 26th. 12:10 a. m., Bodies Island abeam; distant 8 miles. 4 a. m., light variable winds and overcast. 4:50 a. m., set in foggy. 5 a. m., reduced speed; thick fog. 7:30, soundings, 13 fathoms. 8 a. m., calm, with thick fog. 9:45 a. m., fog clearing; full speed. Noon, thick fog; reduced speed; soundings, 9 fathoms. 1:20 p. m., arrived off Cape Henry, and signaled. 1:30 p. m., fog clearing; took pilot on board, and proceeded for Hampton Roads. 5 p. m., reduced speed, and prepared to cast off tow. 5:20 p. m., cast off tow, and proceeded easy towards the quarantine station. 5:50 p. m., anchored; soundings, 12 fathoms; light breeze and cloudy."

The service rendered by the Sagamore was opportune, was performed at risk to life and property on the part of the Sagamore and her crew, and was performed promptly. It was entirely satisfactory and successful; so much so that, after the arrival of the two steamers at Newport News, the master of the Great Northern and his officers showed their appreciation by formally thanking the master of the Sagamore for his services.

Brown & Brune and Walke & Old, for libellant.  
Convers & Kirlin, for respondent.

HUGHES, District Judge (after stating the facts as above). The sole question in this case is the amount to be allowed to the Sagamore for salvage and for towing. Towing a disabled vessel on the high seas is always a salvage service. Courts, judges, and lawyers of the interior are apt to assimilate this service to towing on the inland canals and rivers of the country, and are apt not to realize the full nature of towing at sea. In the towing of a canal boat by a mule on a towpath, there is no danger of the boat running into the stern or sides of the mule, or of the mule's backing down from the towpath and driving its heels into the stem of the canal boat (which has no stem). On the rivers of the interior West, a steam tug goes right up to the boat to be towed, is made fast close alongside, not even fenders being always interposed between the two vessels, and moves out with its tow into the channel, to breast a steady flow of water if ascending the stream, or to ride upon it if going down stream; the unbridled wind, that dread vis major of the ocean, not entering at all as a factor in the adventure. The case is different on the ocean, and especially off the North Atlantic seaboard, where the sea is never at rest, and where a cessation of winds is almost unknown. In those waters vessels are never in comparative safety except when under headway, and are always in more or less danger when merely riding the waves. In the act of making preparations for towing and being towed, ships out at sea are very liable to collisions, to the fouling of hawsers, to the smashing of small boats, to losing anchors, and to other serious accidents. After getting under way, and commencing the towing service, there is constant danger on the open sea, when the disabled ship has no power of self-control. The hawsers are made as long as practicable, often 70 fathoms or more, in order to keep the vessels far apart. During the towing, the varying conditions of wind and wave are fruitful of casualties. In the case of *The Strathgarry*, which will be mentioned in the sequel, there is a striking instance of the unforeseen accidents incident to towage on

the open main. In that case there was a contract for only a half hour of ocean towage, which was undertaken and performed for a stipulated price. But, "just at the expiration of the half-hour, the hawser broke, and the manilla spring attached to it, recoiling, killed the chief officer of the vessel under tow, seriously injured two other persons, and damaged the skylights and steering gear of the towing ship to the amount of five hundred dollars." It is the latent danger from the multiform accidents to which ships are constantly liable that make a towage service on the open seas, rendered to a disabled ship, always a salvage service.

When the Sagamore approached the Great Northern for the purpose of taking her in tow, the sea and wind were such as to require the utmost care and caution. The Great Northern, having no cargo on, and but one anchor down, lying upon a rolling sea, against a fresh wind, with the exposure of 15 feet of free board, was like a cork upon the water. The evidence makes it probable that she was also dragging her anchor; for the wind was strong, and the bottom smooth and of sand. Under these circumstances, to approach her, and engage in the necessary preparations for taking her in tow, involved in itself the most serious danger. The Sagamore was not built for towing and salvage service. She was meant for rapid ocean navigation in all weathers. She had, practically, no free board, and neither wind nor wave could seriously affect her navigation. She had little capacity for maneuvering at sea; nothing but rudder and propeller; her engineer in the hold receiving directions, through a tube, from the officer in the pilot house.

The value of salvage service is estimated by the circumstances of the salved and salving ship, by the conditions of wind and sea prevailing at the time it is entered upon, and by the casualties which experience teaches practical seamen are liable to happen, in the ordinary course of events, while the service continues.

In the case of *The Strathgarry* [1895] Prob. 264, which was a case in which a sum was agreed upon between salvor and salved before the service was undertaken, the high court of admiralty, Bruce, J., said:

"In forming an opinion of the fairness or unfairness of the agreement, I think the court must regard the position of the parties at the time the agreement was entered upon. The agreement cannot become fair or unfair by reason of circumstances which happened afterwards. \* \* \* In services of this character a very considerable part of the danger and difficulty arises at the commencement of the service. Hawser is not made fast between large vessels in the South Atlantic, even in fine weather, without risk; and the mere maneuvering of the *Hawkhurst* [the salving ship], and the commencing to get a strain upon the towing hawser, was a service certainly attended with some danger. The *Strathgarry* [the ship towed] is a steamship of 5,000 tons gross, and the towage of such a vessel was a service necessarily involving risk. \* \* \* Such a service must have put a considerable strain upon the engines of the *Hawkhurst*, especially having regard to the violent sheering of the *Strathgarry*. \* \* \* In considering the fairness or unfairness of the agreement, I cannot, I think, as regards the *Hawkhurst*, any more than as regards the *Strathgarry*, take into consideration the events that happened after the agreement was made. But the events which actually did happen are only illustrations of the risks incidental to such service as the *Hawkhurst* rendered."

That there was an agreement upon the amount to be paid for salvage service in the case of *The Strathgarry* does not affect the principles to be observed in salvage cases, where the contract, as regards the compensation to be paid and received, is implied, and not agreed upon.

As before said, the value of the service is to be estimated by the conditions of wind and sea prevailing at the time it is entered upon, the circumstances of the salved and salving vessels at that time, and the casualties which experience teaches practical seamen are liable to happen in the course of events while the service continues. In the case at bar, the answer admits that this was "a meritorious salvage service." The logs of the two ships, extracts from which are given in the statement of facts prefixed to this opinion, show that the *Sagamore* encountered very serious risks in going to the relief of the *Great Northern*, and in preparing to take her in tow. She herself, as well as the *Great Northern*, was afterwards liable to all the usual risks attending the towage, on the North Atlantic seaboard, of a great steamer, of more than 3,000 tons gross, and with 15 feet of free board exposed to the wind. The *Great Northern's* motive power was entirely disabled; her propeller useless, and bearing up against her rudder; she was without yards or square sails; and she had only a fore and aft rigging, which was not sufficient to give her steerage way. She was in ballast, and liable to plunge and to sheer ad libitum. She did sheer much during the towing, and brought injurious straining upon the engines of the *Sagamore*. The latter ship was in constant danger of her propeller fouling with the towing hawser. This vessel had \$237,000 of values at risk, and brought the *Great Northern*, worth \$100,000, safely into port. Fortunately for both ships, the weather and sea proved favorable after the towage was commenced. This last fact seems to be relied upon by the respondents as a reason for diminishing the amount which might otherwise be awarded to the salvors. Sufficient has been said to show that this principle does not hold good in admiralty. The good fortune of better weather and a quieter sea, which occurred during the course of the towing service, inured alike to both ships, and does not entitle the salved ship to claim the benefit of it, to the injury of the salving vessel. I think the award in this case should be liberal; and I will sign a decree for \$10,000 and all the costs of this suit.

As to the considerations which usually enter into salvage service, see *The Mary E. Dana*, 5 Hughes, 362, 17 Fed. 353; *The Marie Anne*, 5 Hughes, 462, 48 Fed. 742; *The Sandringham*, 5 Hughes, 316, 10 Fed. 556. See, also, *The Taylor Dickson*, 33 Fed. 886; *The Akaba*, 4 C. C. A. 281, 54 Fed. 197; *The Phoenix*, 10 C. C. A. 506, 62 Fed. 487; and *The Florence*, 65 Fed. 248, for the opinion of this court.

Decree (March 31, 1896).

This cause came on this day to be heard upon the pleadings and proofs, and was argued by counsel; on consideration whereof the court, for reasons stated in writing and filed herewith, doth order and decree:

1. That the libelants, the Belgian American Maritime Company of Antwerp,

Belgium, owners, and Theodore Voss, master, of the steamship Sagamore, on behalf of themselves and the crew of the said steamship, do recover of the steamship Great Northern, for the services mentioned in the libel, the sum of \$10,000, with interest thereon from the 1st day of November, 1895, till paid, and all costs expended by them to be taxed by the clerk of this court.

2. And it appearing to the court from the record that the steamship Great Northern was discharged from arrest in this cause by giving bond with C. J. Smith, J. G. Womble, and C. W. Grandy, as stipulators, the court doth further order and decree that the said Belgian American Maritime Company, of Antwerp, Belgium, and Theodore Voss, on behalf of themselves and crew of the said steamship Sagamore, do recover of the said C. J. Smith, J. G. Womble, and C. W. Grandy the said sum of \$10,000, with interest from the 1st day of November, 1895, till paid, and costs, to be taxed as hereinbefore provided, and may have their writ of execution to enforce the payment of the same against the said stipulators or either of them.

3. And the court proceeding to apportion the sum hereinbefore decreed, doth further order and decree that out of the amount awarded the sum of \$3,000 shall be allowed the master and crew of the said steamship Sagamore, of which the sum of \$750 shall be paid to Theodore Voss, the master of the said steamship, and \$2,250, the balance thereof, shall be paid to the remaining officers and crew of the said steamship in proportion to the wages received by the said officers and crew, respectively, at the time of the services mentioned in the said libel, and that the amounts awarded to the said master and crew shall be net amounts, free of counsel fees, and that the balance of the said award shall be paid to the said Belgian American Maritime Company of Antwerp, Belgium, the owner of the steamship Sagamore, or their proctors of record.

But no execution shall issue on this decree until after the expiration of 20 days from this date.

Norfolk, 31st March, 1896.

### THE MASCOTTE.

DEVENNY et al. v. THE MASCOTTE.

(District Court, D. New Jersey. June 18, 1895.)

#### 1. COMPROMISE—PARTIAL SETTLEMENT—EVIDENCE.

The charterers of a tug, after paying the first month's hire, refused to pay further, because of numerous breakdowns, causing delay and damage in their business. They also sent a memorandum of such claims, with bills for repairs, to the owners. This led to an interview resulting in a settlement, whereby the charterers paid a considerable sum to the owners, while the latter agreed to allow and pay a large bill for repairs, and perhaps some claims for delays; and thereupon a new contract of hiring was made, materially modifying the original one. *Held*, that it was extremely improbable that any claims accruing prior to the settlement were not included in it, and that on the evidence the settlement must be considered as in full to date, so as to bar all prior claims of the charterers.

#### 2. BREACH OF CHARTER PARTY—EXEMPLARY DAMAGES.

The forcible retention of possession of a tug by her charterers after breach of their contract is not a ground for exemplary damages, where they act under legal advice; and the damages for the detention must be measured by the charter rate.

This was a libel by John J. Devenny and others against the steam tug Mascotte to enforce certain claims for damages, and for repairs. A cross libel was filed by the owner of the tug, setting up claims for various items alleged to be due from the charterers.

Flanders & Pugh, for libelants.

Henry M. Snyder, Jr., for respondent.

GREEN, District Judge. About June 1, 1890, the libelants chartered the tug Mascotte, then lying at Perth Amboy, N. J., for a term

of six months, with the privilege of renewal at the rate of \$10 per day. The contract of hiring was made with one S. B. Greason, who was a duly-accredited agent of the owner, Dr. John C. L'Engle. Dr. L'Engle was a resident of Florida. It seems from the testimony that, while the libelants made a personal examination of the tug before chartering, they were assured by Mr. Greason that she was practically a new boat in every part, was in good order, and was fitted for a tug. The charter party describes the tug as "tight, staunch, strong, and every way fitted for the service" to which she was destined. Hardly had the libelants taken possession of the tug before defects became manifest, or she was subject to a series of accidents which seem to be unusual, and which succeeded each other with considerable regularity. These necessitated repairs, caused delays, and interfered apparently with the financial success of the operation of the tug. In fact, the libelants allege that they have suffered heavy pecuniary loss, and it is to recoup themselves for such loss that this libel has been filed.

In the view which I take of this case it is not necessary to discuss the character or legal effect of the instrument executed by the libelants and Mr. Greason as agent for the owner,—the so-called "charter party,"—nor whether the descriptive statements of the tug, therein contained, are warranties. The parties have construed the contract for themselves, and I shall not dissent from their construction. It appears in evidence that after making the first payment for the use of the tug, and covering the first month of the hiring, the libelants refused or declined to pay any more to the owner, alleging that they had an offset in the nature of repair bills and claims for enforced delays. Demand for accrued hire being made upon the libelants, they responded by letter, in which they say, as an excuse for their failure to pay, as follows: "We have been at considerable loss in the time of our barges and wages, etc., of the crew of the Mascotte." And they inclosed a memorandum of their alleged claims for delay and bills for repairs. This letter and claim seem to have been the means of bringing about an interview between the parties in Philadelphia, and finally, on or about the 1st of October, 1890, a settlement was reached. It was insisted upon the argument on behalf of the libelants that this settlement was only a partial one. But I think the weight of testimony sustains the contention of the respondent that it was a full settlement of all demands up to the date when it was made. It can hardly be conceived that the libelants, if they had other claims pending against the Mascotte, should have willingly paid moneys to her owner. And yet it is not denied that they did pay to Dr. L'Engle, as a settlement of his claim, the sum of \$342.22, while the owner agreed to allow and pay a large bill incurred for repairs, and perhaps some claims for delays. That all the claims which the libelants could have under the first hiring were then settled seems to be still further proved by the fact that a practically new arrangement for the use of the Mascotte was then made between the parties. In two respects the original agreement was changed,—the crew were no longer to be paid by the libelants, as was originally provided, but by the owner, and the term was liable to be ended by notice from the owner. It does not seem probable that such material changes in the original contract should have been assented to by the



libelants if they had claims for damages yet unsettled arising under it. I am constrained to find that the settlement of October 1, 1890, was in full to that date, and is a bar to any claim which predates that time. I cannot find any proof that after that date any claim for damages or repairs accrued to the libelants. It is true that one of the libelants testifies that of the 43 days which it is claimed the tug was unusable because of its unseaworthy condition at least 23 were after the settlement, but no dates or causes of delay are given. If that statement is correct, it is evident that the tug must have been out of service nearly the whole of October. But the remaining testimony does not justify such inference. On this point of the case I shall refer it back to a commissioner, if libelants so desire, for more direct and positive testimony. The remaining claim is for loss of anticipated profits on what is called the "Wilmington" contract. It is extremely doubtful if the circumstances of this case warrant the finding of consequential damages. At any rate, the evidence now before the court does not justify any such award. It is extremely unsatisfying, vague, and indefinite, and does not, as it appears, support the contention of the libelants.

The respondent has filed a cross libel, claiming various items, amounting to \$1,368.17, as due from the firm of Devenny & Co. It is only necessary to refer to one of these,—a charge of \$25 per day for the tug from November 10th to December 17th, amounting to \$950. It appears that in accordance with the provisions of the amended contract of hiring, on the 9th day of November, Dr. L'Engle's agent served a notice upon the libelants, terminating the term for failure to comply with the conditions of the charter. That the libelants were in default in payment of hire of the Mascotte is not disputed. Such default gave the owner of the tug the right to cancel the contract of hiring. The due service of the notice is not disputed. In breach of their contract, Devenny & Co. by force kept possession of the tug until December 17th. But this they did under legal advice. This is no case for exemplary damages. I think that the claim of \$25 per day for the tug is not justified, but that the damages sustained by the owner through this illegal detention will be properly measured by the charter rate of \$10 per day, and for such sum it is allowed. The other items of the claim, I believe, are not disputed. Of course, the charge of \$67.62 for legal expenses is disallowed.

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ABBOTT v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. February 3, 1896.)

No. 254.

Error to the Circuit Court of the United States for the Western District of Washington.

This was an action by Twyman O. Abbott against the United States to recover damages for breach of a contract to lease certain rooms for a post office. There was a judgment for plaintiff. 66 Fed. 447. Defendant brings error.

W. H. Brinker, U. S. Atty.

W. C. Sharpstein, for defendant in error.

Before McKENNA and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge. The facts of this case and the principles of law applicable thereto were clearly and correctly stated by the circuit judge (see *Abbott v. U. S.*, 66 Fed. 447), and are not of such a character as to call for any further discussion. The judgment of the circuit court is affirmed.

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BERGNER et al. v. HORN.

(Circuit Court of Appeals, Fourth Circuit. February 4, 1896.)

No. 141.

Appeal from the Circuit Court of the United States for the District of Maryland.

This was a bill by William C. Horn, president of Koch, Sons & Co., an unincorporated joint stock company, against Frederick Bergner and others, for infringement of a patent. There was a decree for an injunction and an accounting (68 Fed. 428), from which defendants appealed.

H. T. Fenton and Edgar H. Gans, for appellants.

Alan D. Kenyon and William Houston Kenyon, for appellee.

Before GOFF and SIMONTON, Circuit Judges, and BRAWLEY, District Judge.

PER CURIAM. We see no error in the conclusion reached by the circuit court. The decree of that court is affirmed, with costs.

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EELLS v. COOK.

(Circuit Court of Appeals, Ninth Circuit. October 10, 1894.)

No. 142.

Appeal from the Circuit Court of the United States for the District of Washington.

William H. Brinker, U. S. Atty.

F. Campbell, for appellee.

Reversed, on authority of *Eells v. Ross*, 12 C. C. A. 205, 64 Fed. 417.

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FOLSOM v. TOWNSHIP OF NINETY-SIX.

(Circuit Court of Appeals, Fourth Circuit. February 10, 1896.)

No. 69.

Error to the Circuit Court of the United States for the District of South Carolina.

Shields & Shields, H. J. Hansworth, and J. W. Parker, for plaintiff in error.

Chas. Inglesby, Eugene B. Gary, and W. C. Miller, for defendant in error.

No opinion. Reversed and remanded, pursuant to the mandate of the United States supreme court. See 16 Sup. Ct. 174.

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HAMMOND v. STOCKTON COMBINED HARVESTER & AGRICULTURAL WORKS.

(Circuit Court of Appeals, Ninth Circuit. February 14, 1896.)

No. 231.

In Error to the Circuit Court of the United States for the Northern District of California.

This was a petition for a rehearing. See, for former opinion, 17 C. C. A. 356, 70 Fed. 716.

**PER CURIAM.** The petition for rehearing is denied. The motion to certify questions of law to the supreme court, having been filed after the decision of the case, and pending the motion for a rehearing, will not be entertained; and, the petition for a rehearing having been denied, the motion to certify is directed to be stricken from the files.

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**LOO WAY v. UNITED STATES.**

(Circuit Court of Appeals, Ninth Circuit. February 3, 1896.)

No. 248.

In Error to the District Court of the United States for the Southern District of California.

This was a proceeding by arrest to determine the right of Loo Way, a Chinaman, to remain in the United States. The circuit court commissioner found the facts as charged, and ordered his removal. This order was affirmed by the district court. 68 Fed. 475. Defendant brings error.

Haines & Ward, for plaintiff in error.

Henry S. Foote, for the United States.

Before McKENNA and GILBERT, Circuit Judges, and HAWLEY, District Judge.

**PER CURIAM.** The facts of the case are fully stated by the learned judge who tried the case in the district court, and, for the reasons and authorities (to the latter it is only necessary to add *Lai Moy v. U. S.*, 14 C. C. A. 283, 66 Fed. 955, and *Lew Jim v. U. S.*, 14 C. C. A. 281, 66 Fed. 953, decided by this court) expressed and cited by him, the judgment is affirmed.

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**MUIRHEID v. CONSOLIDATED ICE-MACH. CO.**

(Circuit Court of Appeals, Third Circuit. March 3, 1896.)

No. 22.

In Error to the Circuit Court of the United States for the District of New Jersey.

Sur motion to docket and dismiss writ of error.

Frank S. Katzenbach, Jr., for defendant in error.

Dismissed, pursuant to the sixteenth rule.

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**WHEATON v. NORTON et al.**

(Circuit Court of Appeals, Ninth Circuit. February 14, 1896.)

No. 141.

Appeal from the Circuit Court of the United States for the Northern District of California.

This was a petition for a rehearing. See, for former opinion, 17 C. C. A. 447, 70 Fed. 833.

**PER CURIAM.** The petition for rehearing is denied. The motion to certify questions of law to the supreme court, having been filed after the decision of the case, and pending the motion for a rehearing, will not be entertained; and, the petition for a rehearing having been denied, the motion to certify is directed to be stricken from the files.

**BARR v. MAYOR, ETC., OF CITY OF NEW BRUNSWICK et al.**

(Circuit Court of Appeals, Third Circuit. March 9, 1896.)

**CIRCUIT COURTS OF APPEAL—JURISDICTION.**

The circuit courts of appeal have no jurisdiction, under sections 5 and 6 of the act of March 3, 1891, of an appeal in which the only question involved is whether the proposed acts of the mayor and council of a city would deprive the appellant of his property without due process of law, in violation of the fourteenth amendment to the constitution of the United States. *McLish v. Roff*, 12 Sup. Ct. 118, 141 U. S. 661; *Lau Ow Bew v. U. S.*, 12 Sup. Ct. 517, 144 U. S. 47, followed.

Appeal from the Circuit Court of the United States for the District of New Jersey.

This was a suit in equity by Henry J. Barr to enjoin the city of New Brunswick and the Pennsylvania Railroad Company from taking complainant's property under the power of eminent domain. The circuit court denied the injunction and dismissed the bill. 67 Fed. 402. From this decree complainant appealed, and defendants have now moved to dismiss the appeal for want of jurisdiction.

Charles E. Gummere, for appellees.

Before ACHESON, Circuit Judge, and WALES, District Judge.

ACHESON, Circuit Judge. The only question in this appeal is whether the proposed acts of the appellees, the defendants below, under an ordinance of the city of New Brunswick, N. J., would be contrary to and in violation of the fourteenth amendment to the constitution of the United States, in that the same would deprive the appellant of his property without due process of law. Clearly, the case is one which "involves the construction or application of the constitution of the United States," or in which "the law of a state is claimed to be in contravention of the constitution of the United States"; and therefore, under sections 5 and 6 of the act "To establish circuit courts of appeal," etc., approved March 3, 1891, this court has no jurisdiction to review the decision of the court below upon that question. *McLish v. Roff*, 141 U. S. 661, 12 Sup. Ct. 118; *Lau Ow Bew v. U. S.*, 144 U. S. 47, 56, 12 Sup. Ct. 517.

The motion to dismiss the appeal for want of jurisdiction must be allowed. Appeal dismissed.

**DAVENPORT et al. v. CLOVERPORT et al.**

(District Court, D. Kentucky. February 3, 1896.)

**1. DISTRICT COURTS—JURISDICTION—DEPRIVATION OF CONSTITUTIONAL RIGHTS**  
—REV. ST. § 563.

A state statute which consolidated two school districts, and established a board of trustees of a high school therein, provided that the trustees might levy a tax upon the white persons in such district; that they should have control of all the school funds of the district; and that all white persons of school age within the district should have equal rights of admission to the schools, free of charge, and the benefit of instruction therein.

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It was also provided that no part of the fund raised by such tax should be used to provide school facilities for colored children. The property of colored residents of the district was not subject to the tax. Certain colored children, resident in the district, filed a bill by their next friends, in the United States district court, alleging that the tax had been levied for several years, and that they and other colored children had been excluded from the benefit thereof, and from the schools erected in the district, and praying for a decree adjudging the act unconstitutional, and for an injunction restraining the board of trustees from disbursing the school moneys otherwise than equally for the benefit of all the children of school age, irrespective of color, and requiring them to levy a tax for school purposes on all persons in the district. *Held*, that the United States district court had jurisdiction, by virtue of Rev. St. § 563, subd. 12, to entertain the suit, and to determine whether the complainants were denied the equal protection of the laws.

2. CONSTITUTIONAL LAW — FOURTEENTH AMENDMENT — EQUAL PROTECTION OF THE LAWS.

*Held*, further, that the act levying taxes upon the property of white persons alone, and applying the proceeds of such tax for the benefit of white children alone, denied to the colored children the equal protection of the laws, and was in contravention of the fourteenth amendment to the constitution of the United States, and void.

3. EQUITY PRACTICE—MANDATORY INJUNCTION—UNCONSTITUTIONAL STATUTE.

*Held*, further, that, as the whole purpose of the act was to raise money by taxes, for the benefit of white children alone, and as there was no constitutional authority for the levy of the tax at all, the relief sought by way of mandatory injunction to enforce a disposition of the tax, different from that provided by the statute, could not be granted, and a demurrer to the bill must be sustained. *Claybrook v. City of Owensboro*, 16 Fed. 301, 23 Fed. 634, distinguished.

In Equity. Bill by W. B. Davenport, Anderson De Haven, Wesley Valentine, Bessie Davenport, Ella De Haven, and Amelia Valentine (the latter three, being infants, under 20 years of age, sue by the former, as their next friends) against the board of trustees of the Cloverport High School, a corporation created by the laws of the commonwealth of Kentucky, and A. B. Skillman, the treasurer of said board. Heard on demurrer to the bill. Dismissed.

George W. Jolly, for complainants.

David R. Murray and D. W. Fairleigh, for defendants.

BARR, District Judge. This suit was brought by the complainants, who are of African descent, and citizens of the United States, and who bring the suit by their next friends, they themselves being colored children of school age, under the laws of the state of Kentucky. The bill sets out that by an act of the legislature adopted February 23, 1876, there was a consolidation of two school districts, which embrace the town of Cloverport, and created the board of trustees of the Cloverport High School, to be elected by the white qualified voters of said district; and that there was authorized, upon the request of said trustees, a levy upon the property, real and personal, of the white persons in said school district, not exceeding 50 cents on each \$100 value of property, and a tax per capita, not exceeding \$2 on each white male 21 years of age. The said tax was not to be levied unless, at an election held for that purpose, a majority of the white voters authorized the levy of said tax. By this law, the property of the colored people and the poll tax of col-

ored voters were not subject to taxation for said purpose. Said board was also authorized to receive from the school commissioner of Breckenridge county the proportion of the school fund due said district. It is alleged in the bill that, under said law, a board of trustees had been elected, and that the defendant Skillman is the treasurer of said board, and that for a series of years, including 1893 and 1894, a tax has been levied and collected upon the property, and a poll tax, of the white persons in said school district. By the tenth section of the law of 1876, it is provided "that the control and management of the public schools of Cloverport, and the property and funds belonging thereto, and which may accrue in any way to them, or for their establishment, maintenance and management under this act, or otherwise, shall be vested in said board of trustees and their successors in office"; and, by the eleventh section, "all white persons of both sexes between 6 and 20 years of age, living within the district constituted by this act, shall have equal rights of admission to this school, free from all charge of admission, or tuition, whatever, and the benefit of instruction in any branch or department whatever without charge"; and it is expressly declared that only white children shall be admitted or taught in said school. It is provided that the special tax authorized by said act shall be levied for the sole purpose of providing suitable buildings, furniture, teachers, and other costs and expenses of maintaining said school, as well as the expenses of having said taxes collected and disbursed, and paying the legitimate expenses of the board and its employes, but that no part of said fund is to be appropriated to provide buildings, furniture, teachers, etc., for colored children of the school age in said district.

The bill sets out that a considerable amount of taxes has been collected by said board, and received by said Skillman, treasurer, from taxes levied under said act, in the years 1893 and 1894, and that said complainants and all other colored children have been excluded from the benefit of any tax thus collected. It is also alleged in the bill that there is received annually, from said taxes, under the enactment of 1876, a sum exceeding \$4,000; and that it should be divided and apportioned equally among and for the benefit of all the children residing in said district and said Cloverport who are of school age,—that is, between 6 and 20 years of age; and that there are in said district 672 children, white and colored, of school age; and that there should be apportioned and set apart for the benefit of each colored child the same as white, to wit,  $\frac{1}{672}$  part of said fund received by said trustees and treasurer. It is also alleged in said bill that a commodious school, costing some \$10,000, has been erected for the white children of school age, and that no provision whatever has been made, by building or otherwise, for the accommodation of the children of African descent. The prayer of the bill is that the said act of February 23, 1876, and the general act of July 6, 1893, be declared unconstitutional and void in so far as they attempt to make any discrimination between the white people and people of the African race residing in

said city and district, or the property belonging to said people, and the levying of taxes on said property, or the collection or disbursement of the same for school purposes, or in the disbursement of any fund received or held by the defendants from any source whatever, "and that the said defendants be restrained by an order of this honorable court, and perpetually enjoined, from failing or refusing to disburse all moneys now in the custody or control of the defendants, and all moneys that may be received by them hereafter for the conducting or carrying on schools exclusively for white children, and from disbursing said funds now in their custody, and which may be hereafter received, otherwise than equally among all children residing in said district and city, between the ages of 6 and 20 years, irrespective of race or color of said children." And they further pray that the defendants be further restrained and enjoined from failing or refusing to forthwith levy and collect, under and pursuant to the provisions of said act and the general laws of the commonwealth of Kentucky, a tax upon all property, real and personal, situate in said district, etc., and a capitation tax on all persons residing in said district, and forthwith purchase a suitable lot, and cause the erection thereon of a good and substantial school building for the accommodation of all the children of the African race aforesaid.

This bill has been demurred to by the defendants, "because the matters and things in the bill alleged are not sufficient to constitute a cause of action against them, or either of them, nor can the court, upon the matters and things in the bill alleged, grant the relief prayed for, nor any other relief." It will be seen the purpose of the bill seeks a mandatory injunction, not to enforce the law of February, 1876, but to declare it unconstitutional, and, in effect, applying its provisions to colored children as well as to white children.

The first inquiry under the demurrer is whether or not the court has jurisdiction of the subject-matter therein alleged. By the twelfth subdivision of section 563 of the Revised Statutes it is provided by congress that the district court shall have jurisdiction "of all suits at law or in equity" authorized by law to be brought "by any person to redress the deprivation, under color of any law, ordinance, regulation, custom or usage of any state, of any right, privilege or immunity secured by the constitution of the United States, or of any right secured by any law of the United States to persons within the jurisdiction thereof." And by section 716 the circuit and district courts are given power to issue all writs not specifically provided for by statute "which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law." And by section 1977 it is provided "that all persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens; and shall be subject to like punishments, pains, penalties, taxes, licenses, and exactions

of every kind, and to no other." And by section 1979 it is provided that every person "who under color of any statute, ordinance, regulation, custom, or usage of any state or territory, subjects or causes to be subjected any citizen of the United States, or other person within the jurisdiction thereof, to the deprivation of any rights, privileges or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law or suit in equity, or other proper proceeding for redress." The first section of the fourteenth amendment to the constitution of the United States declares that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." These provisions would seem to give the court jurisdiction to determine whether the complainants are denied equal protection of the laws, and whether or not they have been unconstitutionally discriminated against in the matter of the taxes which have been levied under the act of 1876 against the property of the white persons alone, and which have been distributed to the white children of the school age, to the exclusion of the colored children of said district.

We think there can be no doubt that a tax levied for school purposes, whether to provide and maintain common schools, or for what are designated as graded schools, is a public purpose, and the levy of such taxes can only be sustained as an exercise of governmental power. Indeed, the present constitution of Kentucky has declared that "taxes shall be levied and collected for public purposes only. They shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax." Section 171.

This court has heretofore had occasion to consider whether a tax levied upon the property of white persons for school purposes, and a similar tax levied upon the property of colored persons for the same purpose, could be separated, and the taxes collected from the property belonging to white persons applied exclusively for the benefit of white children of school age, and the taxes collected from the property of colored persons applied for the benefit of colored children of school age in the same district; and the court decided, after careful consideration (Judge Baxter concurring), that such a division and distribution of taxes thus levied and collected would be a discrimination which is prohibited by the fourteenth amendment to the federal constitution. In that case (*Claybrook v. City of Owensboro*), in considering the fourteenth amendment to the federal constitution, the court said:

"Waiving all considerations of the question as to the rights of the complainants as citizens of the United States, we proceed to inquire whether the act of 1871 and its amendments deny to complainants the equal protection of the laws within the meaning of this section. It may be argued that equal



protection of the law does not mean the equal benefit of the laws; that protection in this section does not mean benefit; and that the inequality here is only in the benefits arising from the laws. Perhaps, the best way to test the soundness of this distinction as applied to the laws of the state would be to imagine the distinction a good one, and see where it would lead. Thus, if protection only means equal taxation, and not equal benefits of the taxes when levied and collected for governmental purposes, the state may apply such taxes not only according to color, but also according to the nativity of the citizens. Thus, taxes levied and collected for police purposes, for the administration of justice, or the enforcement of the criminal laws, or, indeed, for any other governmental purpose, may be distributed by the color line, or, as between white people, according to their place of birth, or in proportion as taxes may be paid by each class. If the taxes can be distributed according to the color line or race classification, no reason is perceived why the division may not be made according to the amount paid by each taxpayer, and thus limit the benefits and distribute the protection of the laws by a classification based upon the wealth of the taxpayers. Such a distribution of taxes would entirely ignore the spirit of our republican institutions, and would not be the equal protection of the laws, as understood by any of the states of this Union at the time of the adoption of this amendment. The equal protection of the laws is not possible if taxes levied and collected for governmental purposes are divided on any such basis. The equal protection of the laws guaranteed by this amendment must and can only mean that the laws of the state must be equal in their benefits, as well as in their burdens, and that less would not be the equal protection of the laws. This does not mean absolute equality in distributing the benefits of taxation. That is impracticable. But it does mean the distribution of the benefits upon some fair and equal classification or basis."

See *Claybrook v. City of Owensboro*, 16 Fed. 301, and also another opinion in same case, 23 Fed. 634; *U. S. v. Buntin*, 10 Fed. 730; *San Mateo Co. v. Southern Pac. R. Co.*, 13 Fed. 722; *Virginia v. Rives*, 100 U. S. 313; *Ward v. Flood*, 48 Cal. 51.

In the case under consideration, no tax was either authorized or levied under the act of 1876 on the property of colored people, but this fact makes no difference in the principle which was decided in the case of *Claybrook v. City of Owensboro*, supra.

It may be questionable whether this act of February, 1876, is not also a violation of the present constitution of Kentucky, which, under the head of "Education" (section 183), declares that "the general assembly shall, by appropriate legislation, provide for an efficient system of common schools throughout the state," and, by section 187, declares: "In distributing the school fund no distinction shall be made on account of race or color, and separate schools for white and colored children shall be maintained." But this is a question upon which we do not feel called upon to indicate an opinion, as this court can only take jurisdiction of the case if the act of 1876 is in violation of the federal constitution.

Assuming, then, that the act of 1876 is unconstitutional, the inquiry arises, can this court grant any of the relief prayed, to the complainants? The difficulty in granting the relief sought is not that the act is constitutional, but that it is unconstitutional, and thus the taxes which have been levied and collected under it, and are now in the hands of the treasurer of the board, Mr. Skillman, cannot be controlled or directed by an order of this court. The whole purpose of this act seems to be to raise money by taxes upon the

property of white people alone, for the benefit of white children of school age exclusively; hence, if this court, as suggested by counsel, should strike out the word "white" where it occurs in this act, it would change the entire meaning of the act, and destroy its sole purpose. This would be, it seems to us, a usurpation of legislative authority of the state of Kentucky.

If we are correct in the opinion that these taxes have been collected without authority of law, then they belong to the taxpayers from whom they have been collected, and cannot be controlled or disposed of by this court. It is true there are many cases in which courts have declared parts of a law unconstitutional, and other parts constitutional; but this is only when the act can be distinctly separated, and when the parts of the act which are unconstitutional have been eliminated, will still leave an effective enactment, and one which the court can fairly presume would have been passed by the legislature originally.

It is said in *Anderson v. Railroad Co.*, 62 Fed. 49:

"Where the provisions of an act are distinct and separate, and the court can determine by construction the constitutional parts of the act from the parts which are unconstitutional, and can presume the legislature would have enacted the constitutional part of the act without the unconstitutional part, it may declare a part of the act unconstitutional, and the other part enforceable." *Baldwin v. Franks*, 120 U. S. 678, 7 Sup. Ct. 656, 763.

It is true, in the case of *Claybrook v. City of Owensboro* there was a proportion of the taxes which had been levied enjoined from being applied for school purposes for white children, but there the tax which had been levied, although by separate acts, was an equal tax upon the property of both white and colored people, and the unconstitutionality of the act consisted in the unequal distribution of the tax levied and collected, in that the division was attempted by the law upon the color line. But here there is no constitutional authority for the levy of the tax at all; hence the court cannot grant to the complainants the relief prayed for. And, for the reasons stated, the demurrer must be sustained; and it is so ordered, and bill dismissed.

OXLEY STAVE CO. v. COOPERS' INTERNATIONAL UNION OF NORTH AMERICA et al.

(Circuit Court, D. Kansas. March 9, 1896.)

No. 7,284.

1. JURISDICTION OF FEDERAL COURTS—ENJOINING BOYCOTT.

In a suit by a Missouri corporation to enjoin certain trades unions or assemblies, and their members, from instituting a boycott, the federal court has no jurisdiction of individual defendants who are citizens of Missouri, nor can the association be sued as a body, or members thereof enjoined who are not parties to the record.

2. CONSPIRACY—UNLAWFULNESS OF BOYCOTT.

A "boycott" by the members of trades unions or assemblies (which term, in law, implies a combination to inaugurate and maintain a general proscription of articles manufactured by the party against whom it is directed) is unlawful, and may be enjoined by a court of equity.

This was a bill in equity by the Oxley Stave Company against the Coopers' International Union of North America, Lodge No. 18, of Kansas City, Kan., the Trades Assembly of Kansas City, Kan., and various individuals named, who are officers and members of such organizations, and also "all other persons who may be members of either of said organizations, their agents, attorneys, etc., to enjoin them from inaugurating and maintaining a boycott against the use of packages, casks, barrels, etc., made by complainant by means of certain machines constituting part of its plant.

Overmeyer & Mulvane, for complainant.

Getty & Hutchings, and Rossington, Smith & Dallas, for defendants.

FOSTER, District Judge. The complainant is a corporation organized under the laws of Missouri, and engaged in the cooperage business at Kansas City, Kan., making barrels, tierces, casks, etc., for packing meat, lard, flour, and other products. The defendants are alleged to be citizens of Kansas. The Coopers' International Union of North America, No. 18, and the Trades Assembly of Kansas City, are voluntary associations, not incorporated. The other defendants are officers and members of said associations. The complainant asks for an injunction against said defendants, restraining and enjoining them from issuing a boycott against the products of its manufactory. It charges "that the defendant associations are composed of a large number of persons, having their lodges and organizations in all of the trade centers of the United States and other countries, and that said associations and the other defendants, the officers of said societies, have combined, confederated, and conspired together to do said complainant a great and irreparable injury, in this, to wit: That complainant has placed in its factory, and is using in its business, machines designed for and used in fitting up and hooping barrels, tierces, casks, etc.; that none of the employes of said complainant are in said conspiracy, or make any objections to complainant's use of said machines, or have any grievances against said complainant whatever; that said defendants have so combined, confederated, and conspired together to demand, and have demanded, of this complainant, that it shall discontinue the use of such machines in its plant, and in the manufacture of barrels, on and after the 18th day of January, 1896; and that, upon the refusal of said complainant to so discontinue the use of said machines as aforesaid, they, the said defendants, will cause a boycott to be placed on all packages, casks, barrels, tierces, etc., hooped by said machines, and against the trade and business of complainant." The bill further alleges, at great length, what action has been taken by defendants in pursuance of said combination and conspiracy to make the boycott effective; "that said associations passed resolutions, and appointed committees to wait upon this complainant, and demanded that it discontinue the use of said machines, under the penalty of a boycott in case of refusal, and other committees were ap-

pointed, and have waited upon the large packing houses who were the chief customers of said complainant, to the extent of many thousands of dollars each year, to wit, the Armour Packing Company, the Jacob Dold Packing Company, Swift & Co., Fowler Sons & Co., Limited, and others, and demanded of said packing companies that they refuse to buy or use said machine-made packages of said complainant, and in case they should refuse said demand, and use said packages, that said defendant associations would cause a boycott to be placed on all products of said packing companies packed in said machine-hooped barrels and packages; that by reason of said demand and threats said packing companies and others have been deterred from making contracts with complainant for its said barrels, tierces, casks, etc., and have been induced to cease the use of the same, through fear of injury to their said business by reason of said threatened boycott; that by reason of said defendant having its associate organizations in all the trade centers, and the great number of members thereof throughout the country, wherever labor organizations and trade unions exist, they have the power to coerce and intimidate persons who would purchase complainant's goods, and thereby work a great and irreparable injury to complainant, of not less than one hundred thousand dollars, for which complainant has no legal redress, as defendants are not pecuniarily responsible," etc. On the presentation of the bill a temporary restraining order was allowed until the matter of an application for temporary injunction could be heard.

The defendants James A. Cable and William Deal have filed pleas to the jurisdiction of the court, on the ground that they and other members of said associations are not citizens of Kansas, but are citizens of Missouri. From the evidence in the case, these pleas are well taken. It is also objected that the defendant associations cannot be sued as a body, or its members enjoined who are not parties to the record. These objections are also well taken, and the complainant has leave to dismiss as to said parties, and the case stands only against the other defendants named in the bill.

This brings us to the question whether, under the allegations of the bill, which is verified, and the other evidence presented, the complainant is entitled to the relief prayed for. The material allegations of the bill are but partially controverted by the defendants. Indeed, they are substantially admitted. Much testimony was offered to show that barrels hooped by machinery were not as serviceable or as valuable as hand-hooped barrels. It also appears that there is some little difference in the price of such barrels; that a skilled workman can hoop 14 to 16 barrels per day by hand, and that the hooping machine does the work of about six or seven men; and that boys or young men, from 16 years upwards, are employed, to some extent, in operating the machines. All of this cuts but little figure in the case. Whether the work of the machine is better or worse than the hand work is not material. The barrels are made and sold as machine work, and a price fixed accordingly, and the customer must decide whether or not he will buy them; and the complainant, in operating the machines in its business, is

engaged in a legitimate enterprise, and defendants had no legal right to demand that it should cease operating them. There is some testimony tending to show that the reason the packing companies had not made contracts for these barrels for this year was not on account of the threatened boycott, but because they preferred hand-hooped barrels. The purchasing agent of Fowler Sons & Co., Limited (Robert McWhittaker), however, testified that a committee of the Coopers' Union and Trades Assembly notified him, if his company purchased machine-made barrels, they would boycott the contents of the barrels, and that such notice would tend to make his company very careful about purchasing machine-made barrels. The manager of Swift & Co. testified that his company was buying hand-made barrels on account of the threatened boycott. The following is a copy of the resolution of the Trades Assembly on the subject, and indicates the purpose of the defendant associations:

"To the officers and members of the Trades Assembly, Greeting: Whereas, the cooperage firms of J. R. Kelley and the Oxley Cooperage Company have placed in their plants hooping machines operated by child labor; and whereas, said hooping machines is the direct cause of at least one hundred coopers being out of employment, of which a great many are unable to do anything else, on account of age,—at a meeting held by Coopers' Union No. 18 on the 31st of December, 1895, a committee was appointed to notify the above firms that unless they discontinued the use of said machines on and after the 15th of January, 1896, that Coopers' Union No. 18 would cause a boycott to be placed on all packages hooped by said machines, the 15th January, 1896; and at a meeting held by Coopers' Union No. 18 on the 4th of January, 1896, delegates were authorized to bring the matter before the Trades Assembly in proper form, and petition the assembly to indorse our action, and to place the matter in the hands of their grievance committee, to act in conjunction with a committee appointed by Coopers' Union No. 18 to notify the packers before letting their contracts for their cooperage. Therefore, be it resolved, that this Trades Assembly indorse the action of Coopers' Union No. 18, and the matter be left in the hands of the grievance committee for immediate action.

"Yours, respectfully,

J. L. Collins,

"Sect'y Coopers' International Union of N. A., Lodge 18."

James Cable, president of Coopers' Union, testified as follows: Unless complainant ceased using the machines—

"That the boycott would be declared by the Coopers' Union upon the contents of the tierces and barrels hooped by machinery; meaning thereby that the members of the said Coopers' Union, and of its parent association, the Trades Assembly, would thereafter cease to purchase or use any of the commodities that were packed in machine-hooped tierces or barrels."

No one can question the right of the defendants to refuse to purchase machine-made packages, or of goods packed in them, or, by fair means, to persuade others from purchasing or using them. If that is all that is implied by a boycott, as insisted by defendants, it is difficult to see where they violate any law, although it might injure the complainant's business. It has been decided, however, that while such action would not be unlawful by an individual, a combination and conspiracy to accomplish the purpose would be an illegal act. In *Arthur v. Oakes*, 11 C. C. A. 209, 63 Fed. 321, 322, Mr. Justice Harlan says:

"It is one thing for a single individual, or for several individuals, each acting upon his own responsibility, and not in co-operation with others, to form the purpose of inflicting actual injury upon the property or rights of others. It is quite a different thing, in the eye of the law, for many persons to combine or conspire together with the intent not simply of asserting their right of accomplishing lawful ends by peaceable methods, but of employing their united energies to injure others or the public. An intent upon the part of a single person to injure the rights of others or of the public is not in itself a wrong of which the law will take cognizance, unless some injurious act be done in execution of the unlawful intent. But a combination of two or more persons with such intent, and under circumstances that give them, when so combined, a power to do an injury they would not possess as individuals acting singly, has always been recognized as in itself wrongful and illegal;" citing *Callan v. Wilson*, 127 U. S. 540, 8 Sup. Ct. 1301; also, *Com. v. Hunt*, 4 Metc. (Mass.) 111.

The term "boycott" has acquired a significance in our vocabulary, and in the literature of the law. The resolution of the defendant associations says, unless complainant discontinue the use of said machines on and after January 15, 1896, that Coopers' Union No. 18 would cause a boycott to be placed on all packages hooped by said machines. Just what action would be taken, the resolution does not state. It does not say the defendants would not purchase the packages, or the goods packed in them, but simply says a "boycott" would issue. That term implies that a general proscription of all articles so manufactured, and the goods packed in them, would be inaugurated and maintained by the power of these assemblies, wherever they could reach. It is fair to presume, from the resolution and other testimony, that the defendants were determined to use all means, short of violence, to make the proscription effective. That has been the history of such proceedings in the past, and such is the meaning imputed to the use of the word "boycott." It has become a word carrying with it a threat and a menace, and was evidently so intended by this resolution. In *Thomas v. Railway Co.*, 62 Fed. 818-821, the court says:

"But the combination was unlawful, without respect to the contract feature. It was a boycott."

Again the court says:

"The combination under discussion was a boycott. It was so termed by Debs, Phelan, and all engaged in it. Boycotts, although unaccompanied by violence, have been pronounced unlawful in every state of the United States where the question has arisen, unless it be in Minnesota, and they are held to be unlawful in England."

The court further says:

"Boycotts have been declared illegal conspiracies in *State v. Glidden*, 55 Conn. 46, 8 Atl. 890; in *State v. Stewart*, 59 Vt. 273, 9 Atl. 559; *Steamship Co. v. McKenna*, 30 Fed. 48; *Casey v. Typographical Union*, 45 Fed. 135; *Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co.*, 54 Fed. 730, and in other cases."

The case above cited (*Casey v. Typographical Union*, 45 Fed. 135) is very much in point in this controversy.

From these authorities we reach the conclusion that complainant is entitled to the relief prayed for. The labor-saving machines which modern invention has brought into every industry in life excite our wonder and admiration, but our enthusiasm is subdued

by the thought that the machines must largely drive the skilled laborer out of a field he has spent years to fit himself for, and upon which, more or less, depends the means of livelihood for himself and his family; and yet it is a hopeless task for the laborer to contend against the use of machinery, wherever it can be utilized. Labor can only adjust itself to the constant progress made in all the mechanical pursuits, and it has been well said that, despite all the inventions to save hand work, there never was a time when the laborer was paid better, or had greater advantages, than he has to-day. The injunction will be allowed as prayed for by complainant.

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EVERY v. BOSTON SAFE-DEPOSIT & TRUST CO.

(Circuit Court, D. Massachusetts. January 30, 1896.)

No. 416.

1. CORPORATIONS—DISSOLUTION—RIGHT OF RECEIVER TO SUE.

A receiver of the assets of a corporation, appointed, upon its dissolution, as its successor, by the statutes and the courts of the state where it was organized, can sue in a federal court sitting in another state upon rights of action belonging to such corporation.

2. COURTS—COMITY—POSSESSION OF SUBJECT-MATTER.

Two suits were brought in a Massachusetts court by citizens of Massachusetts against the C. Co., a New York corporation, in each of which the B. Co., a Massachusetts corporation indebted to the C. Co., was summoned as trustee, and the funds of the C. Co. in its hands attached. The B. Co. appeared and answered, disclosing property of the C. Co. The C. Co. was not served, and did not appear. After the commencement of the trustee suits, the C. Co. was dissolved by a decree of a New York court, and a receiver of its assets appointed, who was summoned into the trustee suits, but did not appear. After his appointment, the receiver demanded from the B. Co. the debt due to the C. Co., and, upon refusal of payment, began suit in the United States circuit court in Massachusetts to recover it. The state court in which the trustee suits were pending had power to convert either of them into a proceeding in equity in which the rights of all parties could be adjusted. *Held*, that the federal court, out of comity to the state court, which had possession of the fund in controversy, would suspend action, in the suit brought by the receiver, until the state court had disposed of the suits pending in it or at least had had full opportunity of indicating its purpose in reference thereto.

Fish, Richardson & Storow, Robert F. Herrick, and Guy Cunningham, for plaintiff.

Solomon Lincoln and Sherman L. Whipple, for defendant.

PUTNAM, Circuit Judge. This is an action at common law, and some of the principles which the courts have applied to suits in equity need to be carefully discriminated. The plaintiff is described as the receiver of a manufacturing corporation created under the statutes of New York, and known as the "Canoga Woolen Company." The declaration alleges that by due legal proceedings in the courts of New York the corporation has been dissolved, and it proceeds:

"And the said Avery further says that, in accordance with the said charter of the said Canoga Woolen Company and the statutes of the state of New York relating to corporations, which govern and are a part of said charter,

he became by the above proceedings the temporary receiver, and became, and is now, permanent receiver of the said Canoga Woolen Company, and by force of the said charter and statutes and the said proceedings, from the said first day of December, A. D., 1894, the title to all the property and debts due to the said corporation became vested in him as the legal and statutory successor of the said corporation, and he became entitled to collect the same for the benefit of the creditors of said corporation, the Canoga Woolen Company; that upon the said first day of December, A. D. 1894, there was due to the said Canoga Woolen Company the sum of seventeen thousand six hundred ninety-five dollars and fifty-seven cents from" the defendant corporation.

The action was brought to recover this indebtedness. The principal defense is that the plaintiff cannot be recognized in this district for the purpose of maintaining this suit. It is well settled that this court can take judicial cognizance of the laws of New York, and, therefore, it must do so. That, however, the corporation has been dissolved, is not denied, and therefore we are not called on to scrutinize the statutes of New York in order to ascertain whether there is not sufficient vitality left to enable a suit to be maintained in the name of the corporation for the indebtedness which the case admits to exist. We are justified in assuming that this cannot be done, and that we must apply the following from *Pendleton v. Russell*, 144 U. S. 640, 644, 645, 12 Sup. Ct. 743:

"Looking at the judgment of the circuit court of the United States, we are satisfied that the ruling of the court of appeals was correct. That judgment purports to be against the insurance company, but that company, at the time, had no legal existence. It had been dissolved, and franchises, rights, and privileges declared forfeited, by a decree of the supreme court of New York in a proceeding brought by the attorney general of the state in the name of the people, and a receiver appointed of the effects of the corporation. The judgment was therefore no more valid against a nonexistent corporation than it would have been if rendered for a like amount against a dead man. The receiver was not substituted in the place of the dissolved corporation. No process or citation was issued by that court to bring him before it, nor any proceeding taken for that purpose. Nor would such a proceeding have had any effect, for, the corporation having expired, the suit itself had abated."

The result is that no one can maintain a suit at common law for this indebtedness, unless the plaintiff can do it. He is styled a receiver; but he is in substance a trustee, appointed by the statutes and the courts to collect and distribute the assets of the corporation, and vested with the title to them. He is the successor of the corporation, so far as the statutes and the courts can make him such. If he were a mere receiver, in the ordinary sense of the word, the corporation would survive, and he could sue in a common-law court only in its name. This distinction must be kept in view, and was elaborately expounded in *Booth v. Clark*, 17 How. 322. The plaintiff resembles, in some respects, a new corporation into which an old one has been merged. In *Relfe v. Rundie*, 103 U. S. 222, 225, a receiver of the same character was described as the successor of the corporation, and it was there said that he was the corporation itself, for all the purposes of winding up its affairs.

The general rules applicable to the collection and distribution of the assets of dissolved corporations were fully stated in *Curran v. Arkansas*, 15 How. 304. It was there explained that such assets are not lost to the creditors and stockholders by the dissolution, but that



the appropriate remedy, and, independently of statute, the only one, is the administration of them as a trust by a court of equity. In that case a bill for that purpose brought by a creditor was sustained. In *Greenwood v. Railroad Co.*, 105 U. S. 13, 19, it was said that, when some special remedy is not provided, the equity courts will enforce existing rights by the means within their power. This rule permits the entertaining of a bill filed by any one having even a remote or contingent interest in the assets. Of course, this would include a receiver appointed in a foreign jurisdiction of domicile, though the regular course would be a quasi ancillary receivership, with due provision for the protection of domestic creditors and stockholders. For, as said in *Booth v. Clark*, 17 How., at page 337, courts "will not subject their citizens to the inconvenience of seeking their dividends abroad, when they have the means to satisfy them under their own control." All this relates to proceedings in equity. But the case at bar involves common-law rights, and permits no equitable discretion on the part of the court. If this suit is maintained, it must be because the corporation is wholly dissolved, and because the plaintiff is its successor. That, under the circumstances, the plaintiff's rights are pure common-law rights, and that this suit can be maintained in his name, *Relfe v. Rundle*, *ubi supra*, seems to go far towards supporting. However, the court does not consider it necessary that it should work out its own conclusion on these questions, or go beyond pointing out what they are, because in the circuit court for the district of Maine, in a case not officially reported, and but lately decided,<sup>1</sup> after full argument and due consideration, under conditions in all substantial respects like those at bar, Judge Webb laid down a rule which supports this suit; and, under the circumstances, the court here should follow that decision, whatever its own views might be.

There are, however, some further facts which affect the discretion which this court must properly exercise as a court of law, and which lie in a different field from that equitable discretion which we have been considering. It is agreed in the case as follows:

"Upon the eleventh day of December, A. D. 1894, prior to the order of the supreme court of New York dissolving the said Canoga Woolen Company, and before any demand had been made upon the Boston Safe-Deposit and Trust Company by the plaintiff in this action, and before it had received any notice of his appointment, or of any proceedings instituted for the purpose of having a receiver appointed or the corporation dissolved, \* \* \* two suits were brought in the superior court for the county of Suffolk, and commonwealth of Massachusetts, against the said Canoga Woolen Company, \* \* \* in which suits said Boston Safe-Deposit and Trust Company was summoned as trustee upon the said eleventh day of December, 1894. The plaintiffs in the first writ were Jacob F. Brown and Samuel G. Adams, both citizens and residents of Boston, in said county of Suffolk, and commonwealth of Massachusetts, and plaintiff in the second writ was the Atlas National Bank, a banking corporation duly organized under the laws of the United States, and having its principal place of business in said Boston. The amount of the attachment in the said suits was in the aggregate the sum of \$25,000. The writs in these suits were returnable on January 7, 1895, and were duly entered upon that day, and are now pending in said court. The Boston Safe-Deposit and Trust

<sup>1</sup> Not to be reported. No opinion filed.

Company has appeared in said suits and answered, disclosing that it had at the time of said attachments the sum of \$17,695.57 in its hands belonging to the said Canoga Woolen Company. \* \* \* The Canoga Woolen Company has never at any time had a place of business in the commonwealth of Massachusetts, though Pierrepont Wise, who was its treasurer on the said November 17, and thereafter until the fifteenth day of December, A. D. 1894, after the service of the trustee process as above referred to, except in so far as affected by the proceedings in New York, was at the time of the service of said trustee process a resident of West Newton, Mass., and no service has ever been made upon it, nor has it ever appeared in the said actions. Charles I. Avery, the plaintiff in this action, upon motion of the plaintiffs in the said actions brought in the superior court of Massachusetts, was summoned as claimant, and a copy of this summons was served upon Messrs. Fish, Richardson & Storow, of Boston, Mass., attorneys at law, and a certified copy of said summons was delivered to the said Charles I. Avery at Auburn, N. Y., but the said Charles I. Avery has not appeared in said proceedings, and the time for appearance has passed. A motion has been made by the plaintiffs in each of the two actions in Massachusetts that the trustee be charged upon its answer, but the said superior court has refused either to allow or disallow the said motion for the present. Upon the nineteenth day of December, A. D. 1894, after the service of said trustee writs, said Charles I. Avery duly demanded payment of the said sum of \$17,695.57 from the defendant, the Boston Safe-Deposit and Trust Company, and the Boston Safe-Deposit and Trust Company refused and still refuses to pay the said sum or any part thereof. No technical questions of pleading are to be raised as to the pleadings of either party. If on these facts the Boston Safe-Deposit and Trust Company is bound to pay the said sum, or any sum to the said Charles I. Avery, receiver, notwithstanding the said trustee process, then judgment is to be entered for the plaintiff for such sum as is proper on these facts, otherwise judgment is to be entered for the defendant."

The court has stricken from this agreement a statement of the proceedings in New York prior to the order dissolving the corporation, because it regards them as unimportant with reference to the questions at issue. The writ in the suit at bar is dated January 3, 1895, which is subsequent to the bringing of the trustee suits named, and after service on the trustee, though before the return day of the writs in those proceedings. The plaintiff at bar was summoned into the trustee suits under the authority of the public statutes of Massachusetts (chapter 183, § 35 et seq.). Also, pursuant to chapter 167, § 43, Pub. St., either of the suits in the superior court may, perhaps, be converted into a proceeding in equity. Therefore, not only had the state court attached the fund in controversy in the only way in which it is attachable, before this suit was brought, but it has jurisdiction to determine the rights of the present plaintiff as between him and the plaintiffs in the trustee suits, and also to investigate and determine whether it may not convert the trustee suits into such equity proceedings as will give the relief awarded in *Curran v. Arkansas*, 15 How. 304, already referred to. For, notwithstanding whatever effect may be given to *Relfe v. Rundle*, *ubi supra*, that case does not dispose of the question whether the powers of the equity courts to supersede proceedings at law, or to anticipate them and apply the assets of dissolved foreign corporations on equitable principles, do not remain. All these matters are proper subjects for examination by the court where the trustee suits are pending and it has, or can have, before it all the parties necessary for the disposition of them in a safe and intelligent manner. Non constat there may

be laid before it such further facts as will enable it to determine that the Canoga Woolen Company still has life, though under qualified conditions, so that *Folger v. Insurance Co.*, 99 Mass. 267, and *Hunt v. Insurance Co.*, 55 Me. 290, and other cases of the same class, would apply. It may be that none of the decisions of the supreme court—most, if not all, of which are explained in *Byers v. McAuley*, 149 U. S. 608, 13 Sup. Ct. 906, and *Moran v. Sturges*, 154 U. S. 256, 14 Sup. Ct. 1019—go to the extent of absolutely barring this suit; but the spirit underlying them ought not to be disregarded. That was well expressed by Judge Pardee, speaking for the court of appeals for the Fifth circuit, in *Adams v. Trust Co.*, 15 C. C. A. 1, 66 Fed. 617, 620, as follows:

“While state and national tribunals are independent and separate, neither can impede or arrest any action the other may take, within the limits of its jurisdiction, for the satisfaction of its judgments and decrees.”

We are of the opinion, therefore, that the proper comity which should exist between federal courts and those of the state exercising concurrent jurisdiction, and our duty not to jeopardize the defendant unnecessarily through any hazard of conflicting judicial decisions, prohibit a judgment for the plaintiff until the court having jurisdiction of the trustee suits has disposed of them, or, at least, has had full opportunity of indicating its purposes in reference thereto. On the other hand, we are reluctant to interpose anything in the nature of a judicial discretion in such way as to bar the plaintiff indefinitely from obtaining the judgment of the court of appeals on his alleged rights. Such would be the effect if we should merely order a continuance. The agreed statement submitting this case provides that if the defendant is bound to pay the plaintiff, notwithstanding the pendency of the trustee suits, judgment is to be entered for the plaintiff; otherwise for the defendant. The views expressed in this opinion prevent the court from now entering a judgment for the plaintiff, but we can relieve him from the strict letter of the alternative. It is ordered that judgment will be entered for the defendant, unless within one calendar month the plaintiff elects that the case be continued until further order of the court.

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FIDELITY INSURANCE, TRUST & SAFE-DEPOSIT CO. et al v. NORFOLK & W. R. CO. (VIRGINIA & T. COAL & IRON CO., Intervener).

(Circuit Court, E. D. Virginia. March 6, 1896.)

EQUITABLE LIENS—RAILROAD FREIGHTS.

The V. Co., which owned coal and iron lands near the line of the N. Ry. Co., agreed with that company to construct, at its own expense, a branch line and spurs, extending from the line of the railway to its mines, and to convey the same to the railway company, in consideration of the agreement of the latter to pay to it the earnings of such branch line on coal transported, at the rate of 10 cents per ton, until the payments should amount to the cost of the construction of the branch. This agreement was made while the V. Co. was in possession of the branch road and spurs. It was duly performed by the V. Co., and the railway company paid the earnings as agreed, until it passed into the hands of a receiver,

appointed in a suit to foreclose a mortgage, made before the agreement with the V. Co., and covering after-acquired property, at which time a large balance remained due on the cost of the construction of the branch road, and a considerable amount of freight had been earned by the railway company, and not paid over. Other freight was afterwards earned by the receiver on the branch road, but the earnings of the division of the railroad to which the branch belonged were insufficient to pay its operating expenses. *Held*, that the agreement between the V. Co. and the N. Ry. Co. created an equitable charge upon the earnings of the branch, which did not become subject to the general mortgage upon the conveyance of the branch to the railway company, and that the amount of such earnings should be paid over by the receiver to the V. Co.

This was a suit by the Fidelity Insurance, Trust & Safe-Deposit Company and the Mercantile Trust Company against the Norfolk & Western Railroad Company for the foreclosure of a mortgage. A receiver was appointed, and the Virginia & Tennessee Coal & Iron Company intervened, asking the payment of certain moneys to it by the receiver.

From the petition of the intervener it appears that it was the owner of valuable coal and iron lands in Wise county, Va., near the line of the defendant's railroad; that in 1892 it entered into contracts with the railroad company to have a branch road and spurs of about four miles in length constructed, extending from the main line to its coal and iron mines; that it stipulated that it would acquire, and would convey, in fee simple, free of all incumbrances, to the railroad company, for this purpose, a strip of land 60 feet wide for the branch road and its spurs, and additional widths of land for sidings; that it would construct upon this ground all the necessary grading, masonry, and other preparation for the roadbed, and would convey and deliver this work to the railroad company, free from constructors' liens and all other liabilities; that it would furnish all the moneys necessary for the purchase by the railroad company of cross-ties, switches, rails, fastenings, and other material for these main and spur tracks, and for laying the same, and would deliver and convey the whole free of liens to the railroad company, which was to have the exclusive right to operate and control the same, and to extend them at its option; and the railroad company was to keep the track of the branch and spur tracks in good working order and repair. These stipulations were all fulfilled on the part of the interveners, the coal and iron company; and the branch road and spurs were constructed, equipped, delivered, and conveyed by the coal and iron company to the railroad company as stipulated. On the part of the railroad company it was agreed that, in consideration of the conveyance to it of the main and spur roads contemplated by the contract, in fee simple, free from all liens and incumbrances, it would pay to the coal and iron company all the earnings of this branch road and spurs on coal transported on it from the mines upon them, which were fixed at the rate of 10 cents per gross ton transported, until these payments should amount in aggregate to the cost of the branch road and its spurs. The branch road and spurs under consideration were completed in 1893. Their cost to the coal and iron company was \$38,973.52. The railroad company, from the time the branch road and its spurs began to be operated in 1893, complied with the terms of its contract by paying to the coal and iron company its earnings of 10 cents per gross ton. The property of the Norfolk & Western Railroad Company went into the hands of receivers of this court on the 6th day of February, 1895, under an order of this court in this cause entered on that day. At the time at which the receivers took charge of the Norfolk & Western Railroad, there had been paid on the freights due to the coal and iron company, the sum of \$16,427.70, leaving \$22,546.32 still due; and there had accrued, besides, an aggregate of freights due to the coal and iron company, amounting to \$5,728.60. Since the receivers took charge of the Norfolk & Western Railroad and of the branch road and spurs in question, the earnings of the latter, on 108,012 tons of freight passing over them, have been \$10,801.20, up to the end of August, 1895, no part of which earnings has been

paid to the coal and iron company. When the branch road and its spurs under consideration were conveyed to the Norfolk & Western Railroad Company in 1893, all the roads and property of that company were incumbered by mortgages amounting in the aggregate to \$19,056,000. The company is in default in the payment of the later installments of interest accrued on the bonds to secure which these mortgages were given and the current earnings of the division of the Norfolk & Western Railroad, with which the branch road and its spurs under consideration immediately connect, are not sufficient to pay its operating expenses. In this condition of things the receivers submit to the court for its instruction the question whether the earnings of the branch road and its spurs, conveyed to the Norfolk & Western Railroad Company by contract as set forth, are to be paid as stipulated in the contract of conveyance, or whether its obligation to pay these earnings is junior and of inferior dignity to the debts which rested upon the property of the railroad company at the time when the branch road and its spurs built by the coal and iron company were conveyed by it to the railroad company.

Daniel Trigg and Hobart Miller, for Virginia & T. Coal & Iron Co.  
Samuel Dickson, for Fidelity Co.  
Wm. W. Old, for Mercantile Trust Co.

HUGHES, District Judge (after stating the facts). It is to be observed that the coal and iron company, at the time of its contracts with the Norfolk & Western Railroad Company, was in possession of the branch road and its spurs which are the subject of this inquiry. It had purchased the strips of land on which they were located. It had constructed the grading, bridging, masonry, and kindred work, and it had furnished the money for purchasing the rails, cross-ties, spikes, and so forth, which were used in fitting the branch road and spurs for use. While in possession it contracted to convey the whole in fee simple, free of incumbrances, to the railroad company, in consideration of a stipulation on its part to pay the earnings of the branch road and its spurs, at the rate of 10 cents per gross ton transported over them, to the coal and iron company, until the cost to it of the branch road and its spurs should be reimbursed in full. It was after this contract was made that the coal and iron company conveyed the branch road and its spurs to the railroad company. It will be admitted that the coal and iron company was liberal almost beyond example in constructing a branch road out and out, costing many thousands of dollars, at its own expense, and then conveying it to the railroad company outright on an agreement to accept the prospective earnings of the branch road for the whole outlay. On this state of facts, I think the case at bar is governed by the rulings of the supreme court of the United States, in the cases of *Ketchum v. St. Louis*, 101 U. S. 306, and *U. S. v. New Orleans R. R.*, 12 Wall. 362, and the numerous cases cited in each of them. In these cases the distinction between mortgages by formal deeds and equitable mortgages is emphasized. One of the rulings in the case of *Ketchum v. St. Louis* is stated in one of the headnotes, as follows:

"A party may, by agreement, create a charge or claim in the nature of a lien on real as well as on personal property whereof he is the owner or in possession, which a court of equity will enforce against him, and volunteers or claimants under him with notice of the agreement."

One of the cases cited by the learned justice who delivered the opinion of the supreme court in that case was that of *In re Strand Music Hall Co.*, 3 De Gex, J. & S. 147, in which Lord Justice Turner said:

"There can be no doubt that it was intended by these agreements to create a charge upon the property of the company. \* \* \* Where this court is satisfied that it was intended to create a charge, and that the parties who intended to create it had the power to do so, it will give effect to the intention, notwithstanding any mistake which may have occurred in the attempt to effect it."

The learned justice also cited from *Jones on Mortgages* the following passage and the numerous authorities which support it:

"An agreement of a company to set apart specific earnings or property in the hands of a third person to meet the interest or principal of its bonds creates an equitable lien or charge."

In the case of *U. S. v. New Orleans R. R.*, *supra*, the court said:

"A mortgage intended to cover after-acquired property can only attach itself to such property in the condition in which it comes into the mortgagee's hands. \* \* \* It only attaches to such interest as the mortgagor acquires; and if he purchase property, and give a mortgage for the purchase money, the deed which he receives and the mortgage which he gives are regarded as one transaction, and no general lien impending over him, whether in the shape of a general mortgage or judgment or recognizance, can displace such mortgage for purchase money."

In the case of a lease of land for an annual rent, it will not be contended that a transfer of the lease to a company whose property is under a heavy mortgage, would give priority to the mortgagee over the right of the lessor to his rents. The transfer carries the lease cum onere, which goes to the purchaser charged with the contract for rents running with the land. The Norfolk & Western Railroad Company expressly stipulated, in advance of receiving a conveyance of the branch road and its spurs, that their freight earnings should be paid to the vendor from whom it received them, until the purchase price should be fully discharged. This charge upon the earnings was fixed before the transfer of the branch roads, and as the consideration for the transfer. There was no necessity for an actual mortgage of these earnings, because the coal and iron company, its agents and assigns, were the owners of the coal and iron intended to be shipped; and a formal mortgage would have given them no better control of the earnings than the coal and iron company had and would continue to have as miners and shippers of the coal. I will sign a decree directing the receivers to carry out the contract under consideration, and to pay the earnings of the branch road and its spurs to the petitioner in compliance with the stipulations of the railroad company.

ALABAMA & G. MANUF'G CO. et al. v. ROBINSON.<sup>1</sup>

(Circuit Court of Appeals, Fifth Circuit. January 14, 1896.)

No. 426.

**1. MORTGAGE FORECLOSURE—REVERSAL AFTER SALE—RESTITUTION.**

There is no substantial difference in the basis on which restitution is required at law and in equity. It is ordered at law when conditions existing would require it in equity, and the law courts can protect the equities of all the parties. It may be refused at law because its processes are not adequate to do full justice in the premises; and in equity the matter rests somewhat in the sound discretion of the chancellor, who may, when the equities require or justify it, impose conditions, as a prerequisite to the relief.

**2. SAME—FORECLOSURE DECREE.**

It is not necessary, and is often impracticable, to exactly and minutely adjust all the disputed claims of original parties and interveners, growing out of foreclosure proceedings, before ordering a sale. The court has full power in the premises, and the matter rests in the sound discretion of the chancellor.

**3. SAME—SALE—RESTITUTION ON CONDITIONS—RESALE.**

A decree foreclosing a trust deed given to secure bonds was reversed after the property had been sold. It appearing that the purchasers were holders of nearly 90 per cent. of the mortgage bonds, the court below ordered restitution of the property, on condition, however, that the defendants should repay the amount of cash paid into court by the purchasers, and which had been distributed, partly in payment of costs and expenses. The condition was not complied with, and the purchasers remained in possession. In the meantime it was ascertained by further proceedings, in accordance with the decree of reversal, that part of the bondholders were entitled to have their lien enforced. The court then, on the theory that the purchasers must have taken the property subject to the lien of the bonds last found entitled to enforcement, ordered a resale, reserving the right to protect the interests of all parties in the distribution of the proceeds. *Held*, on appeal, that it was within the discretion of the court to require repayment of the cash deposit as a condition of ordering restitution; that it was not necessary, as a prerequisite to imposing such condition, that an account should have been taken of the receipts and expenditures of the property while in possession of the purchasers; and that there was no error in the decree ordering a resale of the property, although the costs and expenses growing out of the previous sale had not yet been fully ascertained.

**Appeal from the Circuit Court of the United States for the Northern District of Georgia.**

This was a suit in equity by J. J. Robinson, trustee, against the Alabama & Georgia Manufacturing Company, the Huguley Manufacturing Company, and William T. Huguley, to foreclose a trust deed given by the first-mentioned company. A demurrer to the bill was overruled (48 Fed. 12), and a decree of foreclosure was entered. An appeal was allowed to defendants, but was not prosecuted, and no supersedeas bond was given within the time allowed by law. Afterwards, however, an appeal was taken without supersedeas, but between the allowance of the first and second appeals the property was sold under order of the court. Upon the second appeal the circuit court of appeals reversed the decree of foreclosure because some of the bondholders had waived the default, and were not entitled to enforcement of their lien, and directions were given for further proceedings below to ascertain which of the bondholders were entitled to enforce the trust deed and the amount of their claims. 6 C. C. A. 80, 56 Fed. 690. On the coming down of the mandate, defendants moved for a restitution of the property, which was granted upon condition that they pay into court, for the benefit of the purchasers, the sum of \$10,000.

<sup>1</sup> Rehearing pending.

which amount had been paid by the purchasers in cash at the time of the sale, and had been consumed in paying expenses of the sale, and in paying certain bondholders who refused to join in the agreement to purchase the property. This condition was not performed by the defendants, and the property remained in the possession of the purchasers. In accordance with the decision of the circuit court of appeals, the circuit court proceeded to ascertain the bonds which were entitled to payment, and thereafter ordered a resale of the property, considering that the purchasers at the original sale took the same subject to the lien of the bonds last found entitled to enforcement. The court reserved the right, by proper orders, to control the proceedings so as to fully protect the rights of all parties in the distribution of the funds arising from the second sale. 67 Fed. 189. From this decree the Alabama & Georgia Manufacturing Company, the Huguley Manufacturing Company, and William T. Huguley have appealed.

John M. Chilton, Allen Fort, Hall & Hammond, and Bigby, Reed & Berry, for appellants.

Dorsey, Brewster & Howell and B. F. Abbott, for appellee

Before PARDEE and McCORMICK, Circuit Judges, and BOARMAN, District Judge.

McCORMICK, Circuit Judge. This case was before us at a former term. The proceedings in it up to that hearing are sufficiently stated in the report of our decision. *Manufacturing Co. v. Robinson*, 13 U. S. App. 359, 6 C. C. A. 80, 56 Fed. 690. We affirmed the action of the circuit court in overruling the demurrers to the bill; in holding that such default had been made in the payment of interest as entitled the holders of the bonds to declare them mature and obtain foreclosure and sale. But, as it appeared that a considerable number of the holders had waived this default by subsequently accepting the interest, we held that the bonds on which the interest was so received were not, at the time the bill was filed, subject to be declared mature, and that the circuit court should have had an account taken, and found what amount had become due by the election of holders who refused to waive the default. And because the decree passed had found and adjudged that the whole issue of bonds had matured, and had required that the whole amount so found to be due be paid into court within a certain short time, or otherwise the mortgaged property should be sold by a commissioner, and on terms named in the decree, it, on this ground, was reversed, and the case remanded to be proceeded with in accordance with the views we expressed. Such further proceedings have been had as resulted in the decree of March 30, 1895, from which the defendants therein have prosecuted this appeal. After the passing of the decree from which the former appeal was taken, the defendants had applied for an appeal, endeavored to obtain a supersedeas, and, failing to furnish the required security within the time limited for procuring a supersedeas, took no steps to perfect an appeal without supersedeas until after the mortgaged property had been sold under the decree, the sale confirmed, and the proceeds of the sale distributed to the beneficiaries. When the case returned to the circuit court the defendant manufacturing companies moved that court to order restitution of the property, on the ground that the purchasers were parties to the suit, and benefi-



ciaries under the decree, to such an extent and in such manner that the conditions existing at the time of the passing of the reversed decree could be, and should be, restored. On the matters set up in this motion, and in the answers thereto, issue was joined, reference was made to the master, proof taken, and on the coming on to be heard of his report a decree was passed ordering restitution to be made, provided the movers, within a given limited time, should pay into court \$10,000, which payment was adjudged requisite to enable the court to do full equity between the parties. This condition was not met. No such payment, or tender of that or of any amount, was made at any time. Reference was ordered to the master to report forthwith the amount of principal and interest due on the bonds, and which of the bonds were due at the filing of the bill, and by whom held at the time of taking the account. After the coming in of the master's report on this reference the circuit court passed its decree making the findings which we had held were requisite, fixing the time within which the amount found to have been due at the filing of the bill should be paid into court, and adjudging that if it was not so paid the property should be sold according to the terms of the decree. Only the Alabama & Georgia Manufacturing Company, the Huguley Manufacturing Company, and William T. Huguley, defendants in the bill, have appealed. They cannot and do not complain that the court ordered restitution of the property. We are therefore relieved from inquiring into and deciding whether the case was one calling for restitution, as the appellants insist that it was, the court held that it was, and the other parties affected have not appealed. But the decree that the defendants have restitution was passed on condition that "they deposit with the registry of this court, within thirty days from this date [September 22, 1894], the sum of ten thousand dollars; the same being the sum paid into the court by L. Lanier, A. T. Dallas, and J. T. Kirby, the purchasers of said property." And although this condition was not satisfied, and the order for restitution was therefore not enforced, the court proceeded to decree a foreclosure and sale, with due opportunity to defendants to make payment of the matured mortgage debt, and due reservation to the court to fix, by other and further orders and decrees, the rights of all parties growing out of the previous sale, and the intermediate operation and use of the mortgaged property. This property was a large and going factory for the manufacture of cotton goods, employing many operatives, carrying a considerable stock of "quick assets, requiring competent, careful, and responsible handling. Restitution had been ordered because the purchasers were shown to have owned nearly 90 per cent. of the first mortgage bonds. The funds of these parties, to the extent of the value of the bonds, were in the custody of the court,—an ample pledge for the proper care and operating of the property, and accounting for its proceeds. Under the previous order of the court, these purchasers had deposited with the master commissioner \$10,000 in cash in addition to the first mortgage bonds which they owned, and this had been distributed under, or in accordance with, the decree of the court. That

decree was reversed so far as it improvidently ordered the sale of the mortgaged property. The cost of advertising that sale was \$250. The fee of the commissioner who made the sale was \$400. Other small items of cost may have grown directly out of the sale, and become embraced in the other court costs. Issue may also be joined as to the liability of the mortgaged property for counsel fees. These matters have not been finally passed on, and the condition of the proceedings are not and have not been such, since the remanding of the case, as to require that these matters arising in the progress of the proceedings should be finally passed on before decreeing a foreclosure and sale to satisfy the bonds.

In like manner, the claim that an account of receipts and expenses resulting from the custody and operation of the mortgaged property should have been ordered and taken before imposing the condition on which restitution was to be had, or ordering foreclosure and sale, cannot be sustained. There is no substantial difference in the basis on which restitution is required at law and at equity. It is ordered at law when conditions existing would require it at equity, and the law courts can protect the equities of all of the parties. This relief may sometimes be refused at law because its processes are not adequate to do full justice in the premises, and even equity has to dispense justice by stages, the due order of which necessarily rests somewhat in the sound discretion of the chancellor. The defendants in this bill, while in possession of all the mortgaged property, had defaulted for more than six months on the payment of the interest due on the bonds. They had, while still in the possession of the property, been unable to give a \$10,000 bond to procure a supersedeas. All the conditions were substantially shown by the record of the previous proceedings. The bonds that were paid pro rata were not mature, under our view of the law, at the time the payment was made; but the president of one of the defendant companies, the one which alone had a subsisting interest in the property, had received a part of this payment, and did not tender it back and have the credit on his bonds canceled. It can hardly be questioned that a considerable part of the court costs paid out of the \$10,000 in cash deposited with the master commissioner was a proper charge against the mortgaged property. The essence and the environment of the case, if they did not require, fully justify the ruling of the chancellor that the possession of the property should not be restored to the defendants unless they, within the time designated, should pay into the registry of the court the sum which the court had received in cash from the purchasers and had disbursed. We do not appreciate the suggestion that \$10,000 of minted money was not counted or weighed into the registry, or into the hands of the master commissioner. It is manifest that the terms of the former decree in this respect were substantially, if not literally, complied with by the purchasers at the sale. Though the court does not hold the property by a receiver, it is, for all the purposes of this suit, as fully in the custody and control of the court as if it were held by a receiver. Its operation is necessary to the preservation of its value, if not to the pres-

ervation of its material fiber. While continued operation is thus necessary to the preservation of the property, it is greatly embarrassed by this litigation, and the good-faith interest therein of all parties will be promoted by a speedy sale binding on all. It was necessary "that there should be declared the fact, nature, and extent of the default which constituted the condition of the breach of the mortgage, and which justified the complainant in filing his bill to foreclose it, and the amount due on account thereof, which \* \* \* the mortgagor is required to pay within a reasonable time, to be fixed by the court, and which if not paid a sale of the mortgaged premises is directed." *Railroad Co. v. Fosdick*, 106 U. S. 47-70, 1 Sup. Ct. 10. But it is not necessary, and often is not practicable, to exactly and minutely adjust all the disputed claims urged by original parties or interveners, growing out of the foreclosure proceedings, before ordering a sale of the mortgaged property. The matter clearly rests in the sound discretion of the court. There is no lack of power in the court. *Bank v. Shedd*, 121 U. S. 74-87, 7 Sup. Ct. 807. The circuit court having decreed that the defendants were entitled to restitution on condition, which decree was not fully executed because the condition was not met, and having decreed a foreclosure and sale of the property, will, of course, have an account taken of the proper receipts and disbursements incident to the custody and operation of the mortgaged property, and of the rents and profits earned, or that should have been earned, since its delivery to the purchasers under the former sale, and make such further orders in reference to the conflicting claims of parties, in the distribution of the proceeds of the sale, and ultimate settlement of the proceedings, as to justice and equity may appertain. The decree appealed from is affirmed.

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NEWGASS et al. v. ATLANTIC & D. RY. CO.

WESTERN UNION TEL. CO. v. THOM.

(Circuit Court, E. D. Virginia. May 3, 1894.)

1. RAILROADS—RECEIVERSHIP—PERFORMANCE OF CONTRACTS.

The A. Ry. Co. made a contract with the W. U. Tel. Co., by which it sold to the telegraph company a telegraph line which it had constructed along one of the branches of its road, and the telegraph company agreed to equip a telegraph line along the main line of the railroad and to operate the same regularly in the usual manner. It was provided that the contract should continue for 25 years from August 30, 1887, and that the railway company should pay for telegraph services rendered to it, at certain agreed rates, the accounts to be settled on August 30th in each year. The telegraph company paid for the line sold to it, constructed the line along the railroad, and rendered the services, as provided in the contract. On August 30, 1890, there was due to it from the railway company \$797, and on January 3d following \$258 more. On the latter date, the railroad was placed in the hands of a receiver, appointed in a creditors' suit, seeking, among other things, an account of all the debts and liabilities of the railway company. On May 30, 1891, the claim of the telegraph company against the railway company was recorded, as a lien, under the laws of Virginia. The receiver refused to pay the balance due to the telegraph company at the time

of his appointment, but, upon the telegraph company's claiming the right to discontinue the contract if its claim were not paid, he applied to the court for instructions. *Held*, that the telegraph company, if not paid, would have a right to discontinue the contract, and, since the exercise of such right would entail great inconvenience, loss, and mischief upon the railroad, with a probable violation of the Virginia statute forbidding the operation of a railroad without a telegraph line, the receiver should be directed to pay the balance due to the telegraph company.

2. **SAME—LABOR CLAIMS—VIRGINIA STATUTE.**

*Held*, further, that the claim of the telegraph company, for services rendered to the railway company, was a labor claim within the statute of Virginia (Code Va. §§ 2485, 2486) giving to laborers' claims priority over mortgages, if recorded within six months after the claims mature.

3. **SAME—LIENS—LIMITATIONS.**

*Held*, further, that the filing of the creditors' bill suspended the running of the six-months limitation for recording such claims, and, accordingly, that the claim for the balance, due August 30, 1890, four months before the filing of the bill, was a valid lien, though not recorded until more than six months after August 30, 1890.

This was a creditors' suit brought by B. Newgass & Co. and others against the Atlantic & Danville Railway Company. A. P. Thom, appointed receiver of the property of the defendant, filed a petition for instructions in respect to a contract with the Western Union Telegraph Company, to which petition the telegraph company filed an answer.

Robt. M. Hughes, for Western Union Tel. Co.

Richard Walke, for Atlantic & D. Ry. Co.

**HUGHES, District Judge.** The Atlantic & Danville Railway Company had constructed, some years before its road came into the hands of the receivers of this court, a branch road from Claremont, on James river, to Hicksford, in Brunswick county, Va., and had put up telegraph poles and wires, and equipped a telegraph line on that branch. In August, 1887, a few years before the bill of foreclosure was filed in this court, it entered into a contract with the Western Union Telegraph Company by which it sold and conveyed this telegraph line, with all poles, wires, batteries, and material, to that company, for an agreed price, of which it duly received payment. By the same contract the telegraph company agreed to put up telegraph poles and wires, and equip a telegraph line along the main route of the railroad from Portsmouth to Danville, and on other branches of the railroad, and to operate the several telegraph lines regularly in the usual manner. A variety of stipulations were inserted in the contract. Among others is one by which the railroad company grants, as far as it may be competent for it to do so, the exclusive right of constructing and operating a telegraph line along the railroad. Another stipulation is that this contract shall continue in force for 25 years from its date, which was the 30th of August, 1887, and on, until after notice given to the contrary by either party to the other. The contract also defined the rates at which the railroad company should pay for the telegraph services rendered to it, and that the settlement of accounts arising out of these services and charges should be made at the end of each fiscal year, ending on

the 30th of August. The telegraph company duly complied with the requirements of the contract by establishing telegraph lines along the roads of the railroad company and by keeping them in operation. On the 30th of August, 1890, there was due the telegraph from the railroad company \$727.52, and on the 3d of January, 1891, an additional indebtedness of \$258.38 had accrued,—making the debt of the railroad company at the latter date \$985.90. The Atlantic & Danville Railway Company was placed in the hands of receivers by this court on the 3d of January, 1891, on a creditors' bill praying the appointment of receivers and a sale in foreclosure. There were, at first, two receivers. There is now but one. The claim of the telegraph company was recorded as a lien in the clerk's office of the hustings court of Portsmouth, on the 30th day of May, 1891. In July, 1891, the receivers of the Atlantic & Danville Railway filed a petition or report in this cause, representing that they are advised they have no authority to pay the claim of the telegraph company, which has been described, inasmuch as it does not, in their opinion, constitute a lien upon the property of the railroad company. They also represent to the court that the telegraph company claims the right, in case the claim is not paid, to discontinue and annul the contract, and to refuse to perform further service to the railroad, and threatens to exercise that right. The receivers, in their petition, deny such right, holding that the telegraph company is bound to go on with the contract. They therefore pray the instruction and direction of the court in the premises. The telegraph company answers, representing that the contract is a continuous one, which has many years to run, and claiming the right, though disclaiming any such desire, to terminate the contract entirely, if the receiver, acting for the railroad company, should violate the contract by refusing payment of the debt which stood in arrears when he took charge of its property. It also claimed that the debt is a lien upon the railroad property superior to that of the mortgage.

The case presented is novel. I find nothing like it in any of the reporters. The one seeming most to resemble it is that of *Southern Exp. Co. v. Western N. C. R. Co.*, 99 U. S. 191. But the distinction between that and the one at bar is quite marked. There the express company had entered into a contract with the railroad company, under which it had advanced to the latter a sum of money, to be expended in repairs and betterments on the road, and was to be repaid by the earnings of the railroad in carrying express freights. Some year or more afterwards, the railroad company conveyed its property by trust deed to secure creditors, and, some time after that, a bill was filed against the railroad company, praying for a receiver and for a sale in foreclosure. At the time of the appointment of the receiver, a balance of the debt of the railroad to the express company remained unpaid. The receiver deemed this debt to be of inferior dignity to the debts of the trust, being unsecured by lien in any form upon the property in his hands. He therefore declined to go on with the contract with the express company, and the latter brought a bill for specific performance of the

contract against the receiver. The supreme court of the United States held that the contract could not be carried on by the receiver, the express company's rights being subordinate to those of the cestuis que trustent under the trust deed. That case, obviously, differs materially from the one at bar. There the receiver resisted the further execution of the contract. Here the receiver comes into court praying for leave to go on with the contract, and protesting against the right of the telegraph company to annul it. There it was beyond the ability of the receiver, with respect to the superior rights of lien creditors, to go on with the contract. Here, unless the receiver continues to fulfill his part of the contract, great injury to the interests of all creditors of the railroad and to the public, attended by a breach of the law of Virginia forbidding any railroad to be operated except in conjunction with a telegraph equipment, would result. For it cannot be contended that, if the receiver should be authorized by the court to violate his duty under the contract, the telegraph company would not be at liberty to abandon it on its part. The contract in the case of the express company had terminated, except as to payment of the amount due, when the receiver took charge. The contract here is an entirety, and is continuous, having 15 or 20 years yet to run. It is a beneficial contract to the receiver, which he asks the court to continue in force, and from which he protests that the telegraph company shall not be released. The case seems to me, therefore, to be essentially different from that of *Southern Exp. Co. v. Western N. C. R. Co.*, supra; and, so far from being all fours with, is the opposite of, it in its leading features.

I think the case turns, however, upon other points than those which have been adverted to. There are serious difficulties in the way of denying the claim of the Western Union Telegraph Company under consideration. Though it is hardly presumable that this company would exercise its own right of canceling this contract, if the receiver should violate it on his part by refusing to pay the amount in arrears due under it, yet that right, as before indicated, would certainly exist; and, if enforced, would entail the utmost inconvenience, loss, and mischief upon the railroad, involving a breach of section 1257 of the Virginia Code, forbidding any railroad from being operated in the state without a telegraph line. It would, therefore, be in the highest degree impolitic for the court to direct the receiver to repudiate this debt, and as hazardous to the interests of the mortgage creditors of the railroad company as to those of all others concerned. In the case of *Skiddy v. Railroad Co.*, 3 Hughes, 320-381, Fed. Cas. No. 12,922, this court, on mere grounds of policy, decreed the payment of a large amount of labor claims in prejudice of mortgage liens, long before the priority of such claims was established by the equity courts of the country, and by statute. Policy requires, in this case, like action by the court.

The receivers, in their petition, deny that this claim of the Western Union Telegraph Company is a lien ahead of that of the lien creditors. Whether it is or not depends, in part, upon the question

whether a telegraph company, rendering services to a railroad company, is a laborer, within the intent and reason of sections 2485 and 2486 of the Virginia Code, which give labor claims priority over mortgages, if recorded within six months after the claims mature. Telegraph services are probably more important to the safety of persons and property carried on the trains of railroads than those of any other class of railroad operatives, and their superior importance is emphasized by the statutory requirement that trains shall not be run at all except under their protection. I cannot entertain a doubt that the telegraph company, attached by law to every railroad in Virginia, is a laborer, in the meaning and reason of the statute of Virginia giving laborers' claims priority over mortgages. Being a labor claim, did it become a lien on the property in the hands of the receiver superior to the lien of the creditors secured by deed? As to the smaller item of \$258.38, which became due either on the filing of the bill on the 3d of January, 1891, or on the 30th of August next following that event, it was equally in time, having been registered on the 30th of May, 1891. As to the larger item of the claim, namely, that of \$727.90, the grounds on which it rests are different. It became due on the 30th of August, 1890, rather more than four months before the filing of the bill in this cause; and whether it ranks as a lien or not depends upon the question whether the filing of the bill operated to stop the running of the six-months limitation against it, prescribed by the Code of Virginia.

The bill in this case is a creditors' bill, brought to administer the assets of an insolvent corporation. Its prayer, among other things, is that an account be taken of all the debts and liabilities of the Atlantic & Danville Railway Company, the liens upon its property, and their priorities, and any and all other just and proper accounts that may be ordered. This makes it, in substance, a creditors' bill, and the law is well settled that, in such a case, the statute of limitations ceases to run, not at the date of the decree of reference, but at the date of the filing of the bill. Every creditor has, after the filing of the bill, an inchoate interest in the suit, to the extent of his claim being considered a demand, and to prevent his being shut out because he had not obtained a decree within the period of limitation. The authority on which this doctrine is based is the leading case of *Sterndale v. Hankinson*, 1 Sim. 393, and it is settled, beyond all controversy, for the federal courts, by the case of *Richmond v. Irons*, 121 U. S. 29, 7 Sup. Ct. 788. See pages 52-54, 121 U. S., page 788, 7 Sup. Ct., which discusses the whole question, and quotes the case of *Sterndale v. Hankinson* with approval.

I am of the opinion, therefore, that the lien of the Western Union Telegraph Company is superior to that of the creditors under the mortgage deed. I will sign a decree directing the payment of the claim by the receiver for several reasons: (1) Because not to pay it would be a breach of a beneficial contract which the receiver wishes to be continued, and which the telegraph company is continuing to execute in good faith on its part; (2) because not to pay it would entitle the telegraph company to throw it up, entailing great inconvenience and loss to the receiver, and all interests rep-

resented by him, and the probable breach of a statute of the state of Virginia; (3) because the payment of it, and the maintenance in all respects of the contract of which it is part, would be for the best interests of all parties to this suit, and especially of the lien creditors; and (4) because it is a valid lien in favor of laborers under the law of Virginia, having priority, as such, over the claims of the creditors under the mortgage deed.

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KANSAS CITY HAY-PRESS CO. v. DEVOL et al.

(Circuit Court, W. D. Missouri, W. D. March 12, 1896.)

No. 1,987.

1. CORPORATIONS—POWERS OF OFFICERS—CONVEYANCE OF PROPERTY.

The M. Co. owned a patent under which all its business was done, and which constituted practically all its capital. A suit was pending against the M. Co., brought by the K. Co., for infringement of a patent owned by the latter. Pending this litigation, C., the president of the M. Co., being about to abscond, to avoid prosecution for certain criminal acts of which he had been guilty, was induced, in order to pay a debt to one K., and to pay the fees due to the lawyers of the M. Co., to make an arrangement with K. and the K. Co. by which, acting as president of the M. Co., he assigned the patent owned by that company to K., in consideration of the discharge of his debt to K. and the payment of the lawyers' fees; it being also agreed that K. should assign the patent to the K. Co., which thereby put an end to its infringement litigation. No part of the consideration passed to the M. Co., which was left with considerable debts outstanding, and substantially without assets. No meeting of the directors of the M. Co. was held to consider or authorize the transaction, and one of the three directors was not informed of it; the third, besides C., the president, at first objecting to it, but finally assenting, when urged by C. and the company's lawyers. The statute under which the M. Co. was organized provided that its property and business should be managed by directors, and that the decisions of the directors, duly assembled as a board, should be valid. The by-laws provided that the directors, and the president, under their control, should have the general management of the affairs of the corporation, and that the president should execute and acknowledge instruments requiring acknowledgment, provided that he should not execute any instrument by which real estate was conveyed or stock controlled until authorized by the board of directors. *Held*, that the execution of the assignment of the patent by C., as president of the M. Co., was without authority, and such assignment was ineffectual to pass title to K., or through him to the K. Co., both having knowledge of the circumstances, and, hence, that the K. Co. had no title to the patent which would enable it to maintain a suit for its infringement.

2. SAME.

In such action, where the complainant declares alone on the existence of a legal title to the patent sued on, it cannot avail him at the trial, after failing to show such legal title, that he held a contract with one of the defendants whereby it was agreed, for a consideration, that such defendant would transfer to complainant any invention he might thereafter have patented, such invention being interposed to defeat complainant's claim.

This was a suit by the Kansas City Hay-Press Company against H. F. Devol, George Devol, and W. S. Livengood, to restrain the infringement of a patent. The cause was heard on the pleadings and proofs.



R. H. Manning, Scammon, Crosby & Stubemauch, and Offield,  
Towle & Linthicum, for complainant.

Geo. A. Neal and T. S. Brown, for respondents.

PHILIPS, District Judge. This is a bill in equity to enjoin the respondents from infringing on certain patent rights claimed by the complainant. The claim is what is known as a "combination claim," based on several patents claimed by the complainant. Among these is patent No. 495,944 (serial No. 439,907), dated April 18, 1893, granted to Winfield S. Livengood (one of the respondents), Walter H. Chadbourne, and James M. Gibbons, of Kansas City, Mo. It is conceded by the parties that this patent passed by assignment and vested in the Midland Manufacturing Company of Kansas City, a corporation created under the general corporation laws of the state of Missouri. The complainant claims thereunder by mesne assignments. This title is sharply controverted by the respondents. As the ownership of this title by the complainant is essential to the right of recovery, the question raised lies at the threshold of this controversy. The instrument under and through which complainant claims is as follows:

"Whereas, Winfield S. Livengood, Walter H. Chadbourne, and James M. Gibbons, all of Kansas City, in the state of Missouri, invented certain new and useful improvements in baling presses, for which, on the 15th day of July, 1892, they filed application for letters patent of the United States, serial number 439,907, all of which said parties having assigned their entire interest in said improvements to the Midland Manufacturing Company, of the same place; and whereas, Edward Kelly, of the same place, is desirous of acquiring the entire interest in said invention, and in the letters patent to be obtained therefor: Now, therefore, to all whom it may concern, be it known that for and in consideration of the sum of eight hundred (\$800) dollars, to it in hand paid, the receipt of which is hereby acknowledged, the said Midland Manufacturing Company, through its duly-authorized president, Walter H. Chadbourne, have sold, assigned, transferred, and by these presents do sell, assign, and transfer, unto the said Edward Kelly, the full and exclusive right to the said invention, as fully set forth and described in the specification executed by the said Livengood, Chadbourne, and Gibbons preparatory to obtaining letters patent of the United States therefor. And the said Midland Manufacturing Company does hereby authorize and request the commissioner of patents to issue the said letters patent to the said Edward Kelly, as the owner of the entire right, title, and interest in and to the same, for the sole use and behoof of the said owner and his legal representatives. In testimony whereof, I have hereunto set my hand and affixed, the corporate seal of said company, this 23rd day of March, A. D. 1893.

"The Midland Manufacturing Company,

"[Seal.]

By W. H. Chadbourne, Prest.

"Attest: P. D. Myers, Secy."

Did Chadbourne, who signed this instrument as president, have authority to execute the same and pass the title? The statute under which this company was incorporated provides (Rev. St. Mo. 1889, § 2772) that "the property or business of the corporation shall be controlled and managed by directors, not less than three nor more than thirteen in number." Section 2508 provides, *inter alia*, that such corporation has power "to make by-laws not inconsistent with existing law, for the management of its property, the regulation of its affairs and for the transfer of its stock." Among the by-laws adopted by this company are the following:

"Art. 4. An annual meeting of the directors shall be held immediately after the annual stockholders' meeting, on the second Monday in January, at the general office of the company. Special meetings of the board may be held at any time, on written call of the president, mailed by registered letter to the usual place of address of each director five days prior to said meeting. The board of directors shall have the general management and control of the affairs of the company, being the trustees holding and managing the corporation property for the benefit of the stockholders." "Art. 6. It shall be the duty of the president to preside at all meetings, both for directors and stockholders; to issue calls for special meetings of the board of directors, and perform such duties as the board of directors may prescribe. The president shall, under the directors, have the general management and control of the business affairs of the company. The president, treasurer, and secretary shall attest the same, and affix the corporate seal thereto. The president shall execute and acknowledge, in behalf of the company, all instruments requiring acknowledgment: provided, that in no case shall he execute and acknowledge any instrument of writing whereby real estate is conveyed or affected, or stock is to be controlled, until he has been authorized by the board of directors."

At its inception, on June 18, 1892, the directors named were said Chadbourne, Livengood, and Gibbons; said Chadbourne being named as the president, and Livengood as the secretary. On August 1, 1892, at a stockholders' meeting, it was voted to increase the number of directors to five, which was done by naming James Trowbridge and John Wedge additional directors. But as no certificate evidencing this increase of directors was filed with the secretary of state, as prescribed by said section 2508 of the statute, that act, for the purposes of this case, may be regarded as ineffectual, thus leaving the board of directors as originally constituted. At said meeting on August 1, 1892, Livengood tendered his resignation as secretary of the board, which was accepted, and thereupon P. D. Myers was elected director and secretary. It does not affirmatively appear that Livengood ever resigned as director, though the board seems to have acted on that assumption. The last meeting of the board, as shown by the records of the company, was held August 15, 1892, at which nothing was done.

It may be conceded that, where a deed in form is made by the officer authorized by statute to make it, it is prima facie evidence of a conveyance; but it is subject to explanation and contradiction by evidence, and will be ineffectual to pass the title to one taking with knowledge of the facts contradicting the authority. The facts, as disclosed by this record, are that this same complainant, at the time of said attempted assignment and conveyance, had pending in this court a suit against said Midland Manufacturing Company for infringement of complainant's rights under its other patents. Pending that litigation said Chadbourne got into some trouble, criminal in its character, which, in his judgment, rendered an indefinite leave of absence from the state advisable. He owed one Edward Kelly between two and three hundred dollars. To pay that and the lawyers who represented the manufacturing company in said litigation, Chadbourne was induced, before leaving, to execute said instrument to Kelly, who was then to convey to complainant company. The said arrangement in fact was made to accomplish a threefold object: First, to enable Kelly to collect

his claim against Chadbourne; second, to enable said lawyers to get their fees; and, third, to obtain this money the complainant company was brought into the scheme, its inducement being to get rid of that litigation, and to acquire whatever of right and value there was in the patent. Whether any part of the money thus obtained went to aid Chadbourne in his flight, does not affirmatively appear. There is an entire absence of proof that one dollar of this purchase money went into the treasury of the manufacturing company, and its debts, of a large amount, were left unsatisfied. There was no meeting of the board of directors to consider this attempted sale, although they had, at the regular meeting in August preceding, established an office and place of meeting. The matter of such sale and transfer was never considered nor canvassed by the board of directors, as such, and one of the directors (Gibbons) was not even notified thereof. Chadbourne was simply called into the private office of said lawyers, and his signature to the instrument of conveyance was there obtained. Mr. Myers, in his testimony, explains this transaction. He says that they met Mr. Sooy, the president of the complainant company, and made to him a proposition to buy out the whole concern on condition that Mr. Livengood was to manufacture hay presses for the complainant, and he (Sooy) was to assume and pay the debts of the Midland Manufacturing Company. This being declined, it was finally concluded, as far as Sooy and the attorneys of the manufacturing company were concerned, to turn the property over to Kelly, for money he had loaned Chadbourne, and for some checks which he had loaned to the company, and for the fee that said lawyers claimed for conducting said suit,—all at an estimate of about \$800. Myers testified:

"After their plans were submitted to me, and the assignment paper made out for my signature as secretary of the company, I refused to do it, on the ground, as I had then learned, that these patents were about the entire capital stock of the company, and without the action of the board of directors, and others interested, they had no right to do it."

He says there was no meeting of the board of directors to consider the matter.

"I told Mr. Alderson [one of the lawyers] I would not do it, and I told Mr. Chadbourne and I told Mr. Kelly that I would not do it; but Alderson was the attorney of the concern, and insisted that I had a right to do it, and he and Chadbourne overruled me, and I did do it. I always insisted that whoever took the patents should pay the debts of the company."

All he did was simply to "attest" the instrument. Mr. Gibbons, the other director, was not even notified of this action.

It is common learning, universally recognized in this country, that such corporations are precisely what the act of their creation makes them,—no more and no less. They possess such faculties only as they are endowed with by the creative act. As said by Wagner, J., in *City of St. Joseph v. Clemens*, 43 Mo. 404:

"The corporate acts must not only be authorized by the charter, but these acts must be done by such officers and agents, and in such manner, as the charter directs."

Officers of corporations are special, not general, agents. They have no power to bind the corporation, except within the limits prescribed by the charter and by-laws, and persons dealing with them are charged with notice of the extent of their authority. *Adriance v. Roome*, 52 Barb. 399. The designation of certain methods and agencies by the charter implies a prohibition of any others. *Landers v. Church of Rochester*, 97 N. Y. 119. Parties dealing with such corporations take with notice of the by-laws. *Dabney v. Stevens*, 32 N. Y. Super. Ct. 415, 46 N. Y. 681. So it is held that, where the officers of a corporation execute assignments of its property without authority, it cannot be made good by any proof of execution before a commissioner. *Murray v. Vanderbilt*, 39 Barb. 140.

What is the direction of the charter of this company? Section 2510, Rev. St. Mo. 1889, provides that:

"When the corporate powers of any corporation are directed by its charter, or the provisions of this law, to be exercised by any particular body or number of persons, a majority of such body or persons, if it be not otherwise provided in the charter or law creating it, shall be a sufficient number to form a board for the transaction of business, and every decision of a majority of the persons duly assembled as a board shall be valid as a corporate act."

This statute does not say that an act shall be deemed to be that of the governing board whenever it shall be shown to have received the sanction of members of the board, but its express language is that this voice of the majority shall control in the corporate transactions, when "duly assembled as a board." How is this corporate action—the voice of the body politic—to be evidenced? Clearly, by assembling together as a board, either at regular, stated meeting, or at a called convention after due notice to each member of the board, as prescribed by the by-laws herein quoted.

The state of California has a similar statute. In *Gashwiler v. Willis*, 33 Cal. 12, the court held that not all the stockholders, concurring by separate acts or joint act, could transfer the corporate property, because—

"The property in question was the property of the artificial being created by the statute. The whole title was in the corporation. The stockholders were not, in their individual capacities, owners of the property, as tenants in common, joint tenants, copartners, or otherwise."

And although the governing board of trustees were present, and participated in the act of the stockholders, it was held to be ineffectual to pass the title. The court said:

"Such is not the mode in which the corporation is authorized by the law of its creation to manifest its will and exercise its corporate powers. The power to sell and convey could only be conferred by the trustees when assembled and acting as a board. This is the mode prescribed."

In *McCullough v. Moss*, 5 Denio, 567, the court says:

"The affairs of the corporation were to be conducted by five directors, a majority of whom formed a board for the transaction of business, and a decision of a majority of those duly assembled as a board was requisite to make a valid corporate act. \* \* \* When a charter invests a board with power to manage the concerns of a corporation, the power is exclusive in its character. \* \* \* The stockholders, as such, in their collective capacity,

could do no corporate act. The directors were their representatives, and alone authorized to act."

In *Cammeyer v. Lutheran Churches*, 2 Sandf. Ch. 208-229, the vice chancellor said:

"The directors in the bank, and the trustees, in this case, are, by the charter, the select class or body which is to exercise the corporate functions. In order to exercise them, they must meet as a board, so that they may hear each other's views, deliberate, and then decide. Their separate action, individually, without consultation, although a majority in number should agree upon a certain act, would not be the act of the constituted body of men clothed with the corporate powers. Nor would their action in a meeting of the whole body of corporators, or of another and larger class, in which they are but a component part, be a valid corporate act. In thus acting they would not be distinguishable from their associates, and their action is united with that of others who have no proper or legal right to join with them in its exercise. All proper responsibility is lost. The result may be the same that it would have been if they had met separately, and it may be different. In the general assemblage, influences may be brought to bear upon the trustees, which, in their proper board, would be unheeded, and no one can say with certainty that their vote in the latter event would have been the same."

In *State v. Ancker*, 2 Rich. Law, 245, the court, speaking of the action of a board illegally assembled, says:

"Without being summoned together, the board, as individuals, have no official authority, nor have they any original authority at all, either under the charter or the by-laws."

So it is said in *Titus v. Railroad Co.*, 37 N. J. Law, 102:

"The affairs of corporate bodies are within the exclusive control of their board of directors, from whom authority to dispose of assets must be derived."

See, also, *Bank v. Dunn*, 6 Pet. 51; *U. S. v. City Bank of Columbus*, 21 How. 356; *Railway Co. v. Allerton*, 18 Wall. 233; *Walworth County Bank v. Farmers' Loan & Trust Co.*, 14 Wis. 357; *Hyde v. Larkin*, 35 Mo. App. 365.

Another question of gravity is presented by this action of the president of the Midland Manufacturing Company. It has been held by high authority that it is not within the contemplation of the legislative grant of such a franchise that the board of directors, even by their formal action, can deed away the entire property of the corporation, on which it depends for "living up to the object of its creation"; for, when they thus strip the corporation of its means of subsistence, they put an end to its active life, and work out its practical dissolution. This is not within the terms of their agency to "manage its business affairs." *Abbot v. Rubber Co.*, 21 How. Prac. 193, 33 Barb. 578; 1 Mor. Priv. Corp. §§ 512, 513. It has been held in this state that directors of such corporations may make a deed of general assignment for the benefit of creditors, and the like, as such act, in case of insolvency, is but executing the intentment of the charter, in conducting its business, by thus applying the assets for the purpose for which the directors held them in trust; yet I undertake to say that no authority can be found to support the action of the president of this concern, attended with the remarkable circumstances which characterize the transaction under review. And while it is true that the charter

of this company, following more the letter of the statute than the spirit prompting the incorporators, authorized them to engage in other business operations, the concern in fact had no other business or property. It was organized by the three grantees under said patent, and for the purpose of manufacturing and selling hay presses thereunder. The patent gone from their control, the corporation ceased to be "a going concern." It is suggested in argument by counsel that these defendants are not in position, in this action, to interpose this defense. Why not? The bill counts on a naked legal title; as much so as an action of ejectment, or trespass *vi et armis*. Chief Justice Dixon, in *Walworth County Bank v. Farmers' Loan & Trust Co.*, *supra*, met a like contention with characteristic aptness. After conceding that in the action of trespass, where possession of personal property was ordinarily sufficient to maintain trespass against all persons save the owner, he said:

"But when, in order to prove possession, it becomes necessary for the plaintiff to show a transfer of the property from some former owner to himself, and he attempts to do so, and fails, the right of action fails also."

And, looking at the equities of this case, the defendant Livengood, at least, who seems to have had about genius enough to invent something in mechanics, but not enough common sense to protect his discoveries against his immediate necessities, may well complain of this attempted transfer of the patent which is the claimed product of his mind. He owned \$8,000 of the capital stock of this corporation. When he resigned his secretaryship, the concern contracted to pay him an amount of money for his stock, which stock was placed—in the nature of an escrow—with one Wedge, to hold until the purchase money was paid. That money was never paid, and consequently the stock, of right, belongs to Livengood. So, when Chadbourne undertook to convey the patent to the complainant company, had it been effective, it would have rendered absolutely valueless the claim of the defendant Livengood. He has a right, therefore, in this action, to complain of the attempt of Chadbourne to thus despoil him.

The complainant has presented in evidence an alleged contract with Livengood,—made in 1889, perhaps,—by which Livengood was to concede to complainant any future patents he might acquire. There are several answers to the interposition of this claim: No such issue is presented by the pleadings, and therefore the same cannot be considered. *Newham v. Kenton*, 79 Mo. 382. It was also an executory contract, for breach of which, if any, the complainant has a remedy in another form of action, the forum for which would be the state court, the parties being citizens of this state. It cannot be the predicate of a claim for the infringement of a patent of which the complainant is not the legal owner.

Inasmuch, therefore, as the lack of title to said patent No. 495,944 breaks the continuity of the combination claim, it results, without considering the validity of complainant's other patents, that this action must fail. The bill is accordingly dismissed, at complainant's costs.

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## ELDER et al. v. WHITESIDES et al.

(Circuit Court, E. D. Louisiana. March 22, 1895.)

No. 12,383.

## 1. CONSPIRACY—UNLAWFUL COMBINATIONS—INJUNCTION.

A conspiracy to prevent the loading or unloading of a vessel, except by such labor as may be acceptable to defendants, may be enjoined, though no particular overt act against that particular vessel is alleged or proved. *Arthur v. Oakes*, 11 C. C. A. 209, 63 Fed. 310, followed.

## 2. SAME—CRIMINAL ACTS.

It is no ground for refusing an injunction to restrain conspirators from doing irreparable damage to complainant's property rights that some of the acts enjoined would subject the wrongdoers to a criminal prosecution. *Arthur v. Oakes*, 11 C. C. A. 209, 63 Fed. 310, followed.

## 3. SAME—JURISDICTION OF FEDERAL COURTS.

A suit by an alien against citizens of the United States to enjoin a conspiracy to prevent the loading or unloading of complainant's ship is within the equity jurisdiction of the federal courts, independently of any question as to interference with interstate or foreign commerce. *Arthur v. Oakes*, 11 C. C. A. 209, 63 Fed. 310, and *Hagan v. Blindell*, 6 C. C. A. 86, 56 Fed. 696, followed.

This was a bill in equity, filed March 4, 1895, by Elder, Dempster & Co., of Liverpool, England, owners of certain steamships, against William Whitesides et al., citizens of Louisiana, alleging an unlawful combination and conspiracy on the part of said defendants to prevent the loading or unloading of complainants' steamships at Gretna, La., except by such labor as might be acceptable to said defendants; that such combination and conspiracy absolutely prevented complainants from loading or unloading their steamers, at said port of Gretna, by other than the said defendants and their confederates. An injunction restraining said defendants from continuing their said combination and conspiracy is prayed for.

Gurley & Mellen, for complainants.

W. L. Thompson, for defendants.

PARLANGE, District Judge. The defendants have been granted all the time which they have requested to present their side of the case. The argument made by their counsel may be divided under four heads. He urged: First, that there is no allegation or proof of any overt act committed by the defendants against the particular vessel mentioned in the bill; second, that a court of equity cannot enjoin crime; third, that no damages have actually been inflicted upon the vessel; and, fourth, that the proof of conspiracy is insufficient.

In a recent case decided by the United States circuit court of appeals, Seventh circuit (*Arthur v. Oakes*, 11 C. C. A. 209, 63 Fed. 310), in which Mr. Justice Harlan was the organ of the court, all the law points made by the counsel for the defendants have been passed upon, clearly and distinctly. In speaking of combinations and conspiracies, Mr. Justice Harlan said:

"According to the principles of the common law, a conspiracy upon the part of two or more persons, with the intent, by their combined power, to wrong

others, or to prejudice the rights of the public, is in itself illegal, although nothing be actually done in the execution of such conspiracy. This is fundamental in our jurisprudence. So, a combination or conspiracy to procure an employé or body of employés to quit service, in violation of the contract of service, would be unlawful, and, in a proper case, might be enjoined, if the injury threatened would be irremediable in law. It is one thing for a single individual or for several individuals, each acting upon his own responsibility, and not in co-operation with others, to form the purpose of inflicting actual injury upon the property or rights of others. It is quite a different thing, in the eye of the law, for many persons to combine or conspire together with the intent, not simply of asserting their rights or of accomplishing lawful ends by peaceable methods, but of employing their united energies to injure others or the public. An intent upon the part of a single person to injure the rights of others or of the public is not in itself a wrong of which the law will take cognizance, unless some injurious act be done in execution of the unlawful intent. But a combination of two or more persons with such an intent, and under circumstances that give them, when so combined, a power to do an injury they would not possess as individuals acting singly, has always been recognized as in itself wrongful and illegal."

The justice cites approvingly the language of another court, as follows:

"There is nothing in the objection that to punish a conspiracy where the end is not accomplished would be to punish a mere unexecuted intention. It is not the bare intention that the law punishes, but the act of conspiring, which is made a substantive offense by the nature of the object to be effected." *State v. Buchanan*, 5 Har. & J. 317.

The justice further said:

"The authorities all agree that a court of equity should not hesitate to use this power [injunction] when the circumstances of the particular case in hand require it to be done in order to protect rights of property against irreparable damage by wrongdoers. \* \* \* That some of the acts enjoined would have been criminal, subjecting the wrongdoers to actions for damages or to criminal prosecution, does not, therefore, in itself determine the question as to interference by injunction. If the acts stopped at crime, or involved merely crime, or if the injury threatened could, if done, be adequately compensated in damages, equity would not interfere. But as the acts threatened involved irreparable injury to and destruction of property for all the purposes for which the property was adapted, as well as continuous acts of trespass, to say nothing of the rights of the public, the remedy at law would have been inadequate. 'Formerly,' Mr. Justice Story says, 'courts of equity were extremely reluctant to interfere at all, even in regard to cases of repeated trespasses. But now there is not the slightest hesitation, if the acts done or threatened to be done to the property would be ruinous, irreparable, or would impair the just enjoyment of the property in future. If, indeed, courts of equity did not interfere in cases of this sort, there would, as has been truly said, be a great failure of justice in this country.'"

So far as the question of jurisdiction is concerned, it is clearly settled, both by *Arthur v. Oakes*, *supra*, and by the decision of the United States circuit court of appeals of this (the Fifth) circuit. *Hagan v. Blindell*, 6 C. C. A. 86, 56 Fed. 696. In both of those cases the jurisdiction depended entirely, as in the case at bar, upon the diverse citizenship of the parties and the equitable powers of the court. In the former of said cases, Mr. Justice Harlan said:

"In the course of the argument, some reference was made to the act of congress of July 2, 1890, entitled 'An act to protect trade and commerce against unlawful restraints and monopolies' (26 Stat. 209). It is not necessary in this case to decide whether, within the meaning of that statute, the acts and combinations against which the injunction was aimed would have been in restraint



of trade or commerce among the several states. This case was not based upon that act. The questions now before the court have been determined without reference to the above act, and upon the general principles that control the exercise of jurisdiction by courts of equity."

In the latter of said cases (*Hagan v. Blindell*, 6 C. C. A. 86, 56 Fed. 696), Judge Toulmin, as the organ of the Fifth circuit court of appeals, said:

"The only practical question presented by the record is whether the court below had jurisdiction of the case as made by the bill. We concur in the conclusion reached by the learned judge who decided the case below, as expressed in his opinion, and which is made a part of the record, that the jurisdiction of the court is maintainable on general principles of equitable jurisdiction; and a careful examination of the case satisfies us that, under all the facts before it, there was no error in the court awarding a preliminary injunction."

The decisions above referred to clearly dispose of all the law points raised by defendants' counsel. The proof of conspiracy is made out by the affidavits offered by complainants. The only proof offered by the defendants is their affidavit, which confines itself to a denial that they interfered with the complainants, or prevented the loading of the vessel *Niagara*, or caused damages to the complainants. This seems to be in line with the argument of their counsel, and to be based upon the theory that the jurisdiction of the court depends upon unlawful overt acts having been committed against the particular vessel mentioned in the bill, and upon actual damages having been caused the complainants, prior to the application for the injunction. There is no denial of the agreement or conspiracy to do the unlawful things charged in the bill, which conspiracy is the gravamen of the case. The preliminary injunction must issue.

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DE LACEY v. NORTHERN PAC. R. CO. et al.

(Circuit Court of Appeals, Ninth Circuit. February 3, 1896.)

No. 244.

RAILROAD LAND GRANTS—EXCEPTION OF PRE-EMPTION CLAIMS.

When a grant is made to a railroad company of parts of the public lands, within certain limits, "not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights," at the time of the definite location of the road, the mere existence, at the time of the definite location of the road, of a pre-emption claim to land within the limits of the grant, properly entered on the records of the land office, prevents the grant from attaching to such land, without regard to the validity of such claim; and no title passes to the railroad company by virtue of a patent for the land, issued to it by the government upon a finding that the pre-emption claim had been abandoned.

In Error to the Circuit Court of the United States for the Western Division of the District of Washington.

This was an action of ejectment by the Northern Pacific Railroad Company and others against James De Lacey to recover certain lands in the state of Washington. Judgment was rendered for the plaintiffs in the circuit court. 66 Fed. 450. Defendant brings error. Reversed.

Ballard & Norris and Thos. Carroll, for plaintiff in error.

F. M. Dudley and Jos. D. Redding, for defendants in error.

Before McKENNA and ROSS, Circuit Judges, and HAWLEY, District Judge.

ROSS, Circuit Judge. The Northern Pacific Railroad Company, the defendant in error here, brought this action in the court below to recover from the defendant there, plaintiff in error here, the possession of the S. W.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$ , the S. E.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$ , and the E.  $\frac{1}{2}$  of the S. W.  $\frac{1}{4}$ , of section 21, township 20 N., range 3 E., of Willamette Meridian, situated in the state of Washington, for which that company holds a patent issued by the government of the United States in confirmation of title supposed to have been conferred upon it by the act of congress of July 2, 1864 (13 Stat. 365). By that act, the Northern Pacific Railroad Company was incorporated, with authority to construct and to maintain a continuous railroad and telegraph line—

“Beginning at a point on Lake Superior, in the state of Minnesota or Wisconsin, thence westerly by the most eligible railroad route, as shall be determined by said company, within the territory of the United States, on a line north of the 45th degree of latitude, to some point on Puget Sound with a branch via the valley of the Columbia river, to a point at or near Portland, in the state of Oregon, leaving the main trunk line at the most suitable place, not more than three hundred miles from its western terminus.”

—And granting to the company, in aid thereof, every alternate section of public land, not mineral, designated by odd numbers, to the amount of 20 alternate sections of land per mile on each side of its line, as the company should adopt through the territories of the United States, and 10 alternate sections per mile where the road passes through any state—

“And whenever on the line thereof the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption, or other claim or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land office; and whenever prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the secretary of the interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections.”

The sixth section of the act provided that:

“The president of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale, or entry, or pre-emption before or after they are surveyed, except by said company, as provided in this act.”

On the 31st day of May, 1870, congress passed a joint resolution, by which, among other things, the Northern Pacific Railroad Company was authorized—

“To locate and construct, under the provisions and with the privileges, grants, and duties provided for in its act of incorporation, its main road to some point on Puget Sound via the valley of the Columbia river, with the right to locate and construct its branch from some convenient point on its

main trunk line across the Cascade Mountains to Puget Sound; and in the event of there not being in any state or territory in which said main line or branch may be located, at the time of the final location thereof, the amount of lands per mile granted by congress to said company, within the limits prescribed by its charter, then said company shall be entitled, under the directions of the secretary of the interior, to receive so many sections of land belonging to the United States, and designated by odd numbers, in such state or territory, within ten miles on each side of said road, beyond the limits prescribed in said charter, as will make up such deficiency, on said main line or branch, except mineral and other lands as excepted in the charter of said company of eighteen hundred and sixty-four, to the amount of the lands that have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of subsequent to the passage of the act of July two, eighteen hundred and sixty-four. And that twenty-five miles of said main line between its western terminus and the city of Portland, in the state of Oregon, shall be completed by the first day of January, Anno Domini eighteen hundred and seventy-two, and forty miles of the remaining portion thereof each year thereafter until the whole shall be completed between said points." 16 Stat. 378.

By this resolution, as said by Mr. Secretary Lamar, in Railroad Co. v. McRae, 6 Land Dec. Dep. Int. 400—

"The designations of the lines of the road were changed; that which by the granting act was known as the 'branch line' (via the valley of the Columbia river, to a point at or near Portland, in the state of Oregon) was changed to 'main road' or 'main line,' and that which had been designated as 'main line' (across the Cascade Mountains to Puget Sound) was changed to 'branch line.' So, by the joint resolution of 1870 [May 31], the company was authorized to locate and construct its main line via the Columbia river, through some point at or near Portland, Or., to a suitable point on Puget Sound, with the privileges, grants, and duties provided for in its act of incorporation."

In the case of U. S. v. Northern Pac. R. Co., 152 U. S. 284, 14 Sup. Ct. 598, it was held, among other things, that by the act of July 2, 1864, no land was granted to the Northern Pacific Railroad Company to aid the construction of any line of road between Portland and Puget Sound, and that no public land disposed of by the government after the passage of the act of July 2, 1864, was intended to be embraced in the grant made by the joint resolution of May 31, 1870. The land in controversy lies within the primary limits both of the grant of the main line of the railroad as definitely located, between Portland and Puget Sound, and the line of the Cascade Branch, as definitely located, between the point where it leaves the main line and crosses the Cascade Mountains to Puget Sound. By the resolution of May 31, 1870, lands were granted to the Northern Pacific Railroad Company, to aid the construction of that portion of the road between Portland and Puget Sound. It is undisputed that, at the time of the passage of that resolution, there was upon file, in the local land office of the district where the land in controversy is situated, a valid and subsisting pre-emption claim by one John Flett, which claim operated to except the land from that grant to the railroad company. The question in the case is whether it was also excepted from the grant contained in the act of July 2, 1864, in aid of the line across the Cascade Mountains, then called the "main line," and subsequently made, as has been said, by the joint resolution of May 31, 1870, the "branch line."

It appears from the findings of fact filed by the court below that on April 9, 1869, Flett filed his declaratory statement of his intention to purchase the land in question under the laws of the United States authorizing the pre-emption of unoffered lands, but that whether or not he was then qualified to enter the land under the pre-emption laws was not made to appear at the trial; that in the fall of 1869 he left the land in question, and did not thereafter reside thereon, "although it is recited in the decision of the secretary of the interior, in a contest between the railroad company, De Lacey, Flett, et al., before the interior department, involving the land here in controversy, that in September, 1870, Flett went to the local land office, and told the officers that he had come to prove up on his claim; that they told him it was railroad land, and that he had lost it; that Flett did not then actually offer to make proof, but acquiesced in the advice of the local office that he was not entitled to make proof under his filing"; and that on September 7, 1887, Flett "submitted proof in support of his pre-emption claim, founded upon his declaratory statement filed April 9, 1869." It was also found as a fact by the court below that De Lacey settled upon the land in controversy in April, 1886; that on April 5, 1886, he applied to make homestead entry thereof; that his application was rejected, "for the reason that the land fell within the limits of the grant to the railroad company on both main and branch lines"; that, from this decision of the register and receiver, De Lacey appealed to the commissioner of the general land office; that afterwards, under the instructions of the commissioner, a hearing was had, at which the railroad company, De Lacey, Flett, and one John Algyr, who, it appears, had also sought to file a declaratory statement for the land, were present; that on July 27, 1889, the receiver of the local land office found that Flett had not voluntarily abandoned the land in 1869, and that his entry should be reinstated; that, from this finding, all of the parties named, except Flett, appealed to the commissioner of the general land office, and that, on December 5, 1889, the commissioner sustained the finding of the receiver; that thereafter the adverse parties to the contest appealed to the secretary of the interior,—and that on September 28, 1891, the secretary of the interior reversed the ruling of the commissioner of the general land office, and awarded the land in controversy to the railroad company, in pursuance of which ruling the patent was, on December 13, 1892, issued to the company; that Flett's declaratory statement "was not formally canceled upon the records until December 23, 1891."

It appears from the bill of exceptions that Flett, at the time of filing his declaratory statement, paid to the receiver of the local land office the statutory fee of three dollars therefor, upon which the register of the land office issued and delivered to him his certificate; that on July 15, 1887, Flett gave notice of his intention to make final proof to establish his claim to the land, notice of which was duly published by the register of the land office. In the contest that there arose between Flett, De Lacey,

Algyr, and the railroad company, testimony was taken, which was reviewed by the local officers, and, in turn, by the commissioner of the general land office and the secretary of the interior. The officers of the local land office, in holding that Flett was entitled to make final proof of his right to pre-empt the land, said that it appeared from the testimony that Flett, in 1869,—

"Bought the improvements of a former settler, and moved on the land, claiming it under the pre-emption law; that he continued thereon with his family until the fall of that same year, when he was appointed as blacksmith on the Indian reservation; that he removed with his family from the land, when he received his appointment, and did not return thereto until the following summer; that he continued to cultivate the land, and made, during the years 1869 and 1870, valuable improvements thereon, and in the fall of 1870 he went to the land office to render his final proof, but the register would not listen to him, and finally, upon his insisting, ordered him out of the office, saying that the land belonged to the Northern Pacific Company; that Flett did not pursue the matter further at the time in the way of appeal, and immediately removed from the land, and has not resided thereon since; that no other claim, under any of the settlement laws, appears to have been made until 1873, when John Algyr made his application to file a pre-emption; that the testimony shows that Algyr settled upon the land in 1883, and built a house thereon, but has not resided upon the land since about the year 1884; that James De Lacey settled upon the land in 1886, and has since resided continuously thereon, and has made valuable improvements."

These views of the local office were, as has been said, approved by the commissioner of the general land office, but were overruled by the secretary of the interior, who said, among other things:

"The record shows that Flett made settlement upon the land early in February, 1869, and actually resided upon it, with his family, until November, 1869, when he left it, and removed to other land, upon which he was residing on March 30, 1887, as shown by his answers to interrogatories propounded to him and submitted on the hearing ordered upon the application of Algyr to enter this land. What land this was is not definitely shown by the record, but, considering all the evidence therein taken upon the several hearings, it may be fairly inferred that it was lot 3 in section 30, T. 20 N., R. 5 E., W. M., of which he made homestead entry on February 20, 1874, and made proof and received final certificate therefor June 9, 1880, as shown by the records of the office. It is contended that Flett did not move from the land in controversy until the fall of 1870, and that he cultivated the land in 1871, after the date of the filing of the map of general route. While I am satisfied that the evidence of Flett offered on the hearing upon the application of Algyr shows that he left the land in 1869, yet it may be conceded that he did not leave the land until 1871, because whether he did or did not would not in any manner affect the question as to whether the land was excepted from the withdrawal on general route, inasmuch as the filing of itself, being a prima facie valid pre-emption filing, of record at said date, served to except the land covered thereby from the operation of said withdrawal; and whether the pre-emptor, under such filing, inhabited and improved the land, and performed other duties under the pre-emption law, are questions that cannot be raised by the company in aid of the grant; but, when the statutory period had expired without proof and payment having been made, no presumption arises of the actual existence or continuance of the claim of the pre-emptor under such filing, and, if such a claim is alleged, it must be shown that the pre-emptor had not abandoned the land, and that his right or claim to the land was still existing. Hence, on May 14, 1874, when the road was definitely located, the filing of Flett had expired; and, proof and payment not having been made, the presumption arose that whatever claim had previously attached to the land under or by reason of such filing had been abandoned, and no longer in fact existed."

The secretary proceeded to hold that that presumption was not rebutted by any proof, and accordingly awarded the land to the railroad company.

It is not for us to determine in this case whether Flett or either of the other individuals claiming the disputed land was legally entitled thereto, but the question is whether the land was covered by the grant to the Northern Pacific Railroad Company of July 2, 1864. If it was excepted from that grant, the officers of the land department were without authority to issue a patent therefor to that company. *Steel v. Refining Co.*, 106 U. S. 447-452, 1 Sup. Ct. 389; *Smelting Co. v. Kemp*, 104 U. S. 636, 641.

It appears from the findings that the map showing the definite location of the line across the Cascade Mountains was filed in the office of the commissioner of the general land office March 26, 1884. The case therefore turns upon the question whether at that time the land in controversy was public land, and therefore passed under the grant of July 2, 1864, to the company, or was excepted therefrom by reason of the declaratory statement of Flett filed April 9, 1869, and the proceedings thereunder. The court below held that the pre-emption claim of Flett had been extinguished by abandonment at the time of the definite location of the Cascade Branch, and did not then exist, saying, in its opinion:

"The material fact in this case is that, at the time the line was definitely located, the claim of Flett no longer attached, but had been extinguished. It is immaterial whether it was extinguished by a proceeding in the land office resulting in a cancellation of the entry, or by the voluntary action of the claimant amending his entry and releasing the lands, as in the *Amacker Case* [7 C. C. A. 518, 58 Fed. 850], or by the abandonment and forfeiture of the claim, as in the case now under consideration. The defendant relies upon the fact that the Flett entry remained uncanceled until 1891. A declaratory pre-emption statement on file prior to and at the time the grant was made would be proof of the intention of congress to exclude from the grant the land covered thereby; and such an entry in the file of the land office, made after the date of the grant, and remaining in existence at the time of the definite location, so as to furnish evidence of a claim that might ripen into a title by compliance with the land laws, would likewise serve to exclude the land from the grant; for it was not the intention of the grant, as construed by the decisions, to permit an inquiry into the bona fides of such a claim, or the performance of the conditions which rested upon the claimant. But here it is not only admitted by both the parties to the action that Flett abandoned and forfeited his claim in 1871; but the very right of the defendant to possess and claim the land is predicated upon such abandonment by Flett and the extinction of Flett's claim. Such an admission must be held to destroy the effect and force of the entry in the land office. The court will not regard the existence of an entry the life of which is admitted to have expired, but must be guided by the admitted fact. It must be held, therefore, that the land in controversy was public land, subject to the grant in 1864, and free from any claim that would exempt it therefrom in 1884, when the line of the road was definitely located."

The fact that the claim of the defendant to the land in controversy is based upon the alleged fact of the abandonment by Flett of his pre-emption claim is, we think, a false quantity, for, the action being ejectment, the question is not whether the defendant thereto has title, but whether the plaintiff has; and, if the record shows that the condition of the land was such at the time of the

definite location of the line of the road that it was excepted from the grant to the railroad company, it must necessarily result that the plaintiff has no title, regardless of who may have.

As has been seen, there was excepted from the grant to the Northern Pacific Company, among others, all lands to which there was a pre-emption claim or right at the time of the definite location of the road. This filing of the map of definite location, said the supreme court, in *Railway Co. v. Dunmeyer*, 113 U. S. 629-644, 5 Sup. Ct. 566, established the criterion by which the lands to which the road had a right were to be determined. It also, said the court, furnished—

"The means of determining what lands had previously to that moment been sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim had attached; for, by examining the plats of this land in the office of the register and receiver, or in the general land office, it could readily have been seen if any of the odd sections within ten miles of the line had been sold, or disposed of, or reserved, or a homestead or pre-emption claim had attached to any of them. In regard to all such sections they were not granted. The expressed and unequivocal language of the statute is that the odd sections 'not' in this condition are granted. The grant is limited by its clear meaning to the other odd sections, and not to these. \* \* \* Did congress intend to say that the right of the company also attaches, and whichever proved to be the better right should obtain the land? The company had no absolute right until the road was built, or that part of it which came through the land in question. The homestead man had five years of residence and cultivation to perform before his right became absolute. The pre-emptor had similar duties to perform in regard to cultivation, residence, etc., for a shorter period, and then payment of the price of the land. It is not conceivable that congress intended to place these parties as contestants for the land, with the right in each to require proof from the other of complete performance of its obligation. Least of all is it to be supposed that it was intended to raise up, in antagonism to all the actual settlers on the soil, whom it had invited to its occupation, this great corporation, with an interest to defeat their claims, and to come between them and the government as to the performance of their obligations. The reasonable purpose of the government, undoubtedly, is that which it expressed, namely: 'While we are giving liberally to the railroad company, we do not give any lands we have already sold, or to which, according to our laws, we have permitted a pre-emption or homestead right to attach. No right to such land passes by this grant. No interest in the railroad company attaches to this land, or is to be founded on this statute.' Such is the clear and necessary meaning of the words that there is granted every alternate section of odd numbers to which these rights have not attached. It necessarily means that, if such rights have attached, they are not granted."

When, on March 26, 1884, the map of the definite location of the Cascade Branch of the Northern Pacific Railroad Company was filed in the office of the commissioner of the general land office, the records of the land office showed, then existing and uncanceled, a declaratory statement filed by Flett for the land in controversy, for which filing he had paid, and for which he had the certificate of the local land office. The filing of such a statement was, as held by the supreme court in *Whitney v. Taylor*, 158 U. S. 85-94, 15 Sup. Ct. 796, "in the strictest sense of the term, the assertion of a pre-emption claim; and, when filed and noted, it was officially recognized as such." The record shows that it so remained, not only at the time of the filing of the map of the definite location

of the plaintiff's road, along which the land in controversy is situated, but until December 23, 1891. Is not the condition of the records of the land department, at the time the railroad grant becomes effective, in respect to the land embraced within its limits, to determine the question as to whether the particular land in controversy passed or was excepted from the grant to the company? If not, what becomes of the declarations made by the supreme court in the *Dunmeyer Case*, above quoted? To permit, for the purpose of a solution of that question, an inquiry into the merits of the pre-emptor's claim, is wholly inadmissible, for the reasons there stated. It is not the validity of the claim, but the fact that it existed at the time of the definite location of the plaintiff's road, that excluded the land in controversy from the category of "public lands," to which alone the company's grant attached. *Doolan v. Carr*, 125 U. S. 618-638, 8 Sup. Ct. 1228; *Whitney v. Taylor*, *supra*.

In the case of *Amacker v. Railroad Co.*, 7 C. C. A. 518, 58 Fed. 850 (referred to by the court below in support of its conclusion), it appeared from the records of the land office themselves that, at the time of the definite location of the road, the pre-emption claim that was relied upon to defeat the company's grant was not existing, for the pre-emption claimant, Scott, had theretofore "voluntarily filed in the land office his amended pre-emption claim, wholly excluding therefrom the land in controversy, and fixing his pre-emption entry upon other land." 7 C. C. A. 518, 58 Fed. 852. It is true that it is recited in the opinion of the secretary of the interior, above quoted, that on February 20, 1874, Flett entered as a homestead another piece of government land, and that on June 9, 1880, he made proof and received a certificate therefor; but it is also true that when, in September, 1870, he went to the local land office for the purpose of making proof of his right to pre-empt the land in controversy, he was denied that right, upon the ground that the railroad company was entitled to the land, and that he had lost it. That the company had not then acquired any right whatever to the land in question has already been shown, and that Flett was then legally and justly entitled to make, if he could, proof of the facts necessary to entitle him to purchase the land under the pre-emption laws, is equally clear. The error of the officers of the local land office in denying him that right is palpable. And such was the view of the subsequent officers of that office, when, in September, 1887, Flett "submitted proof in support of his pre-emption claim, founded upon his declaratory statement filed April 9, 1869," which was allowed by them, and afterwards, on appeal, by the commissioner of the general land office. Its subsequent rejection by the secretary of the interior, upon the ground, in part, that Flett had, in 1874, entered as a homestead another piece of public land, in respect to which he was allowed to make the appropriate proof, and for which he received a certificate, only emphasizes the fact that land in respect to which such a contest was being waged, to make good a claim of record and uncanceled at the time of the filing of the map of the definite location of the plaintiff's road, was not then "public land," to



which the grant to the railroad company attached. It might be difficult to maintain that a pre-emptor who goes to the local land office for the purpose of making proof in support of his claim, and is denied by the officers that right, upon the ground that the land is within a grant to a railroad company, and that he has lost it, can be properly held to have voluntarily abandoned his claim, even though, under such circumstances, he afterwards enters as a homestead another tract; but we think it unnecessary to determine whether Flett intended to abandon his pre-emption claim, or whether he abandoned and forfeited it by entering, in September, 1874, as a homestead, another piece of public land. The controlling fact is that at the time of the definite location of the plaintiff's road, opposite which the land in controversy is situated, there was on the record of the local land office Flett's declaratory statement, which had not been altered, amended, canceled, or set aside; and that fact operated to except the land in respect to which the claim existed from the grant to the railroad company.

The principle applicable to the case is thus summed up by the supreme court in the case of *Whitney v. Taylor*, *supra*:

"When on the records of the local land office there is an existing claim on the part of an individual under the homestead or pre-emption law, which has been recognized by the officers of the government, and has not been canceled or set aside, the tract in respect to which that claim is existing is excepted from the operation of a railroad land grant containing the ordinary excepting clauses, and this notwithstanding such claim may not be enforceable by the claimant, and is subject to cancellation by the government at its own suggestion, or upon the application of other parties. It was not the intention of congress to open a controversy between the claimant and the railroad company as to the validity of the former's claim. It was enough that the claim existed, and the question of its validity was a matter to be settled between the government and the claimant, in respect to which the railroad company was not permitted to be heard." 158 U. S. 92, 93, 15 Sup. Ct. 796.

Judgment reversed, and cause remanded for further proceedings not inconsistent with this opinion.

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#### GLENS FALLS NAT. BANK v. CRAMTON.

(Circuit Court, D. Vermont. March 9, 1896.)

##### 1. ABATEMENT—ACTION AGAINST STOCKHOLDER.

It is not a good plea in abatement, in an action against a stockholder in a corporation, based on a statute providing that the stockholders shall be personally liable for the indebtedness of the corporation, beyond their stock, to an amount equal to the par value of their stock, to allege merely that there are many other stockholders besides the defendant, and many other creditors besides the plaintiff, without alleging any interest in any one else in the plaintiff's cause of action, or that others are jointly liable with the defendant.

##### 2. SAME.

Nor is it a good plea in abatement to such an action that the claims of the plaintiff are so involved with the claims of others that relief for all must be had in equity.

Joel C. Baker, for plaintiff.  
Charles M. Wilds, for defendant.

WHEELER, District Judge. The charter of the Vermont Investment & Guaranty Company provides:

"Sec. 9. This corporation shall not transact business until at least twenty-five thousand dollars (\$25,000) of its capital stock has been actually paid in; and no part of the capital stock shall be withdrawn so long as the corporation has any unpaid or outstanding indebtedness or liability; and for any injury or damage coming to any person or party from a violation of the provisions of this act, the stockholders shall be personally liable, and such injury or damage may be recovered by such person or party in an action on the case, founded on this statute, and the stockholders shall be personally liable for the indebtedness of the corporation beyond their stock, to an amount equal to the par value of their stock." Laws Vt. 1884, No. 193.

This suit is brought by the plaintiff, as a creditor, against the defendant, as a stockholder, upon the last clause of this section of that statute. The defendant has pleaded in abatement that there are 3,000 shares of stock, of \$100 each, held by 146 persons, and many other creditors, with dues amounting to \$800,000; that the corporation is in the hands of a receiver of the state court, with whom the plaintiff has filed this claim; and that the cause of action, if any, accrued in equity, and not at law. "Wherefore he prays judgment if the court here will take further cognizance, or sustain the action aforesaid." The plaintiff has replied that the unsecured debts are less than \$300,000, and the defendant has demurred.

Ordinarily, a replication to a plea in abatement would be of no use; for, as the plea must be certain to a certain intent in every particular, whatever would save the suit should be negatived, and the omission of it would be fatal to the plea. But when a replication to such a plea is filed, and demurred to, the demurrer, of course, reaches back to the plea, and tests it. This plea is not a plea to the ability of the plaintiff to sue alone, for there is no allegation of any interest of any one else in the plaintiff's cause of action; neither is it a plea of nonjoinder of defendants, for there is no allegation that others are jointly liable with the defendant; and, if the plea could in any wise be said to be well founded for such defect of parties, it might be cured under the practice of the state, adopted here, by adding the parties lacking. St. Vt. § 1180. That the plaintiff has a remedy in equity against the defendant which would include this cause of action can be no ground for abating this suit, for whether the plaintiff can maintain the action or not is to be tried in the action, and not elsewhere, on a plea to the merits, and not in abatement.

The argument of the demurrer has not, however, proceeded upon the ground that the claim of the plaintiff alone against the defendant alone is cognizable only in equity, but rather upon the ground that it is so involved with the claims of others that relief for all must be had in equity. If this ground is well founded, and goes so far as to show that the plaintiff has no right of action at law against the defendant, it is matter in bar, and not in abatement, and should be so pleaded. It, then, is of the gist of the

action to be tried on the merits, and the suit must be retained for the trial. If not, the right of that trial would be denied.

But the broader ground of the plea seems to be that equitable rights of other creditors and liabilities of other stockholders are involved, and cannot be tried here in this proceeding. If there are other such rights and liabilities arising out of the situation, they cannot oust nor affect the jurisdiction of this court to try this case, without being brought forward and set up by some appropriate proceeding in equity, for that purpose. A plea in abatement is wholly inadequate to that end. The right of the plaintiff to maintain this action at law as against any legal defense must be tried in the action itself. The equitable rights of the defendant, not amounting to a legal defense, or of others, must be asserted, if any, in equity, and not in this mode here. The plea is therefore bad as a plea in abatement; the replication is good for such a plea; and the demurrer must, in this view, be overruled.

Demurrer overruled, replication adjudged sufficient, and plea insufficient; defendant to answer over.

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### NORTHERN PAC. R. CO. v. McCORMICK.

(Circuit Court of Appeals, Ninth Circuit. February 10, 1896.)

No. 226.

#### 1. PUBLIC LANDS—DECISIONS OF LAND DEPARTMENT—EFFECT OF PATENT.

The decisions of the land department in contested cases are conclusive only as to matters of fact within their jurisdiction, and a patent is not evidence of title to land which was not subject to disposition by the United States; but the question whether land included within a patent was, at the time of the issue thereof, a part of the public domain, or subject to such disposition, is always open for consideration.

#### 2. SAME.

The N. R. Co. brought an action of ejectment to recover a parcel of land within the limits of a grant to it in aid of the construction of its road. The incorporation of the company, the grant by congress, the filing of the maps of the route, in accordance with the terms of the grant, and the fact that the land in question was within the limits of the grant, were alleged in the complaint, and admitted by the answer. The complaint also alleged that, on the day of the location of the road, the land was public land, not sold or otherwise appropriated. This was denied in the answer, which alleged that, from a time prior to the grant to the railroad company, the land had been occupied and improved by the defendant and those from whom he derived title. This was denied by plaintiff's reply. The answer also alleged that, at a time subsequent to the location of the road, the defendant applied to the land office to file his pre-emption on the land; that the railroad company disputed his right to do so, and a contest followed, which was carried up, by appeals, to the secretary of the interior, who held that the defendant was entitled to the land, and a patent was thereafter issued to him therefor. These allegations were not denied by the plaintiff's reply, and thereupon judgment was given for the defendant on the pleadings. *Held* error, since the adjudication of the land department and the issue of the patent were insufficient to overcome the presumption in favor of the title of the railroad company.

In Error to the Circuit Court of the United States for the District of Montana.

F. M. Dudley, Cullen & Toole, and Joseph D. Redding, for plaintiff in error.

Toole & Wallace, for defendant in error.

Before McKENNA and GILBERT, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge. The plaintiff in error brought an action of ejectment in the court below against the defendant in error for the recovery of the possession of the N. W.  $\frac{1}{4}$  of section 21, township 13 N., range 18 W., P. M., Montana. Judgment was rendered for the defendant upon the pleadings, and the sole question presented upon the writ of error is whether or not such judgment was erroneous. It is alleged in the complaint that the plaintiff is a corporation created under the act of congress approved July 2, 1864, with authority to build a railroad from Lake Superior to Puget Sound, and that it has built such railroad, and earned the land grant which was provided for in section 3 of said act; that the map of the general route of said railroad through the territory of Montana was filed on the 21st day of February, 1872; that the map of definite route through said territory was filed on the 6th day of July, 1882; that the land in controversy lies in one of the sections granted by the act, and is within 40 miles of the line of general route and of the line of definite route; and that the land is agricultural, and not mineral. All these averments are admitted in the answer. The complaint further alleges that on the day of location of the general route of 1872, and on the day of the definite location in 1882, the land in controversy was public land of the United States, to which it had full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights. The answer denies this allegation, and states that in January, 1864, one Higgins entered into the possession of the land, which was then unappropriated; that he erected improvements, and inclosed a portion thereof with a fence; that thereafter he continued to occupy and possess the same, until he sold his rights to others, and, through mesne conveyances, to the defendant, who, on the 6th day of January, 1881, became the owner of Higgins' claim to the land; that the land has been occupied continuously from July 1, 1862, to the time of the commencement of this action, by persons who were entitled to enter the same under the public land laws of the United States. These allegations of the answer are denied in the reply. The defendant, in his answer, proceeded further to allege the facts upon which judgment was granted in his favor in the court below, which, in substance, are as follows: That some time after January 6, 1881, the date whereof is not stated, but elsewhere appears to be May 1, 1889, the defendant applied to the United States land office, at Helena, Mont., to file his pre-emption on said land; that the plaintiff appeared and contested said filing; that, after a hearing and full proof, the register and

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receiver decided that the defendant was entitled to enter said land under the laws of the United States, and that the plaintiff had no right, title, or interest therein, said land being reserved from the land grant to the railroad company; that from this decision in the land office at Helena an appeal was taken to the commissioner of the general land office, and then to the secretary of the interior, whereupon the decision was affirmed, and it was held that the defendant was entitled to hold and possess said land under the public land laws of the United States, and that the plaintiff had no right, title, or interest therein; that the defendant filed his declaratory statement with the register and receiver at Helena, Mont., to pre-empt said land on the 1st day of May, 1889; that he afterwards changed his pre-emption entry to a homestead entry, and paid the register and receiver the necessary fees therefor; that on March 20, 1891, he made final proof, and that the plaintiff made no objection or protest thereto; that the proof was accepted by the land office, and a patent issued to the defendant on November 16, 1891.

What are the facts, then, which are admitted in the pleadings, and upon which judgment was rendered? They are, in brief, that the land in controversy is in an odd-numbered section, and lies within the place limits of the land grant to the plaintiff; that said land was, at the date of the grant, as well as at the date of filing the map of the general route, and at the time of the definite location of the road, unsurveyed public land; that it was not excepted from the grant by reason of being mineral land; that it has been patented to the defendant as a homestead claimant, and has been by the land department decided to be subject to his homestead claim, in a contest between him and the plaintiff, upon proceedings the initial step of which was taken in the local land office, seven years subsequent to the date of the definite location of the road. There is but one question, therefore, for determination in this court, and that is whether the adjudication of the land department and the issuance of the patent overcome the presumption that otherwise would obtain in favor of plaintiff's title, and prove the title to be vested in the defendant.

The decisions in the land department in contested cases are conclusive only as to matters of fact which come within their jurisdiction, and a patent is not evidence of title to land which was not subject to disposition by the United States. *Barden v. Railroad Co.*, 154 U. S. 327, 14 Sup. Ct. 1030; *Best v. Polk*, 18 Wall. 112; *Morton v. Nebraska*, 21 Wall. 660; *Sherman v. Buick*, 93 U. S. 209; *Wright v. Roseberry*, 121 U. S. 488, 7 Sup. Ct. 985; *Mining Co. v. Campbell*, 135 U. S. 286, 10 Sup. Ct. 765. As the pleadings stood at the time judgment was rendered, all the facts essential to the establishment of the plaintiff's title were alleged, and were undisputed, save only as they are affected by the adjudication referred to in the answer and the patent so issued. The adjudication was had upon an entry confessedly made long after the title passed to the railroad company. No state of facts appears, and none is conceivable, upon which the right of the defendant could relate back to a period anterior to the time when the grant to the plaintiff be-

came vested, except the alleged facts so pleaded in the answer, predicated the defendant's right upon a settlement on the land made before the date of the grant. Those allegations are excluded from consideration here by reason of their denial in the reply. It is not stated in the answer that the decision of the land department was based upon proof of such alleged prior settlement, or that the effect of such settlement or claim was considered in the determination of said contest. The adjudication, therefore, cannot be held to affect the legal rights of the plaintiff, nor divest it of its title. The patent was issued to land the title to which thus appears to have passed from the United States. The question whether land which is included within a patent was, at the time of the issuance of the patent or at the time the rights thereunder accrued, a part of the public domain, or subject to such disposition, is always open for consideration; and the right of the real owner of such land is not affected by the unauthorized action of the officers of the government in so issuing such instrument. The uncontroverted allegations of the answer were insufficient, therefore, to sustain the judgment; and the judgment is reversed at the cost of the defendant in error, and the cause is remanded to the circuit court for trial.

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ALBION LUMBER CO. v. DE NOBRA.

(Circuit Court of Appeals, Ninth Circuit. February 10, 1896.)

No. 230.

1. NEGLIGENCE—PRESUMPTION—DERAILMENT OF TRAIN.

Though, ordinarily, in an action for damages arising from negligence, the negligence charged must be proved by the plaintiff, when the injury complained of arises from an accident which, in itself, is indicative of negligence, such as the derailment of a train of cars, the plaintiff is relieved from the burden of further proving the defendant's negligence, as the law presumes its existence. It is not, therefore, necessary for the plaintiff, in an action for damages caused by the derailment of a logging train, to prove that running such train at any given rate of speed was dangerous, in order to justify the submission to the jury of the question of defendant's negligence in running it at too high a speed.

2. SAME—CARRIER OF PASSENGERS—LIABILITY OF OTHER THAN COMMON CARRIER.

In an action against a logging company for personal injuries caused by the derailment of a train on its logging road, on which the plaintiff was riding, it appeared that the defendant's sole business was logging, and it had never authorized the use of its road for carrying passengers; but there was evidence that the defendant's general superintendent had instructed the plaintiff, who had come to the logging camp in search of work, to get on the train, and go for his blankets, so as to return and go to work, and also evidence that the trains were used, with the knowledge of defendant, for carrying people up and down the road. *Held*, that it was not error to refuse to direct a verdict for defendant.

In Error to the Circuit Court of the United States for the Northern District of California.

C. E. Wilson and Warren Olney, for plaintiff in error.

A. B. Hunt, for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge. The plaintiff in error was the defendant in the court below in an action brought by Maria De Nobra, as administratrix, to recover damages for the death of Jose De Nobra, who was killed while being transported on the logging train of said defendant. It was alleged in the complaint that the defendant was engaged in operating a railroad, and carrying passengers and freight thereon; that it received De Nobra as a passenger on one of its trains; that the employes in charge of the train were careless and reckless and incompetent to manage the same, which fact was known to the defendant; and that, while being transported thereon, the train was carelessly and negligently run, and at a dangerous and reckless rate of speed, to wit, at more than 30 miles per hour, whereby the cars were thrown from the track, and De Nobra was killed. It was proven that the defendant operated its railroad as a logging road solely for the transportation of its own property; that one Hickey had general charge of the road and the logging camps, and had authority to employ men in the woods to work for the company; that the deceased and some others who were with him applied to him for employment on the day of the accident, and were engaged to work for the defendant. There was evidence to the effect that Hickey inquired if they had blankets, and on being informed that the deceased and another had blankets at the Big River Hotel, several miles distant, he told them to get on the cars, and go down and get their blankets, and come up the next day, and start in to work. Hickey testified, however, that he did not tell the men to get on the cars; that he had no authority to permit it; that it was not safe, for the reason that the logs were liable to roll off. The conductor of the train at the time of the accident was riding on top of the logs, and had seen the deceased on the top of the logs before the train started, and knew that he was there. He testified that he did not object to him riding or to any one riding on the train. The general manager of the defendant testified that there was no way of getting down the road except by riding on the train or walking; that those who rode on the train had to ride on the logging cars; that there was no other place for the brakeman and conductor or anybody else except to ride on the logging cars; that he knew of no instance where the company had objected to persons riding on the train if they wanted to do so. It was shown that the train was a long one, consisting of 13 cars loaded with logs, drawn by a single locomotive. There was testimony that the speed of the train at first was only about 8 or 10 miles an hour, for the first half mile, and that, upon coming to a steep down grade, the train increased its speed, and ran "like the wind," and, in the opinion of a witness, at the rate of 30 miles an hour, when a sudden jerk was felt, and the train went off the track. A witness testified that 30 or 40 miles an hour was a dangerous rate of speed for that road.

Upon the writ of error to this court, the principal assignment of error is that the court gave the following instruction:

"If you find from the evidence that the train was run at 30 miles an hour, and you also find it was gross carelessness to do so,—that is, to so run it,—you will find on this issue for the plaintiff. If you find it was not so run, but, on the contrary, it was run from 7 to 10 miles an hour, and that this was not gross negligence, you will find on that issue for the defendant. I have instanced these two rates of speed of 30 miles an hour, and from 7 to 10 miles an hour; but if the evidence satisfies you that the train was run at a different rate from either 30 miles an hour, or from 7 to 10 miles an hour, then you will have to address yourselves to the inquiry as to whether or not such rate was or was not gross negligence. If you find it was gross negligence, you will find for the plaintiff; and, if you find it was not, you will find for the defendant."

It is said that this is error, because there was no evidence whatever that running the train at a less rate of speed than 30 miles per hour was dangerous, and that, by the instruction, the court left the jury to determine whether or not any rate of speed between 10 miles an hour and 30 miles an hour was negligence. It is true that, ordinarily, in an action to recover damages for personal injuries, the elements of which the negligence consists must be proven by the plaintiff, and the burden of proof rests upon him. But, if it is shown that the injury complained of resulted from an accident which in itself is indicative of negligence, the plaintiff is relieved from the burden of further proving the negligence of the defendant, for the law presumes its existence. The derailment of a train has been held to be of itself sufficient to raise the presumption of negligence on the part of the railroad company. *Seybolt v. Railroad Co.*, 95 N. Y. 562; *The New World v. King*, 16 How. 469; *Railroad Co. v. Rainbolt*, 99 Ind. 551; *Cummings v. Furnace Co.*, 60 Wis. 603, 18 N. W. 742, and 20 N. W. 665; *Dougherty v. Railroad Co.*, 81 Mo. 325. It was not necessary, therefore, that the plaintiff should have proven that running the train at any given rate of speed was dangerous, or negligent on the part of the defendant. Notwithstanding the fact that the deceased was on the defendant's train upon the defendant's invitation, and not as a passenger for hire, the defendant owed him proper and adequate care under the circumstances. The instruction required the jury to find the existence of gross negligence on the part of the defendant before the plaintiff could recover. In that respect it was perhaps more favorable to the defendant than the law justifies, but of that the defendant cannot complain. *Railroad Co. v. Derby*, 14 How. 486; *The New World v. King*, 16 How. 469; *Railroad Co. v. Lockwood*, 17 Wall. 357.

Said Mr. Justice Davis, in *Railroad Co. v. Arms*, 91 U. S. 494:

"'Gross negligence' is a relative term. It is, doubtless, to be understood as meaning a greater want of care than is implied by the term 'ordinary negligence'; but, after all, it only means the absence of the care that was requisite under the circumstances."

Error is assigned to the refusal of the court to instruct the jury to return a verdict for the defendant. It is contended that the defendant was entitled to such instruction under the proof which was submitted, and was not denied, to the effect that the defendant was not engaged in the business of carrying passengers upon



its road, and had never authorized its superintendent to permit the use of its road for that purpose, but that its sole business was that of logging. The bill of exceptions shows that Hickey, the superintendent, had the general charge and management of the defendant's woods, logging camps, and logging railroad. He had authority to, and did, employ the men who worked for the company in the redwoods. The superintendent, so clothed with such power by the defendant, and so in the control and management of its road, engaged the plaintiff's intestate to work in the logging camps. There is evidence that he instructed him to get upon the cars, and to go down the defendant's road, for the purpose of getting his blankets, and to return the next day. The defendant cannot be heard to say, in the absence of notice to the contrary, that its general superintendent had not the powers usually incident to his office. Such an officer, in the management of such property, controls the coming and going of the trains, the method of their operation, and ordinarily decides who shall or shall not ride upon them. There was evidence that the company had notice of the fact that its trains had been used in carrying people up and down its road. There is no evidence that it had taken any means to prohibit such use of its property. The deceased was in search of work, and for that purpose applied to the defendant's superintendent, and was by the defendant, through such superintendent, hired to work. He was, by the duly-authorized agent of the defendant, invited to get upon the train upon which he received his injury. The case is widely different in principle from the cases cited by the plaintiff in error, of which those most relied upon were *Duff v. Railroad Co.*, 91 Pa. St. 458; *Hoar v. Railroad Co.*, 70 Me. 65; and *Morris v. Brown*, 111 N. Y. 318, 18 N. E. 722. In *Duff v. Railroad Co.* the injured person had habitually ridden upon the train without paying fare, in violation of the company's regulations, but with the connivance of the conductor. The court said: "This is the case of a mere trespasser, and the company owed him no duty." In *Hoar v. Railroad Co.* it was held that, if the defendant company were not a common carrier, a section foreman with his hand car had no right to impose upon it the onerous responsibilities arising from that relation; that he had "no right to accept passengers for transportation, and bind the company for their safe carriage, and every man may safely be presumed to know thus much." In *Morris v. Brown* the defendants were contractors for the excavation of a tunnel. The plaintiff's intestate was a civil engineer, whose duty it was to inspect their work. In so doing, he entered the tunnel on dump cars, which were operated to remove debris, and were not intended to take persons into the tunnel, or fitted for that purpose. There was no obstruction in the way of the engineer's inspecting the work on foot. He had ridden on the dump cars with the permission of the brakeman, but not with the knowledge of the defendants, and there was no proof that the brakeman had authority to give such permission. Upon these facts, it was held that the defendants were not liable for an accident occurring through the brakeman's negligence.

It is further contended that the court should have instructed the jury to return a verdict for the defendant, on the ground that the negligence of the deceased was proven to have contributed to his injury. Such contributory negligence is said to consist in the fact that the plaintiff rode in a dangerous place upon the car. The evidence upon this point was conflicting. The conductor testified that the place where the deceased was riding was as safe as it would have been elsewhere, and it appeared that the conductor and brakeman both rode there. In view of such testimony, there can be no doubt that the question of the contributory negligence of the plaintiff's intestate was properly left to the jury.

The judgment is affirmed, with costs to the defendant in error.

### SALISBURY v. BENNETT.

(Circuit Court, S. D. New York. March 10, 1896.)

#### 1. PRACTICE—LEAVE TO INTERPOSE DEFENSE—DISCRETION.

When application is made to the favor of a court, for leave to interpose a defense, and the application is one resting in discretion, all the circumstances of the case will be considered, and care taken not to sanction any such abuse of procedure as would shock the conscience.

#### 2. SAME—STATUTE OF LIMITATIONS.

On November 17, 1892, defendant, the proprietor of a newspaper, published an article claimed by plaintiff to be a libel upon him. The limitation fixed by the local statute for actions for libel was two years. More than five months before the expiration of such period, plaintiff delivered a summons in an action for libel to the United States marshal, for service, but the marshal was unable to make service, because the defendant had previously left the United States, and continued to sojourn abroad, though maintaining his domicile and legal residence within the state. The local statutes provided no means by which an effectual service, other than personal service, could be made. The defendant continued to sojourn abroad until after the expiration of the period of limitation, but after the passage of an amendment to the local statute, permitting attachments in actions for libel, he voluntarily appeared in the action, and answered, but did not plead the statute of limitations, for the reason that under the prevailing interpretation of the statute, his counsel supposed that the period of his sojourn abroad would not be counted as part of the period of limitation, though his residence continued within the state. A decision of the state court of last resort having given a contrary interpretation to the statute, defendant applied for leave to amend his answer by setting up the statute. *Held* that, even if the state court's interpretation of the statute should be adopted by the federal court, it would be so grossly inequitable to permit defendant so to defeat the plaintiff's action that his application for relief to amend should, in the exercise of discretion, be denied.

Taylor, Thompson & Kaufman, for plaintiff.  
John Townshend, for defendant.

LACOMBE, Circuit Judge. This is a motion for leave to amend the answer by setting up the statute of limitations. The action is for libel, and the limitation is two years. Code Civ. Proc. N. Y. § 384. The defense was not interposed when the answer was served, for the reason that, under the decisions of the state courts

as they then stood, defendant's counsel assumed that it was a defense which he could not establish. The recent decision of the state court of appeals in *Hart v. Kip*, 148 N. Y. 306, 42 N. E. 712, reversing same case, 74 Hun, 412, 26 N. Y. Supp. 522, and construing section 401 of the Code, however, has led him to believe that such defense can be established, and he now asks leave to set it up.

This section 401 provides that:

"If, after a cause of action has accrued against the person, he departs from and resides without the state, and remains continuously absent therefrom for the space of one year or more, \* \* \* the time of his absence \* \* \* is not a part of the time limited for the commencement of the action."

The court of appeals held in *Hart v. Kip* that, when a person retains his residence and domicile in this country, continuous absence as a mere sojourner in another country or in many countries, no matter how prolonged, will not suspend the running of the statute of limitations under this section.

The facts of this case are as follows: The libel was published in defendant's newspaper on November 27, 1892, on which day the cause of action arose. On May 13, 1893, the defendant left this port for Europe, where he has sojourned continuously ever since, still, however, retaining his legal residence and domicile in this city. On June 14, 1894, more than five months before the expiration of two years after the cause of action arose, plaintiff placed the summons and complaint in the hands of the United States marshal for service. As the plaintiff was by that time in Europe, personal service of the summons could not be effected. Nor could he be served under section 435, which provides for substituted service upon a resident, for, under the decisions, that section does not apply where defendant's residence outside of the state is known. Nor could plaintiff proceed by publication, because the case was not one in which an attachment could be obtained; and, if defendant did not voluntarily appear, judgment by default could not have been entered against him upon proof of service by publication. Code, §§ 428, 635, 1216, 1217. Defendant's act, therefore, in departing from the state, and remaining absent therefrom, effectually prevented plaintiff from beginning his action. On September 1, 1895, nearly three years after the cause of action accrued, an amendment of the Code extended the provisions of section 635 as to the issue and levy of attachments, for the first time extending that provisional remedy to a case such as this, where the action is to recover a sum of money only, as damages for an injury to person or property in consequence of negligence, fraud, or other wrongful act. Thereupon defendant voluntarily appeared in the action by his attorney, and served an answer, November 29, 1895.

The old rule which discriminated against the defense of the statute of limitations per se as unmeritorious, and not entitled to the same consideration as other defenses, is no longer as strictly enforced as it once was. *McQueen v. Babcock*, 3 Abb. Dec. 132; *Arnold v. Chesebrough*, 33 Fed. 571. The excuse given for not pleading this defense originally is a reasonable one. It was hardly

to be supposed that section 401 would be so construed as defendant now contends it has been. Nevertheless, when application is made to the favor of a court for leave to interpose any defense, and the application is one resting in discretion, all the circumstances of the case will be considered, and care taken not to sanction any such abuse of procedure as would shock the conscience. If defendant correctly interprets the decision in *Hart v. Kip*, the plaintiff's cause of action was barred by the statute November 28, 1894, although the only reason why he was unable to commence his action five months before by personal service of the summons was because defendant left the country, and has ever since remained continuously absent therefrom. Nay, under such a construction of section 401, it would (except for the amendment of 1895) be possible for one person, by negligence, fraud, or other wrongful act, to injure another, and then, by going abroad the same day, and sojourning there for two years, escape all liability to respond in a civil action for the wrong.

Whether or not the decision in *Hart v. Kip* does so construe the section is a point upon which no opinion is here expressed. It will be noted that in that case, although defendant was absent, he, to plaintiff's knowledge, had property here, and the cause of action was such that plaintiff could at any time during the six years have begun suit with a warrant of attachment. If, however, the decision in *Hart v. Kip* does require the state courts to construe section 401 in the way defendant contends, it does not necessarily follow that the federal practice would be conformed thereto. Section 914 of the United States Revised Statutes simply undertakes to conform the federal practice to the state model, "as near as may be," not as near as may be possible, nor as near as may be practicable. The United States supreme court has declared that it remains still with the federal judges to construe, and, in a proper case, reject, any subordinate provision in such statutes as would unwisely incumber the administration of the law, or tend to defeat the ends of justice in their tribunals. *Railroad v. Horst*, 93 U. S. 300.

Defendant, therefore, would probably gain nothing by his amendment if it were allowed; and, if the converse were true, it would be so grossly inequitable to permit him thus to defeat the plaintiff's claim that his application should be denied.

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#### HUKILL v. MAYSVILLE & B. S. R. CO. et al.

(Circuit Court, D. Kentucky.)

##### 1. PRACTICE—VOLUNTARY DISMISSAL—NEW ACTION.

The plaintiff's voluntary dismissal of an action for a tort, as against some of the defendants, not on the merits, is not a bar to a subsequent action by such plaintiff against the same defendants.

##### 2. REMOVAL OF CAUSES—DIVERSE CITIZENSHIP—FRAUDULENT JOINDER OF PARTIES.

In order to justify the removal to a federal court of a suit in which some of the defendants are citizens of the same state as the plaintiff,

on the ground that such defendants have been fraudulently joined to defeat the jurisdiction of the federal court, it must appear, not only that they were joined for that purpose, but that no cause of action is stated against them, or that they are in law improperly joined, or that the averments of fact on which a joint liability is asserted are so palpably untrue or unfounded as to make it improbable that the plaintiff could have inserted them in good faith.

3. RAILROAD COMPANIES—UNAUTHORIZED LEASES—LIABILITY FOR NEGLIGENCE.

Where a railway company leases its line, without authority of law, though the lease is void, a servant of the lessee company, whose rights depend only upon contract, and not upon any public duty, cannot recover against the lessor company for injuries sustained through the negligence of the lessee in the operation of the road.

4. MASTER AND SERVANT—LIABILITY FOR TORTS—JOINT AND SEVERAL LIABILITIES.

When a master becomes liable to his servant for a failure to discharge his implied contractual obligation to furnish a reasonably safe place for such servant to work, caused by the personal and affirmative act of another servant, in which no concert of the master is alleged, the liability of the master and of the delinquent servant to the injured party is not joint, but several. *Warax v. Railway Co.*, 72 Fed. 637, reaffirmed.

This case was heard on a motion to remand to the state court.

On the 12th day of January, 1895, the plaintiff filed his petition in the Kenton circuit court, at Independence, Ky., against the Maysville & Big Sandy Railroad Company, Chesapeake & Ohio Railway Company, C. E. Acra, George Shumate, Henry Thien, John Shappart, and W. E. Gaynor, defendants, in the following words:

"Defendant the Maysville & Big Sandy Railroad Company is, and at the time hereinafter stated was, a corporation owning a railroad extending into the county of Kenton, and railway tracks, workshops, roundhouse, railway yard, and other appurtenances in said county. Defendant the Chesapeake & Ohio Railway Company is, and at the times hereinafter stated was, a foreign corporation, and possessed, used, and operated said railroad, railway tracks, workshops, roundhouse, railway yard, and other appurtenances under a lease from said the Maysville & Big Sandy Railroad Company, which lease was made without legislative or other authority; and said the Chesapeake & Ohio Railway Company now so operates said railway. On the night of April 28, 1894, L. A. Hukill was the servant of said the Chesapeake & Ohio Railway Company, employed by it as one of the crew of a switching locomotive engine in the yard of said railroad in Kenton county; and while said Hukill was then and there, as such servant, at work upon and about a train of freight cars of said the Chesapeake & Ohio Railway Company, in said yard, and on said railway, he was, by reason of gross and wanton negligence of all the defendants, struck by a board projecting from the roof of one of another train of freight cars of said the Chesapeake & Ohio Railway Company, then and there in the possession, custody, and control of said corporation, and on another and adjoining track of said railroad, and thereby said Hukill was violently knocked under the train of cars upon and about which he was at work, and was run upon and over by said train, and thereby, and by being so knocked from said car, he was so injured in his person that he soon thereafter died thereof. Said projecting board was part of the roof of said car, from which the same projected. Said projecting board was, and long before said decedent was injured as aforesaid had been, a defect in said car, from which it projected, that endangered the bodies and lives of said decedent and other servants of said the Chesapeake & Ohio Railway Company. Said car, with said board so projecting therefrom, was, in said defective, unsafe, and dangerous condition, by the defendants, with gross and wanton negligence, placed where the same was when said decedent, Hukill, was struck by said board as aforesaid. With gross and wanton negligence, all the defendants permitted said defective car to remain where the same was, in its said defective, unsafe, and dangerous condition, until said decedent was injured

as aforesaid; and, with gross and wanton negligence, all the defendants failed to remedy said defect in said car before said Hukill was injured thereby. The defendants Acra, Shumate, Thien, and Shappart were, at all times aforesaid, in said railway yard, which was then and there an inspecting station of said railway, servants of said the Chesapeake & Ohio Railway Company, employed by it in said yard, and at said inspecting station, as car inspectors and repairers; and, as such servants, said Acra, Shumate, Thien, and Shappart had inspected said car, from which said board projected as aforesaid, long before said decedent was thereby knocked from his place, and under said train, as aforesaid, and before said decedent was injured as aforesaid, and for a time long enough theretofore to have, by the exercise of ordinary care, repaired said defect, and prevented said injury to said Hukill. Said Acra, Shumate, Thien, Shappart, the Chesapeake & Ohio Railway Company, and also their codefendants, well knew of said defect in said car; and, before said Hukill was injured as aforesaid, the defendants Acra, Shumate, Thien, Shappart, Gaynor, and the Chesapeake & Ohio Railway Company, and each of them, could, by the exercise of ordinary care, have known of said defect in said car, and could, by the exercise of such care, have remedied and repaired said defect, and prevented said injury to said decedent. Defendant W. W. Gaynor was, at the times aforesaid, a brakeman upon the train in which was said defective car, and he was then and there the servant of defendant the Chesapeake & Ohio Railway Company, and was by his said employer then and there charged with the work and duty of ascertaining and knowing the condition of said car and train, and to either repair said defect in said car, if he could do so, or, if he could not do so, then to report the same upon the arrival of said train and car in said railway yard. And all the defendants, by their joint gross and wanton negligence, failed to remedy or repair said defect; and, by their joint gross and wanton negligence, all the defendants caused said injury to and death of said decedent. Said L. A. Hukill did not, before he was injured as aforesaid, know that said board by which he was struck projected from said car, nor did he know that there was any defect in said car; and he could not, before he was injured as aforesaid, by the use of ordinary care have known that said board did project from said car, or that said car was in any wise defective. By the death of said decedent his estate was damaged in the sum of fifty thousand dollars. On the — day of May, 1894, plaintiff was, in and by the county court of Kenton county, Kentucky, duly appointed administrator of the estate of said decedent, and on the same day he duly qualified as such in said court, and he still is such administrator. Plaintiff prays judgment for fifty thousand dollars and costs."

In its petition for removal the Chesapeake & Ohio Railway Company made the necessary averments as to the amount in controversy and the diverse citizenship of itself and the plaintiff, averring that there was, in said suit, a controversy which could be fully determined as between the plaintiff and the petitioner. "Your petitioner further says that suit upon the same cause of action hereinbefore stated was instituted in the Kenton circuit court at Independence, Kentucky, on May 16, 1894, and that, in said suit, the Maysville & Big Sandy Railroad Company, the Chesapeake & Ohio Railway Company, C. E. Acra, George W. Shumate, Henry Thien, and John Shappart were made joint defendants. Thereafter on the 16th day of October, 1894, at a term of Kenton circuit court, at Independence, the plaintiff discontinued said action as to George W. Shumate, C. E. Acra, Henry Thien, John Shappart, and the Maysville & Big Sandy Railroad Company. Petitioner says that the discontinuance as to the said Maysville & Big Sandy Railroad Company, C. E. Acra, George W. Shumate, Henry Thien, and John Shappart was absolute and final, and without the reservation of any right on part of said plaintiff to again institute a suit upon the same cause of action against the said Maysville & Big Sandy Railroad Company, C. E. Acra, George W. Shumate, Henry Thien, and John Shappart, or either or any of them. And petitioner says that, by reason of the absolute discontinuance of said cause as to the said Maysville & Big Sandy Railroad Company, C. E. Acra, George W. Shumate, Henry Thien, and John Shappart, the plaintiff is barred from any further proceedings against them, or either of them, upon said cause of action; and that said plaintiff

has no right or authority in law to now prosecute its cause of action against the said Maysville & Big Sandy Railroad Company, C. E. Acra, George W. Shumate, Henry Thien, and John Shappart, or either of them. Your petitioner says that, upon the discontinuance of said suit, on the 16th day of October, 1894, as to the said Maysville & Big Sandy Railroad Company, and the said Acra, Shumate, Thien, and Shappart, it filed in the Kenton circuit court, at Independence, a petition and bond for removal of said case to the United States circuit court for the district of Kentucky, which said petition for removal alleged that the said Maysville & Big Sandy Railroad Company, and said Acra, Shumate, Thien, and Shappart were fraudulently and improperly joined as parties defendant for the sole purpose of defeating the right of petitioner to remove said case to the United States circuit court; that said case was transferred to the United States circuit court for the district of Kentucky; and that the said plaintiff appeared in said United States circuit court, and moved the court to remand said case; and that the said United States circuit court overruled said motion to remand, and found, as a fact, that said Maysville & Big Sandy Railroad Company, C. E. Acra, George W. Shumate, Henry Thien, and John Shappart were fraudulently and improperly joined for the purpose of evading the jurisdiction of the United States court. And thereafter the plaintiff discontinued said case in said United States circuit court, and thereafter, on January 12, 1895, filed the present suit in this court. Your petitioner says that the said Maysville & Big Sandy Railroad Company was, at the time of the institution of said suit, on May 16, 1894, and still is, a corporation organized under the laws of the state of Kentucky, and of no other state; and that the defendants C. E. Acra, G. W. Shumate, Henry Thien, and John Shappart were, at the time of the institution of this suit, and still are, residents and citizens of the state of Kentucky; and that the said Maysville & Big Sandy Railroad Company, and the said Acra, Shumate, Thien, and Shappart were fraudulently and improperly joined as parties defendant, because of the fact that they were residents and citizens of the state of Kentucky, for the sole purpose of defeating the jurisdiction of the United States circuit court. And your petitioner further says that the said W. E. Gaynor is a sham party defendant, and that he was fraudulently and improperly joined as a party defendant for the sole purpose of defeating the jurisdiction of the United States court; that said W. E. Gaynor was joined as a party defendant because of his residence and citizenship in Kentucky; and that the joining of said W. E. Gaynor as a party defendant is merely a device to defeat the jurisdiction of the United States court. And your petitioner offers herewith a bond, with good and sufficient surety, conditioned according to law, for its entering in the circuit court of the United States for the district of Kentucky, being the proper district, on the first day of its next session, a copy of the record of this suit, and for paying all costs that may be awarded by said court, if said court shall hold that this suit was wrongfully or improperly removed thereto. And your petitioner prays this honorable court to proceed no further herein, except to make the order of removal required by law, and to accept said surety and bond, and to cause the record herein to be removed into said circuit court of the United States for the district of Kentucky. And your petitioner will ever pray."

The plaintiff filed an answer to the petition for removal, in which he did not deny the averments of the petition for removal with reference to the previous suit which had been removed and then dismissed. He denied, however, that any of the defendants was joined in this action fraudulently and improperly for the sole purpose of defeating the jurisdiction of the United States. Upon a hearing of the motion to remand, and on the issue raised between the petition for removal and the answer of the plaintiff, there were introduced the special acts of Kentucky showing the corporation of the Maysville & Big Sandy Railroad Company; and reference was made, under the laws of Kentucky, also, to the charters of the Chesapeake & Ohio Railway Company in West Virginia and Virginia; and reference was made to the General Statutes of Kentucky, showing, as was claimed, authority vested in the Maysville & Big Sandy Railroad to lease its road to the Chesapeake & Ohio Railway Company. There was introduced in evidence, also, the record of the proceedings in the previous suit of Hukill against the same defendants,

referred to in the petition for removal, and set forth in the opinion of this court in the case of Hukill v. Chesapeake & O. Ry. Co., 65 Fed. 138.

Wm. Goebel, for plaintiff.

C. B. Simrall, for defendants.

Before TAFT and LURTON, Circuit Judges.

TAFT, Circuit Judge (after stating the facts as above). This motion came regularly before me in this court, but it involved such important questions in regard to the removal of cases from the state courts to the federal courts that I deemed it my duty to invite Judge LURTON to sit with me in the hearing of the case. This he kindly consented to do, and we have given to the consideration of the issues presented, and those which we find it necessary to decide, the care their importance demanded. We have been assisted by a very full argument by counsel, and by elaborate briefs. If any one of the Chesapeake & Ohio Railway Company's codefendants is properly joined with it, there is no jurisdiction in this court, and the motion to remand is granted. The counsel contend that there is no proper joinder of the railway company, and urge this on a number of grounds: First. It is contended that the proceedings in the previous suit, by which four of the codefendants of the Chesapeake & Ohio Railway Company were dismissed from the action, prevent their joinder here, and estop plaintiff from claiming any liability against them. Second. The second ground is that the proof conclusively shows the joinder of the Chesapeake & Ohio Railway with its codefendants for the sole and fraudulent purpose of depriving it of its constitutional and statutory right of removal to this court. Third. It is insisted that no cause of action, in the petition, is stated either against the Maysville & Big Sandy Railroad Company or against the natural persons codefendants with the removing defendant. Fourth. It is further contended that, under the allegations of the petition, the cause of action against the defendants is not a joint tort, upon which the Chesapeake & Ohio Railway Company and the Maysville & Big Sandy Railroad Company can be joined as defendants with the employes of the Chesapeake & Ohio Railway Company.

1. The contention of the defendants, that the proceedings in the state court in the first suit, by which plaintiff dismissed from the suit four of the codefendants of the Chesapeake & Ohio Railway Company, prevent their joinder in this suit, cannot be sustained. Their dismissal was voluntary on the part of the plaintiff, and was not upon the merits of the cause. The plaintiff had the right, assuming that a joint tort had been committed, to unite all the defendants, or to sue one or more of them. He had the right, therefore, to dismiss against some without prejudice, and to continue his suit against others. No estoppel grew out, therefore, of the dismissal. Moreover, such a plea is matter of defense, and could have no bearing on the question of removal, for that depends alone on the averments of the petition.

2. The history of this cause conclusively shows that the codefendants of the Chesapeake & Ohio Railway Company were joined for the purpose of avoiding the jurisdiction of this court. See 65 Fed. 138. But this alone would not justify the removal of the suit against the



**Chesapeake & Ohio Railway Company.** It must also appear, either, by the averments of the petition, that no cause of action is stated against the other codefendants, or that they are, in law, improperly joined, or it must be shown by proof that the averments of fact in the petition upon which the joint liability of the codefendants of the Chesapeake & Ohio Railway Company is asserted are so palpably untrue and unfounded as to make it improbable that the plaintiff could have inserted them in his petition in a bona fide belief that he could make proof of them on the trial. If a plaintiff has a good cause of action for a joint tort against several defendants, it is not fraudulent in him to join them all in his suit, even if it does appear that he would not have joined the resident defendants with the nonresident defendants except for the purpose of avoiding the jurisdiction of the federal court. Where he has reasonable ground for a bona fide belief in the facts upon which the liability of all the defendants depends, his motive in joining them cannot be questioned. It is only where he has not, in fact, a cause of action against the defendants, and has no reasonable ground for supposing that he has, and yet joins them, in order to evade the jurisdiction of the federal court, that the joinder can be said to be fraudulent, entitling the real defendant to a removal.

In *Railroad Co. v. Wangelin*, 132 U. S. 599, 10 Sup. Ct. 203, the suit was by the plaintiff, a citizen of Illinois, against the Louisville & Nashville Railroad Company, a corporation of Kentucky, and the Southeast & St. Louis Railway Company, a corporation of Illinois, in a state court of Illinois, for a trespass upon the plaintiff's land. The case was removed into the circuit court of the United States by the Louisville & Nashville Railroad Company, alleging a separate controversy between it and the plaintiff, and that its codefendant was not incorporated at the time the trespasses alleged in the declaration were committed, if at all. It was held that the cause of action alleged was a joint tort, and that the fact that the two defendants pleaded several defenses did not prevent the right of the plaintiff to continue its suit against them jointly, and did not create a separable controversy between the plaintiff and either of the defendants, for the purpose of removal under the act of March 3, 1875. Mr. Justice Gray used this language:

"It is equally well settled that, in any case, the question whether there is a separable controversy which will warrant a removal is to be determined by the condition of the record in the state court at the time of the filing of the petition for removal, independently of the allegations in that petition, or in the affidavit of the petitioner, unless the petitioner both alleges and proves that the defendants were wrongfully made joint defendants for the purpose of preventing a removal into the federal court."

And, in showing that the exception had no application to the case in hand, Mr. Justice Gray closed his opinion with the following sentence:

"As to the suggestion, made in argument, that the Southeast & St. Louis Railway Company was fraudulently joined as a defendant in the state court for the purpose of depriving the Louisville and Nashville Railroad Company of the right to remove the case into the circuit court of the United States, it is enough to say that no fraud was alleged in the petition for removal, or pleaded or offered to be proved in the circuit court."

In *Plymouth Consol. Gold Min. Co. v. Amador & S. Canal Co.*, 118 U. S. 270, 6 Sup. Ct. 1034, in which a mining company and others were joined as defendants for polluting a stream of water belonging to the plaintiff, and the mining company sought to remove the case to the federal court, averring, in its petition for removal, that the other defendants, who were of the same state citizenship with the plaintiff, had been joined merely for the purpose of preventing the removal, Chief Justice Waite said:

"It is possible, also, that the company may be guilty, and the other defendants not guilty; but the plaintiff, in its complaint, says they are all guilty, and that presents the cause of action to be tried. Each party defends for himself; but, until his defense is made out, the case stands against him, and the rights of all must be governed accordingly. Under these circumstances, the averments in the petition that the defendants were wrongfully made to avoid a removal can be of no avail in the circuit court, upon a motion to remand, until they are proven; and that, so far as the present record discloses, was not attempted. The affirmative of this issue was on the petitioning defendant. That corporation was the moving party, and was bound to make out its case."

The necessary implication of these authorities is that, where fraudulent joinder of resident defendants is alleged in the petition, and the fraud is made out, a case is presented in which the removal of the case of the nonresident defendant to the federal court may be sustained. But it must appear that the allegations of joint liability were unfounded in fact, were not made in good faith, with the expectation of proving them at the trial, and were made solely for the purpose of evading the jurisdiction of the federal court. In this case, no attempt has been made to disprove, as palpably untrue, the averments of fact in the petition upon which a liability is claimed against the codefendants of the Chesapeake & Ohio Railway Company; and therefore it follows that if, on the facts alleged in the petition, a tort is shown upon which the Chesapeake & Ohio Railway Company and its codefendants may be jointly sued, the motive of the plaintiff in joining the codefendants of the railway company is immaterial, and cannot affect the right of the plaintiff to retain them as defendants in this suit. It should be noted that the question of fraud here is quite a different one from the question of fraud as it was presented on the motions to remand in the previous suit, brought on this same cause of action, the decision of which is reported in 65 Fed. 138. There the plaintiff, after having joined the defendants, had voluntarily dismissed them from the action before judgment, with the admission that he had joined them, not for the purpose of taking judgment against them, but merely to evade the jurisdiction of the United States court. After he had dismissed them, the cause was removed a second time to the United States court. It was then plainly within the federal jurisdiction but for the fact that the time had elapsed within which a removal could be had under the statute. It was held that the conduct of the plaintiff in joining defendants without a bona fide intention of proceeding to judgment against them, and merely for the purpose of preventing removal, estopped him from pleading the delay in removal which his conduct had necessitated, to defeat the right of removal. Here the plaintiff has not dismissed the defend-

ants, and, on the face of the record, there are citizens of the same state on both sides of the controversy. He has the right to proceed to a judgment against all the defendants, assuming that the facts stated make out a joint cause of action. If so, his motive in joining them, and in taking judgment against them, cannot be inquired into here.

3. We are therefore brought to the third ground urged by the defendants for overruling the motion to remand, namely, the question whether any cause of action is stated against the defendants other than the Chesapeake & Ohio Railway Company. We do not think that any cause of action is stated on the face of the petition against the Maysville & Big Sandy Railroad Company. The averment of the petition is that the plaintiff was a servant of the Chesapeake & Ohio Railway Company, and that he was injured through the negligence of the Chesapeake & Ohio Railway Company and its servants in allowing its machinery to remain in a defective condition, and that the accident occurred on the railroad of the Maysville & Big Sandy Railroad Company, which had leased to the Chesapeake & Ohio Railway Company its railroad without authority of law. The proposition of the plaintiff's counsel is that, where a railroad company, without authority of law, leases its property, to be operated by another railroad company, the lessor company is liable for all the torts of the lessee company. Such a proposition cannot be supported. The lessor company, by virtue of its charter, assumed the obligation to perform certain duties for the public in carrying freight and passengers, and in observing statutory precautions for the protection of the public from danger in the operation of its railroad. When it unlawfully shifts to another company the burden of the discharge of these duties to the public, any loss resulting to any member of the public from a failure by its lessee to discharge them may be made the basis for a claim for damages against the lessor company. The duty owing from the lessee company to its employés is, however, one which arises wholly from contract, and is not imposed by the charter of incorporation. The lessor company was not obliged to employ as a servant any particular members of the public. A person entering the service of the lessee company, therefore, acquired no right against the lessee except by virtue of the terms of employment. Such employé came into no privity of contract with the lessor company. No case has been cited to us in which it is held that the servant of the lessee company, operating under a void lease, can recover against the lessor company for injuries sustained by the negligence of the lessee company in the operation of the road. The only cases where liability in tort is enforced against the lessor company are those where the person injured is a member of the public, with the right to rely upon the discharge of the public duties assumed by the lessor company in the operation of the road. Such persons are shippers, who have a common-law right to demand of the common carrier that he shall carry their goods safely, passengers, who have a common-law right to demand of the common carrier that they shall be carried safely to their destination, and travelers upon the high-

way, who have a statutory and common-law right to such a reasonable and careful operation of the road as shall not unduly injure them in the pursuit of their lawful rights. The distinction is clearly marked in the decision of Judge Lurton in the case of *Arrowsmith v. Railroad Co.*, 57 Fed. 165. In that case the court used this language:

"Where a railway company leases its line without authority of law, such lease is void; and it will continue liable for all the negligence of the lessee affecting the public."

The same limitation of liability under such circumstances is expressed by the court of appeals of New York in *Abbott v. Railroad Co.*, 80 N. Y. 27. See, also, *Railway Co. v. Curl*, 28 Kan. 622; *Freeman v. Railway Co.* (Minn.) 10 N. W. 594; *Railway Co. v. Brown*, 17 Wall. 450; *Railway Co. v. Winans*, 17 How. 38; *Harper v. Railroad Co.*, 90 Ky. 359, 14 S. W. 346. The exact question arose in the case of *Railway Co. v. Culberson*, 72 Tex. 375, 10 S. W. 706, where the distinction was fully considered, and, in an elaborate and very satisfactory opinion, it was held that a servant of the lessee railroad company, operating under a lease not authorized by the statute, who was injured while in the employ of the lessee company, could not hold the lessor company for damages for such injury. A similar conclusion was reached in the case of *Hanna v. Railway Co.* (88 Tenn. 310, 12 S. W. 718), in which it was held that a railroad company, which permitted a private person to move upon its track certain cars without authority of law or sanction of statute, assumed no responsibility to the employes of such private person for injuries sustained while in his service by reason of his negligence. The distinction above made was not considered or suggested in the opinion of this court in *Hukill v. Chesapeake & O. Ry. Co.*, 65 Fed. 138, because it was unnecessary in reaching a conclusion there. So far, then, as the joinder of the Maysville & Big Sandy Railroad Company is used as a reason to oust the jurisdiction of this court, it must fail. *Arrowsmith v. Railroad Co.*, 57 Fed. 165.

The next point made by the counsel for the railway company is that no case is stated against the defendant car inspectors. It is urged that nothing is charged against them but mere omission or nonfeasance in violation of their duty to their employer, and that, while this may subject the company to liability to the plaintiff for injuries suffered by him because of such nonfeasance, it gives him no right of action against them, for the reason that there is no relation of privity between him and them. Conceding the validity of the distinction by which a servant is held liable directly to a stranger only for positive conduct which the servant might reasonably anticipate would result in injury, and which did so while acting in the business of his master, and not for an entire failure to enter upon the master's business at all, the averments of the petition make it inapplicable here. The petition charges that the defendants (which includes the defendant car inspectors), with gross and wanton negligence, placed the car with the board projecting therefrom in a defective, unsafe, and dangerous condition, whereby the defendant was injured. This was

misfeasance, because, but for their act in placing the car where it was, in its dangerous condition, the plaintiff would not have been injured. It is quite like the case considered by the supreme judicial court of Massachusetts in *Osborne v. Morgan*, 130 Mass. 102. There it was held that a servant who attached a block and tackle to the ceiling in the course of his employment, and did not sufficiently secure it to prevent its falling, was directly liable to a fellow servant who was injured by the fall. Chief Justice Gray, speaking for the court, said:

"It is often said, in the books, that an agent is responsible to third persons for misfeasance only, and not for nonfeasance. And it is doubtless true that, if an agent never does anything towards carrying out his contract with his principal, but wholly omits and neglects to do so, the principal is the only person who can maintain any action against him for nonfeasance. But, if the agent once actually undertakes and enters upon the execution of a particular work, it is his duty to use reasonable care in the manner of executing it, so as not to cause any injury to third persons which may be the natural consequence of his acts; and he cannot, by abandoning its execution midway, and leaving things in a dangerous condition, exempt himself from liability to any person who suffers injury by reason of his having so left them without proper safeguards. This is not nonfeasance, or doing nothing; but it is misfeasance,—doing improperly."

In much the same way, when the car inspectors moved this car into a place where its defective condition would in all probability injure some one, they were doing something improperly, instead of doing nothing.

4. We come, now, to the fourth and last proposition upon which the removing defendant, the railway company, rests its right to invoke the jurisdiction of this court to try the suit against it. It is that, even if the natural defendants are liable to the plaintiff on the averments of the petition, yet they are not jointly liable with the removing defendant. We have considered, in the case of *Warax v. Railway Co.* (just decided) 72 Fed. 637, the question when a master and his servant may be joined in an action for the negligence of his servant; and we reached the conclusion that, unless it appeared that the master was present in person, directing the servant, or unless the work in which the servant was engaged was of a character that made the result complained of possible and probable, the liability of the master and servant was not joint. This was on the ground that the liability of the master and that of the servant arise on different principles. That of the master is based on public policy, while that of the servant depends on the simple law of trespass or direct injury. There is a similar distinction between the liability of the master and the servant in this case. The master's liability here arises from his implied contractual obligation to his servant to furnish a reasonably safe place in which, and reasonably safe appliances with which, to do his work. The liability of the servants charged as defendants in this case must arise from their personal and affirmative acts, directly causing the injury, as for trespass. No concert of action is alleged between the master and his servants in this case. On the contrary, the petition is full of allegations that, if the servants had done their duty to their master properly, no injury would have resulted to the plaintiff. It is true the petition charges

that all the defendants were guilty of joint negligence, and that all of them placed the car where it was in its defective condition; but, in the absence of a specific allegation that the defendant railway company was present, by some representative or superintending officer, we must assume that the company was only constructively present in the persons of its agents, the car inspectors and brakeman who are made codefendants, and that its liability is not based on anything akin to the personal interference of a natural master. The case of *Campbell v. Sugar Co.*, 62 Me. 552, was a case in which the liability of the principal arose, as here, from a positive duty enjoined on him, and not simply from the public policy which makes the master liable for the negligence of his servant in and about his business; and yet it was there held that the master and servant were not properly joined unless actual concert of action, or something equivalent thereto, was shown. And a similar relation existed in the case stated by the court in *Clark v. Fry*, 8 Ohio St. 358, 377, between the master and servant, with respect to the character of the act made the basis of that action.

For these reasons, we hold that there was a misjoinder of the removing defendant with its codefendants, that the removing defendant has a right to have the suit against it tried in this court, and that the motion to remand, so far as the suit against it is concerned, must be denied.

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BAIRD v. WINCHESTER.

(Circuit Court of Appeals, Ninth Circuit. February 10, 1896.)

No. 229.

CONTRACTS—DAMAGES—AGREEMENT TO EXTEND MORTGAGE.

Plaintiff, who owned a part of a tract of land, subject to a mortgage to defendant, and who was desirous of buying the remainder thereof by an exchange of other property, entered into negotiations with defendant for an extension of the mortgage, offering to make certain improvements, insure the property for defendant's benefit, and pay delinquent taxes on the property. Defendant agreed to the terms, but further negotiations resulted in breaking off the agreement, and defendant commenced foreclosure proceedings. Plaintiff then sued defendant, alleging that he had purchased the part of the tract not at first owned by him by the conveyance of property worth \$3,200, that he had made improvements and paid for insurance, that the pendency of the foreclosure hindered the disposition of the property, and thereupon demanded judgment for the value of his land so conveyed and the sums so expended. *Held*, that the complaint stated no cause of action.

In Error to the Circuit Court of the United States for the District of Washington, Western Division.

Hudson & Holt and F. A. Graham, for plaintiff in error.

Bogle & Richardson, for defendant in error.

Before McKENNA and GILBERT, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge. The plaintiff in error commenced an action against the defendant in error in the court below, and in

his amended complaint alleged, in substance, the following facts: That Henry K. Moore and wife owned lots 8, 9, and 10 in block 610, in Tacoma, Wash., and mortgaged the same for \$5,000 to the Lombard Investment Company, which mortgage was assigned to the defendant. That the defendant resides at Baltimore, Md. That, prior to January 1, 1894, the plaintiff had become the owner of a portion of said lots 9 and 10, and had paid a proportionate share of the interest on the mortgage up to November 1, 1893. That, the interest and taxes being thereafter delinquent, the defendant had threatened to foreclose his mortgage. That the plaintiff and the defendant then began a correspondence by mail, in which the defendant stated that there was due on said mortgage the principal sum and \$253 interest. The plaintiff then wrote the defendant, informing him that Moore and wife had agreed to deed the remainder of said incumbered property to the plaintiff in exchange for other property, and proposing to the defendant that, if he would extend the time of payment of the mortgage for one year, he (the plaintiff) would pay the delinquent interest and the interest to May 1, 1894, and all delinquent taxes, and would insure the property, with loss payable to the defendant, and would paint and paper the house, and fix up the outbuildings, and would send the defendant an abstract of title up to date, "provided you extend the loan of \$5,000 one year from May 1, 1894, at 6 per cent." That the defendant accepted said proposition on March 9, 1894, by telegraphing as follows: "I will extend loan for eighteen months from November last on condition that you carry out your promises in letter of February 9th. I will instruct my agent to-day to arrange matter with you,"—and by a letter in which he wrote, "I trust you can acquire title to the property quickly, so as to assume the loan and close up the transaction." That the plaintiff did not know who was the defendant's agent until about the 14th or 15th day of March. That he thereupon notified the agent of his acceptance of the proposition, but that the agent did not receive the defendant's instructions until March 25th. That it was made a condition in said instructions that the plaintiff give notes for the interest on said mortgage for the time it was to run, and that he obtain a new deed to the whole of the property from Moore and wife, which deed should contain a covenant that the plaintiff assumed the payment of the mortgage. That the plaintiff assented to such condition and requested said agent to prepare such deed, which the agent agreed to do, but never did. That the plaintiff also requested of the agent that he should have the defendant execute an agreement in writing in accordance with the understanding between plaintiff and defendant, and also requested that the defendant agree in writing that he would, on compliance with said agreement, fully release and discharge the lien of the mortgage on said lots. That the defendant refused to sign such agreement. Thereupon the plaintiff further requested that the defendant agree in writing to assign the mortgage to plaintiff, or to some one by the plaintiff to be named, on compliance by the plaintiff with said agreement. That, without notice to the plaintiff of the acceptance

or rejection of his said last proposition, the defendant, on April 27, 1894, commenced a suit to foreclose said mortgage. That, before the commencement of said suit, the plaintiff purchased the interest of said Moore and wife in said property by the exchange of other property, worth \$3,200, and in further performance of his part of the agreement insured the buildings on said property, with loss payable to the defendant, and expended therefor \$64, and repaired said buildings at a cost of \$1,057.75, and that the plaintiff stood ready to carry out his part of said agreement as soon as the agreement and the papers with reference thereto should be ready, as was agreed upon. That the commencement of said foreclosure suit and its pendency deprived the plaintiff of the ability to sell or trade said property, and that the conduct of the defendant justifies the plaintiff in considering the agreement of March 9th rescinded. That, by reason of the premises, the plaintiff has lost the property he exchanged for said lands and the amount paid for insurance and repairs. Wherefore he demands judgment for \$4,321.75. The defendant demurred to the complaint as not stating a cause of action, which demurrer was by the court sustained. The plaintiff thereupon presented and asked leave to file a second amended complaint, containing substantially the same allegations, and permission to file the same was denied. Both of these rulings are now assigned as error.

It is the contention of the plaintiff in error that, by his proposition, written to the defendant, and its acceptance by the defendant's answer by telegraph on March 9, 1894, a contract was made and entered into between the parties, notwithstanding the condition expressed in the telegram, and the further fact that the details of the agreement were to be reduced to writing and signed by the parties. It may well be doubted whether, in view of the language of the defendant's answer to the plaintiff's proposition, and the continued negotiations and the new propositions advanced upon either side, culminating in an abandonment of the correspondence and the commencement of the foreclosure suit, the minds of the parties ever met upon a definite agreement. But it is unnecessary to determine that question in this case. In any view of the contract relations between the parties, the plaintiff had not, in our judgment, a cause of action against the defendant to recover the sums of money laid in his complaint.

It is urged that the defendant rescinded the contract, and that he cannot, while wrongfully disregarding his own covenants, retain the moneys paid by the plaintiff in carrying out, upon his part, the terms of the agreement. If the defendant had indeed received the plaintiff's money, and now retained the same under a contract which he had violated, a different case would be presented; but such are not the facts alleged in the complaint. The \$3,200 for which the plaintiff sues is the value of real estate which he conveyed to Moore and wife, in return for which he received the title to other real estate, the value of which is not charged to be less than that which he so deeded in exchange. The money he spent in improvements on the buildings went to the betterment of



property the title to which was vested, not in the defendant, but in himself. The money expended for insurance was for the benefit of the plaintiff, rather than for the defendant, since, in case of loss by fire, the sum realized upon the policy would have been paid to the defendant and credited upon his lien, thereby lessening the amount of his demand upon the mortgaged property. There is no allegation in the complaint from which it may be seen that the defendant received even a remote benefit from the expenditures made by the plaintiff. It is not alleged that the value of the incumbered property was insufficient security for the mortgage debt, or that the expenditures made by the plaintiff were necessary for the protection of the defendant's security. The cases cited and relied upon by the plaintiff in error in support of his demand for the repayment of his expenditures, are cases in which moneys paid by one party to a contract in reliance upon its terms had been received and wrongfully retained by the other party, who had violated the same, and recovery was had as for money had and received. *Levy v. Loeb*, 89 N. Y. 386; *Raymond v. Bearnard*, 12 Johns. 274; *Graves v. White*, 87 N. Y. 463; *Gould v. Bank*, 86 N. Y. 75; *Seipel v. Trust Co.*, 84 Pa. St. 47.

The plaintiff confines his action to a demand for the recovery of the moneys expended by him, and does not seek to recover damages for the violation of the contract. Such damages, even if it were conceded that a binding contract was entered into, would be nominal only; for there is no allegation in the complaint upon which other damages may be predicated. If a contract existed, as alleged, one of its provisions was that the time of the payment of the mortgage was extended. That fact could have been pleaded by the plaintiff in abatement of the foreclosure suit. It is alleged, it is true, that the fact of the pendency of that suit has embarrassed the plaintiff, and has interfered with his disposition of his property; but it is not alleged that the security is inadequate to meet the defendant's demands, or that, after the payment of the defendant's lien out of the proceeds of the incumbered property at the end of the foreclosure proceedings, enough will not remain to reimburse the plaintiff fully for all his outlays. Under such a state of facts, it is apparent that the plaintiff could, at most, recover nominal damages only, and that this court would have no jurisdiction of his cause of action.

The judgment is affirmed, with costs to the defendant in error.

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SAYWARD v. DEXTER, HORTON & CO.

(Circuit Court of Appeals, Ninth Circuit. February 10, 1896.)

No. 215.

1. CONTRACTS—BENEFIT OF THIRD PARTY—AGREEMENT NOT TO SUE.

S. was the owner of a lumber mill, at which he carried on the business of manufacturing lumber. Under an agreement with the firm of H. & S., the latter advanced moneys to S., and furnished him with goods for use

in operating the mills, the product of which was consigned to H. & S., who sold the same, and accounted for the proceeds, applying them on their account against S. At a time when S. was largely indebted to H. & S., the latter entered into a contract with one H., by which it was agreed that H. should thereafter make advances and furnish supplies to S., and the product of S.'s mill should be consigned to H., who agreed to pay H. & S. on account of their claims against S., \$20,000 down, and \$2,500 per month thereafter, until the indebtedness of S. to H. & S. was satisfied; and, in consideration thereof, H. & S. agreed not to attempt, during the life of the contract, and while its terms were complied with, to enforce their claims against S. by assignment thereof, or otherwise. S. was not a party to the contract, though his consent to its provisions was recited. The terms of the contract were duly performed by H., but, before its expiration, H. & S. assigned their claims against S. to D. & Co., who brought suit thereon against S., and attached his property. S. pleaded in abatement the agreement not to enforce claims, contained in the contract between H. and H. & S. *Held*, that such plea was bad, S. not being a party to the contract, and there being nothing to show that the stipulation not to sue was made for his benefit, and not merely for the protection of H. in making the payments agreed on for his account.

2. LIMITATIONS—ACCOUNT STATED—SEPARATE ITEMS.

In an action upon an account stated, consisting of a series of monthly statements, showing items and balance due, rendered to and accepted by the defendant, the defense of the statute of limitations is not available as to separate items entering into such statements of account.

3. INTEREST—AGREEMENT AS TO RATE.

Where no usury law prevails, but any rate of interest specified in writing by the parties to a contract is valid and legal, if monthly statements of account are rendered by a merchant showing items of goods sold, interest thereon at a rate above that fixed by statute in the absence of contract, credits, and balance due, interest being calculated in each succeeding month on the balance of the preceding one, including the items of interest therein, such rendition and the acceptance of such statements by the customer, during a series of months, constituting a regular course of business, amount to an adoption of the rate of interest charged, with the same effect as if there had been an express agreement in writing.

Appeal from the Circuit Court of the United States for the District of Washington.

This was an action by Dexter, Horton & Co. against W. P. Sayward on an account stated. Judgment was rendered for the plaintiff in the circuit court. 66 Fed. 265. Defendant brings error. Affirmed.

Battle & Shipley, J. B. Howe, and W. Lair Hill, for plaintiff in error.

Blaine & De Vries and Struve, Allen, Hughes & McMicken, for defendant in error.

Before McKENNA and GILBERT, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge. Dexter, Horton & Co., a banking corporation, brought an action against William P. Sayward, the plaintiff in error, upon an account stated for \$227,768.86, alleging that on an accounting had on the 30th day of September, 1891, between Harrington & Smith, of Seattle, Wash., and the said Sayward, that amount had been found due and owing to the said Harrington & Smith, and that the said account so stated had been subsequently

sold and assigned by them to said Dexter, Horton & Co. At the time of the commencement of the action, a writ of attachment was sued out under the laws of the state of Washington, upon the grounds—First, that the said W. P. Sayward was a nonresident of that state; and, second, that he had assigned, secreted, and disposed of his property with intent to delay and defraud his creditors. Under this writ, a large amount of property in the state of Washington, belonging to the said Sayward, was attached. To the action so commenced, a plea in abatement was filed by Sayward, in which he set forth that on the 18th day of October, 1890, he was, and for a long time prior thereto had been, the owner of extensive lumber mills at Port Madison, Wash., known as the "Port Madison Mills," and was engaged in the business of manufacturing large amounts of lumber at said mills; that, at the date so named, there existed an agreement between him and Harrington & Smith, by which the latter furnished him goods and merchandise to be used by him in operating said mills, and he, in turn, delivered and consigned to said firm, at San Francisco and other places, lumber, the product of said mills, which Harrington & Smith sold and accounted for and applied to his credit on their account against him for supplies so furnished; that on said 18th day of October, with Sayward's consent, and in pursuance of an understanding and agreement between him and one E. M. Herrick, of San Francisco, which agreement was known to Harrington & Smith, the firm of Harrington & Smith and said Herrick entered into a contract in writing, as follows:

"Memorandum of agreement, made and entered into this eighteenth day of October, A. D. 1890, at San Francisco, California, by and between the firm of Harrington & Smith, a copartnership, engaged in general merchandising business, whose principal place of business is at Seattle, Washington, and who are represented at the city and county of San Francisco, state of California, by Andrew Smith, a partner, by virtue of authority to sign its firm name, vested in Andrew Smith, and by such signature to bind all the partners of said firm, the party of the first part, and E. M. Herrick, doing business at the city and county of San Francisco, state aforesaid, the party of the second part, witnesseth: That whereas, the said party of the first part has, at sundry times previous to the date of this agreement, furnished goods, wares, and merchandise, and advanced moneys, to Wm. P. Sayward, owner of the Port Madison Mills, receiving from said Port Madison Mills certain products (to wit, lumber, etc.), which said products the said party of the first part has heretofore consigned to said party of the second part for sales and returns, and that, growing out of the connection of said party of the first part with said Wm. P. Sayward and said Port Madison Mills, said party of the first part has certain claims against said Wm. P. Sayward, which said party of the first part desires to make available as rapidly as possible; and whereas, said party of the second part, with the consent of said Wm. P. Sayward, and under the conditions hereinafter recited, undertakes to make certain payments on account of said claim of party of the first part against Wm. P. Sayward; and whereas, the said party of the second part has entered into certain arrangements with Wm. P. Sayward and said Port Madison Mills to receive consignments of its products (to wit, lumber, etc.), for sales and returns, furnishing funds and supplies, as may be agreed between said party of the second part and said Wm. P. Sayward, and which arrangements said party of the first part hereby permits said party of the second part to enter into and with said Wm. P. Sayward: Now, therefore, in consideration of the sum of five (\$5) dollars paid by each of the parties hereto to each other, the receipt whereof by each is

hereby acknowledged, and, further, the covenants and agreements hereinafter recited, the said parties hereto hereby covenant and agree as follows, to wit: 1st. That said party of the first part agrees that on and after November 1st, 1890, said party of the second part hereafter may supply and furnish directly to said Wm. P. Sayward goods, wares, merchandise, and supplies, as required by said Port Madison Mills, purchasing same at the city and county of San Francisco, or otherwise, as said party of the second part may elect. And, further, that the said Wm. P. Sayward may, on and after such date, consign directly, to said party of the second part, all products (to wit, lumber and kindred material) the shipment of which shall not have been made from Port Madison Mills at said date except cargoes now loading; said consignments being for sales and returns by said party of the second part for account of said Wm. P. Sayward. 2d. That all shipments made by said Wm. P. Sayward from Port Madison Mills prior to said date, including all cargoes loading at mill on Oct. 20, 1890, and consigned to said party of the second part, shall be deemed as for account of said party of the first part; and proceeds thereof shall be paid by said party of the second part to said party of the first part as soon as realized, it being understood and agreed that all claims against said Wm. P. Sayward or said Port Madison Mills for wages, logs, supplied prior to said date, shall be paid for or liquidated by said party of the first part, as heretofore. 3d. Said party of the first part agrees that, so long as the covenants assumed by said party of the second part hereinafter recited are fully carried out by said party of the second part, said party of the first part will not, by any action or procedure whatsoever, whether by assignment of said claims or otherwise, enforce or attempt to enforce said claims against said Wm. P. Sayward; but nothing in this clause shall be deemed to restrain said party of the first part from maintaining the legal life of such claims as said party of the first part may have against said Wm. P. Sayward or said Port Madison Mills. 4th. For and in consideration of above, the said party of the second part agrees to pay to said party of the first part, on or before the thirty-first day of October, A. D. 1890, the sum of twenty thousand dollars, which sum shall be credited by said party of the first part upon its claims against said Wm. P. Sayward, and duplicate receipts for such payments shall be given by said party of the first part, one to said party of the second part, the other to said Wm. P. Sayward or said Port Madison Mills; and such receipts shall recite briefly the conditions of said payment. 5th. And said party of the second part agrees to pay to said party of the first part, or its order, the sum of twenty-five hundred dollars monthly, during each month hereafter, during the term of this agreement, and, further, agrees to pay to said party of the first part, from time to time, all such surplus as may be in the hands of said party of the second part, growing out of the management of the business of said Port Madison Mills by said party of the second part, and the connection of said party of the second part with said Port Madison Mills, as hereinbefore recited; all of said payments being evidenced by receipts for their amount, given by said party of the first part to said party of the second part, reciting that such payments are for account of said Wm. P. Sayward, and the application of said payments by said party of the first part, upon its said claim against said Wm. P. Sayward, shall be as may be arranged between said party of the first part and said Wm. P. Sayward. It is further understood by each of the parties hereto that, so long as the covenants by each hereinbefore recited are fully kept and maintained, this agreement shall be deemed to be in force for not less than the term of three (3) years from said November 1st, 1890, excepting, always, that, if at any time said party of the second part or said Wm. P. Sayward shall cause to be satisfied and liquidated the claims of said party of the first part against said Wm. P. Sayward, said party of the first part shall transfer to said party of the second part all liens and claims, whether recorded or otherwise, vesting in said party of the second part all right, title, and interest of said party of the first part in and to same, this agreement shall be terminated.

"In witness whereof, the said parties hereto have set their hands and seals, in duplicate, this eighteenth day of October, 1890.

"[Signed]

Harrington & Smith. [Seal.]  
 "E. M. Herrick. [Seal.]"

The plea further alleged that, in pursuance of said agreement, the parties thereto and the said Sayward entered upon the performance thereof, and that Herrick paid Harrington & Smith the sum of \$20,000, and \$2,500 per month each month until and including the month of December, 1891, and that all of said payments were received and accepted by said firm as payments for the said Sayward, in accordance with said agreement; that Sayward and Herrick did keep and perform all covenants and conditions of said contract to be kept and performed by them, until prevented from so doing by the attachment in said action; that Dexter, Horton & Co., at the time of the commencement of the action, knew of the said agreement and its performance by Herrick and Sayward, and knew that the assignment of said account was in violation of the terms of said agreement, and that the commencement of the action was also in violation of said agreement and the extension of credit therein provided for.

A demurrer to the plea in abatement was sustained. Thereupon Sayward moved to discharge the writ of attachment, upon affidavits setting forth substantially the facts that were alleged in the plea. The motion was overruled. Sayward then filed his answer to the amended complaint, denying the material allegations thereof, and alleging errors and omissions in the account, and setting forth again the matters so pleaded in abatement. The answer also pleaded the statute of limitations to a portion of the account. To the matters contained in the answer surcharging and falsifying the account, replication was filed. To the other defenses, the plaintiff filed a general demurrer, which was, upon argument, sustained by the court. The said cause was thereupon, on the written stipulation of the parties, sent to a referee, who reported findings of fact and conclusions of law, to the effect that the defendant in the action was indebted to the plaintiff therein, upon an account stated, in the sum of \$130,308.67, and interest thereon from September 30, 1891. To this report both parties filed exceptions, which were heard before the court. Thereupon the findings of fact of the referee were adopted by the court, but his conclusions of law were modified, the court holding that the plaintiff in the action was entitled to recover the sum of \$153,128.89, and interest thereon from September 30, 1891, at the rate provided by the statute laws of Washington, amounting in the aggregate to \$192,627.64. On writ of error to this court, the principal contention of the plaintiff in error is that the facts pleaded in the plea of abatement filed by the defendant in the action were sufficient to abate said action, and to preclude the plaintiff from suing on said statement of account until the expiration of the period of three years, during which Harrington & Smith had covenanted not to enforce, or attempt to enforce, their demand against Sayward.

Upon consideration of the terms of the agreement, it is clear that there are but two parties to its covenants. The circumstances under which it was entered into may properly be considered in interpreting its provisions. For some time prior to that date, Harrington & Smith, of Seattle, had furnished supplies and mer-

chandise for the operation of the Port Madison Mills, and, in return, had managed and disposed of the output of lumber therefrom, through E. M. Herrick, at San Francisco. Under this arrangement, there was no express contract for extension of the time to pay the large balance owing from Sayward to Harrington & Smith. The account was overdue at all times, and Sayward could have been sued thereon at any moment. The allegation in the answer that, by the terms of the agreement then existing, "Harrington & Smith agreed that whatever might become due them by reason of said transactions was to be paid out of the profit of said mill," is not sufficient to show that Harrington & Smith agreed to look solely to the profit of the mill for their reimbursement for outlays, or that they were not to be otherwise paid, or that they would not hold Sayward personally liable for the debt. At the time of entering into the new agreement, it was desired by the parties thereto to substitute Herrick for Harrington & Smith in the future business of the Port Madison Mills. It was the purpose of the agreement to provide that, from and after the date thereof, Herrick, and not Harrington & Smith, should furnish the supplies and merchandise necessary for the operation of the mills, and that the lumber should be consigned directly to him, and that he should dispose of the same, and render his account to Sayward, but that, out of the proceeds, certain monthly fixed payments should be made upon the balance due Harrington & Smith. The new arrangement did not necessarily concern Sayward. For aught that appears in the agreement or in the allegations of the plea, it was matter of indifference to him whether his advances or supplies should come from Harrington & Smith or from Herrick, and whether the product of his mill should be handled by the one or by the other of the two parties to the agreement.

This view of the agreement does not deprive Sayward of any right he enjoyed under the former agreement. It leaves him in substantially the same position that he occupied before. Prior to the agreement, the balance he owed for advances was due, and payment was enforceable at any time by legal proceedings. Under the new arrangement, there was no greater reason than had before existed why provision should be made for his immunity from suit during a period of three years, or for any fixed period. The references in the contract itself to Sayward are not evidence that Sayward was a party in interest therein, or that he was privy thereto. It is recited, it is true, that Herrick, with the consent of Sayward, and under the conditions expressed in the agreement, undertakes to make the payments to Harrington & Smith which the agreement calls for. To say that Sayward assented to these payments is but to say that the arrangement between the parties to the agreement was satisfactory to him, and that he made no objection thereto. It indicates that he consented to the substitution of Herrick for Harrington & Smith, as contemplated by the contract. It is not to be construed as evidence that Sayward made any of the covenants in the agreement, or was privy thereto, or that he exacted the abstention from suit which is stipulated for by its terms. There is also in the contract an allusion

to an arrangement between Sayward and Herrick, but no information is afforded of its terms, except that it is an arrangement to receive consignments of lumber for sales and returns, and to furnish funds and supplies as may be agreed between them. It may be inferred from this recital that there was a separate contract or agreement between Sayward and Herrick. But this reference to an arrangement, so far from connecting Sayward with the contract in question, makes it evident that all the rights of Sayward, so far as they were protected by contract, were provided for in a separate agreement, the terms of which are not disclosed. If it had been intended by the parties to the contract between Harrington & Smith and Herrick to protect Sayward as well as Herrick against the legal enforcement of Harrington & Smith's demand, it is difficult to perceive why Sayward was not made a party to the agreement, and why such provision was not expressly set forth in terms. Nor do the allegations of the plea add to the force of the terms of the contract, so as to sufficiently connect Sayward therewith, or to show that he was a party or privy thereto. Those averments are that the contract was made with the consent and acquiescence of Sayward, and in pursuance of an understanding and agreement between him and Herrick, and that, after its execution, Herrick and Harrington & Smith and Sayward entered upon the performance thereof, and that Herrick made the payments contemplated therein, and that Sayward and Herrick have kept and performed all the covenants and conditions of said contract to be kept and performed by them. There were no covenants and conditions expressed in the contract that were to be kept or performed by Sayward, and these allegations add nothing to the force and effect of the contract itself. They mean no more than that the contract was complied with up to the time of commencement of the suit, that is to say, each party thereto performed his part. So far as Sayward was concerned, he had not in the contract bound himself to do anything. He had not agreed to furnish the product of the Port Madison Mills to Herrick, nor had he agreed to receive funds and supplies from Herrick. So far as the terms of the contract are concerned, neither of the parties thereto could have compelled Sayward to do or refrain from doing any act therein specified. If he were in any way bound to acquiesce in the arrangement contemplated in the contract, it was by virtue of a separate agreement with one or both of the other parties. His right to plead in abatement of this action an agreement in forbearance of suit depends wholly upon the terms of such agreement. He cannot call to his aid covenants made between Harrington & Smith and Herrick, to which he was not a party or privy. But it is contended that, notwithstanding the fact that Sayward is not a party to the contract, the covenant not to sue was made for his benefit, and he may therefore enforce it. It is true there are exceptions to the general rule that the parties or privies to a contract or to its consideration are the only persons who may avail themselves of its provisions, and one of the exceptions is the case of a contract which contains an express promise for the benefit of a third person. Although this doctrine is now denied in England, and is disputed in some of the states, the weight of American authority is in its favor.

Said Mr. Justice Davis, in *Hendrick v. Lindsay*, 93 U. S. 149: "The right of a party to maintain assumpsit on a promise not under seal, made to another for his benefit, although much controverted, is now the prevailing rule in this country." But it is not every contract for the benefit of a third person that is enforceable by the beneficiary. It must appear that the contract was made and was intended for his benefit. The fact that he is incidentally named in the contract, or that the contract, if carried out according to its terms, would inure to his benefit, is not sufficient to entitle him to demand its fulfillment. It must appear to have been the intention of the parties to secure to him personally the benefit of its provisions. *National Bank v. Grand Lodge*, 98 U. S. 123; *Wright v. Terry*, 23 Fla. 160, 2 South. 6; *Burton v. Larkin*, 36 Kan. 246, 13 Pac. 398; *Chung Kee v. Davidson*, 73 Cal. 522, 15 Pac. 100; *Railroad Co. v. Curtiss*, 80 N. Y. 219; *Vrooman v. Turner*, 69 N. Y. 280; *Greenwood v. Sheldon*, 31 Minn. 254, 17 N. W. 478; *Austin v. Seligman*, 18 Fed. 520. There is nothing in the contract made by *Harrington & Smith* with *Herrick* indicative of an intention to protect *Sayward* from suit except for *Herrick's* own benefit. The parties to that agreement evidently had in view their own advantage, and not *Sayward's*. It was clearly for *Herrick's* protection primarily and chiefly that the stipulation in question was inserted. If it was the intention to protect *Sayward* also, that purpose was only incidental and secondary. *Sayward* incurred no new risk under the new contract. His attitude of debtor to *Harrington & Smith* was not changed by the new arrangement. It remained the same as before. The only difference was that his future advances were to come from *Herrick*. But *Herrick's* relation was materially changed. He assumed new obligations. He was required to pay out large sums of money to *Harrington & Smith*, and to make to *Sayward* the advances necessary for carrying on the business. He could not safely undertake these covenants of the contract without stipulating for *Sayward's* protection against the suit of *Harrington & Smith*. We find no error, therefore, in the ruling of the trial court upon the demurrer to the plea in abatement or to the plea in bar set forth in the answer.

It follows from the construction we have given to the terms of the contract and the plea in abatement, that there was no error, as charged in the second assignment, in the refusal of the court to dissolve the attachment, and in including in the final judgment the order that the attached property be sold and applied to the payment of the judgment debt. One of the grounds upon which the writ was issued was the fact that the defendant, *Sayward*, was nonresident within the state. The affidavit alleging that fact was not contradicted on the motion to dissolve, and that ground of attachment continued to exist until the final determination of the case. The debt has been shown to have existed. If there were error in issuing the writ of attachment, such error is not ground to reverse the judgment and to order a new trial. It is only where the judgment erroneously assumes to dispose of attached property that this court may, upon writ of error, consider the validity of the attachment. In such a case the function of the court is limited to the power to modify or



reverse that portion of the judgment which concerns the disposition of the property. In this case there existed a valid cause of action and a ground of attachment, and the property was actually levied upon under the writ. There was no error, therefore, in ordering it sold for the satisfaction of the judgment.

It is further assigned as error that the court sustained the demurrer to the third affirmative defense, contained in the sixteenth paragraph of the answer to the amended complaint. The language of the affirmative defense so demurred to is as follows:

"Defendant, for a further answer and defense, says that the alleged cause or causes of action in favor of the plaintiffs herein, or Harrington & Smith, hereinbefore mentioned, or either of them, as to the items or any of the items set forth and mentioned in the preceding paragraph twelve of this answer, denominated discounts, interest per month (compounded monthly), unauthorized and illegal charges, miscellaneous charges against defendant of discount, interest, attorney's fees, etc., did not accrue to the said plaintiff, or the said Harrington & Smith, or either of them, within three years next before the commencement of this action, nor at any other time. Said paragraph twelve of this answer, referred to above, is made a part of this further, affirmative, separate answer and defense."

The paragraph 12 referred to in this plea of the statute of limitations is that portion of the answer which attempts to surcharge and falsify certain of the items of the account which are alleged by the plaintiff to have entered into the stated account upon which he sought to recover. The answer, it is true, denied that there had been an accounting, as alleged in the amended complaint; and it alleged that objection had been made by the defendant to certain statements rendered by Harrington & Smith purporting to show the state of the account between the parties; and a long list of items, beginning with April, 1882, and extending to November, 1891, was set forth in paragraph 12, and declared therein to be erroneously and improperly charged. If there had, in fact, been no accounting between Harrington & Smith and the defendant, and it had been attempted in this action to recover upon an open account, and not a mutual account, no reason is perceived why a plea of the statute of limitations as to the items that accrued more than three years before the commencement of the suit would be open to demurrer; but the suit was brought upon an account stated. In the findings of the referee, which were adopted by the court in rendering judgment, it was found that there had been such accounting as was declared upon. That accounting consisted in the rendering of a monthly statement from Harrington & Smith to Sayward, in which there was reiterated each month a balance showing the liability of Sayward to Harrington & Smith, as deduced from all their antecedent dealings. Such statement of account, assented to by Sayward, as found by the referee and the court, amounts to an adoption of, and assent to, the figures showing the condition of the account at the date of each statement. It is unnecessary to determine whether, under the statute of Washington (section 131 of the Code of 1891) which provides that the new promise to pay a pre-existing debt must be in writing in order to take the case out of the operation of the

statute of limitations, a former balance found under a prior accounting may be kept alive after it would otherwise be barred by the statute, by bringing it forward, and prefixing the amount thereof to each subsequent monthly statement of account, and incorporating the same therein, for that question is not presented in this case. The plea of the statute of limitations is not directed against any such item in the accounting. It does not allege that any balance found due at any prior accounting is barred by the statute of limitations. It is directed purely against a long series of items covering a period of nine years, all of which went into the accounting, and were merged when the balance was arrived at, constituting an independent debt, from the date of which the statute of limitations began to run, and not before. *Toland v. Sprague*, 12 Pet. 300; *Spring v. Gray*, 6 Pet. 156; *Keller v. Jackson*, 58 Iowa, 629, 12 N. W. 618; *Union Bank v. Knapp*, 3 Pick. 96; *Ramchander v. Hammond*, 2 Johns. 200. There could be no error, therefore, in sustaining a demurrer to the plea of the statute of limitations; for, upon the state of the case as evidenced now upon the record, it is clear that such defense was not available to the defendant, and he is not injured by the ruling.

It is assigned as error that the court held valid and legal the charges of interest made by Harrington & Smith against Sayward. It appeared from the findings of fact that the course of dealing between the defendant and Harrington & Smith was as follows: Beginning with June 1, 1884, and continuing to November 30, 1891, Harrington & Smith charged interest upon the general monthly balance of account due them from defendant, including the amount due for merchandise, as well as for cash advanced and discount thereon, and included the amount due as interest in the balance which appeared as the first item of charge upon each monthly statement, upon which interest was, in turn, charged. During that period Harrington & Smith allowed 60 days' credit upon all amounts for merchandise furnished by them, and charged interest thereon only after the expiration of 60 days from the end of the month in which the goods were furnished. They also allowed the defendant, as a credit, interest upon all sums received by them as payments upon the account of defendant during said month, at like rates as were charged by them. The difference between the debit of interest and the credit of interest was the sum charged as interest by said firm at the end of each month upon said general balance of account. The rates of interest were as follows: From June 1, 1884, to February 28, 1885, 1 per cent. per month, compounded monthly; from March 1, 1885, to May 31, 1888,  $1\frac{1}{2}$  per cent. per month, compounded monthly; from June 1, 1888, to September 30, 1891, 10 per cent. per annum, compounded in said monthly statements. It appeared, also, that it was the custom of Harrington & Smith, and the general custom of merchants at Seattle at that time, to charge interest upon unpaid bills of merchandise after the expiration of 60 days from the date of purchase, and that the rates of interest charged by Harrington & Smith were not greater than those ordinarily charged

by other merchants; that during that period it was the custom of Harrington & Smith to forward to the defendant, upon each day when they furnished goods, an itemized statement thereof, and, at the end of the month, it was their custom to furnish a general monthly statement, including a statement of all goods furnished, of all moneys advanced as expense of the mills, and all moneys advanced in payment of principal and interest on account of defendant; also, of interest upon their said account against the defendant, in the following manner: The defendant was debited with all goods furnished and moneys advanced, and he was credited with all moneys received as proceeds of cargoes of lumber, and a balance was struck showing the state of his account with the firm at the end of each month. This balance was carried forward as the first item in next month's account in the statement thereof. The court held that the charges of compound interest upon the monthly balances could not now be objected to by the defendant; that this method of keeping and rendering accounts had continued so long as to become a regular course of dealing between the parties, and had been known and not objected to by defendant for a number of years. The laws of Washington territory at the time of these transactions provided as follows:

"Any rate of interest agreed upon by parties to a contract, specifying the same in writing, shall be valid and legal." Code 1881, § 2369.

The court held that there arose upon each of these accounts stated an implied promise to pay the entire balance shown thereby, including these items of interest, and that the charge thereof was not illegal.

In *Young v. Hill*, 67 N. Y. 162, 171, it was said:

"Compound interest is recoverable upon merchants' accounts of mutual dealings, upon an express agreement, or when an agreement may be implied from custom or usage, for the reason that an extension of time for payment is implied, and the transaction is fair, as the balance may change, and the benefit of the usage be mutual."

Upon page 172 it was said:

"Upon a like statement of account and of a balance due between merchants, the law implies a promise, for the reason that the several items, when established, constitute legal demands of the respective parties against each other, upon which an action would lie; and the acknowledgment is an admission of the correctness of the items of debit and credit, resulting in the stated balance."

In *Backus v. Minor*, 3 Cal. 231, a similar doctrine was held. The court said:

"The dealings of the parties run through a period of more than two years. During this time the appellants render to the defendant three or four stated accounts, showing balances. In all of these accounts, and through the whole of this time, they pursue the one mode of calculating interest. It has become their way of doing business."

In *Marye v. Strouse*, 6 Sawy. 205, 5 Fed. 483, the court said:

"I find, then, that Strouse knew the rate of interest charged against him in his account. There was no mistake or fraud about it. Having this knowledge, he not only receives and retains accounts without objection, but even pays them. The method of keeping and rendering accounts continued so long as to become a regular course of dealing between the parties. Under such cir-

cumstances, the authorities are clear that an account stated cannot be opened because an item of interest which went into it could not have been recovered by suit, provided such item is not illegal."

The charges of interest, as disclosed by the state of the account between Harrington & Smith, were not illegal under any statute of Washington. There was no usury law applicable to the case. There was a statutory rate fixed to control the rate of interest in the absence of agreement, but there was no statute prohibiting the parties from charging against each other, in their mutual accounts, any rate of interest that they might see fit to adopt. Their current credits and payments upon account, and their acquiescence in the accounts stated, amounted to an adoption of the rate charged, with the same effect as if there had been an express agreement in writing to pay the same. *Auzerais v. Naglee*, 74 Cal. 60, 15 Pac. 371; *Van Vleet v. Sledge*, 45 Fed. 750; *McKnight v. Taylor*, 1 How. 168.

Several of the assignments of error bring in question the sufficiency of the evidence to establish the findings of fact made by the referee, and adopted by the court. It is not contended, nor does it appear, that there was absolutely no evidence upon which to base those findings. The contention is that, upon the evidence adduced, the findings should have been different. That contention cannot be considered in this court.

By section 649 of the Revised Statutes it is provided that:

"The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury."

And section 700 provides as follows:

"When an issue of fact in any civil cause in a circuit court is tried and determined by the court without the intervention of a jury, according to section 649, the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed by the supreme court upon a writ of error or upon appeal; and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment."

Under these statutes and the established construction given them by the courts, the power of this court is limited to the determination of the question whether errors were committed by the trial court in its rulings during the progress of the trial, and whether the special findings made by the court were sufficient to support the judgment. *Norris v. Jackson*, 9 Wall. 125; *Miller v. Insurance Co.*, 12 Wall. 285; *Dirst v. Morris*, 14 Wall. 484; *Insurance Co. v. Folsom*, 18 Wall. 237; *Stanley v. Supervisors*, 121 U. S. 535, 7 Sup. Ct. 1234; *British Queen Min. Co. v. Baker Silver Min. Co.*, 139 U. S. 222, 11 Sup. Ct. 523.

It is contended that the court erred in holding that the monthly statement sued upon amounted to or was a stated account. The course of dealing between the parties has already been referred to. During the period of time which it covered, regular monthly statements were rendered to Sayward, in pursuance of the original agreement entered into between the parties. In the thirty-third finding of fact, it was found that the monthly statements were furnished and rendered "for the purpose of showing to said defendant how his ac-

count with them stood at the end of each month." The thirty-sixth finding is as follows:

"With the exception of some objections to minor errors in said statements, which, upon complaint being made, were corrected by said Harrington & Smith, no objections were made to said statements of account, or to any items of charge or credit therein contained, either by the said George A. Meigs, or by the defendant, until after the beginning of this action."

Upon these findings of fact, there can be no question that the court correctly held the monthly statement to be an account stated. *Wiggins v. Burkham*, 10 Wall. 129; *Marye v. Strouse*, 6 Sawy. 205, 5 Fed. 483; *Auzerais v. Naglee*, 74 Cal. 64, 15 Pac. 371; *Knickerbocker v. Gould*, 115 N. Y. 537, 22 N. E. 573.

There are numerous assignments of error to the rulings of the court upon the admission of testimony. We are unable to discover that any of them were erroneous. Most of the questions so raised relate to the admission of testimony concerning payments alleged to have been made by Harrington & Smith upon certain judgments then outstanding, which payments were charged in the account against Sayward, and were carried into the regular monthly statements. Upon the part of Sayward, it is contended that these payments were not on account of his debt, and that they were illegal and void, and not proper charges against his account. Upon the part of the defendant in error, it is contended that the judgments so paid were judgment liens against the mill property of the defendant, and that the payments were necessary for its preservation and for the continuation of the business of said mills. It was found by the court that these payments were authorized. The evidence being offered upon the issues so raised was clearly not immaterial. But the plaintiff in error further raises the question whether, upon the facts found by the referee and the court, it follows as a legal conclusion that the payments of said judgments could be charged individually against Sayward, and reference is made to the twenty-eighth finding of fact, in which it was said that the defendant had delivered to Crawford & Harrington, predecessors of Harrington & Smith, a written order, and that the same is now lost or destroyed, and cannot be found, the substance of which was a request and authority from the defendant to make advances required by the said Port Madison Mills, and to charge the same to defendant's account. It is contended that this order was the exclusive authority for making advances, and that it was not sufficient to include the payment of judgments against the property. The terms of the order are not stated in the finding, except that, in general terms, the advances were to be such as were required by the Port Madison Mills. But there is another finding which must be taken into consideration in this connection, namely, the twenty-sixth, where it was found that the defendant "also authorized and requested said Crawford & Harrington to advance such sums of money as should be required from time to time to pay off such of the indebtedness of George A. Meigs and the Meigs Lumber & Shipbuilding Company as, being in the form of liens upon the property purchased by him, would, if not paid, result in the sale of the property, and the shutting down of the mills, and to charge all such

sums due for such advances to the defendant's account." But if the written order referred to in the twenty-eighth finding of fact, were, indeed, the sole authority to make payments upon judgments, the defendant could not now be heard to dispute those items of the account. Those payments were made in good faith, as the record shows, and were regularly and periodically reported to Sayward, in the monthly statements of accounts, and no objection was made to any thereof until after the commencement of this action.

Upon the consideration of the whole case and the numerous assignments of error, we find no ground for reversing or modifying the judgment; and it is accordingly affirmed, with costs to the defendant in error.

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UNITED STATES v. FULLER.

(District Court, D. Oregon. March 2, 1896.)

No. 4,055.

**CRIMINAL LAW—INDICTMENT—MAILING OBSCENE DOCUMENT.**

An indictment for depositing in the mail an obscene document, which alleges that the document in question is so obscene and indecent that the same would be offensive to the court, and improper to be placed upon the records thereof, wherefore the grand jurors do not set forth the same, and which does not set forth the document mailed, nor describe the same so as to furnish means of identifying it, is insufficient.

Daniel R. Murphy, U. S. Dist. Atty., and Charles J. Schnabel, Asst. U. S. Atty., for the United States.

M. L. Pipes, for defendant.

BELLINGER, District Judge. The indictment in this case is under section 3893, Rev. St., and charges that the defendant did knowingly deposit in the post office at Albany, for mailing and delivery, a certain envelope, bearing the address, etc., "which envelope then and there contained a certain obscene, lewd, and lascivious paper, writing, print, and publication, of an indecent character, which said paper, writing, print, and publication is so obscene, lewd, lascivious, and indecent that the same would be offensive to the court, and improper to be placed upon the records thereof. Wherefore the grand jurors do not set forth the same in this indictment." A second count charges another like offense, in the same language. To this indictment there is a demurrer upon the ground, among others, that the obscene paper mentioned in each of the counts is not sufficiently described or identified to inform the defendant of the nature of the charge against him, or so that the judgment in this case would be a bar to another prosecution for the same offense.

In U. S. v. Harmon, 34 Fed. 872, there was an indictment under this same section of the Revised Statutes, in which the defendant was charged with mailing "a certain obscene, lewd, and lascivious paper and publication, of an indecent character, called 'Lucifer,' " which paper, it was alleged, was "so obscene, lewd, and lascivious

as to dispense with the incorporation of the words and figures in this indictment." The court held that the identification of the obscene paper was insufficient and sustained a demurrer to the indictment. In passing upon the question the court says:

"The accused are entitled to be informed of the specific charge made against them, and it must be sufficiently explicit and definite to enable them to prepare their defense and present their evidence, and, further, to enable them, in any future prosecution for the same offense, to make the plea of *autrefois acquit* or *autrefois convict*. \* \* \* It is not sufficient for the grand jury to allege that the contents of the paper are too obscene to be spread upon the records, and omit every means of identification. Surely, the objectionable matter can be described or identified in some way without giving offense to the court, or defiling its records with scandalous and indecent matter. The date of the paper, the title of the article, or its general tenor and purport, couched in decent language, would serve to make the charge definite and certain."

In *U. S. v. Clarke*, 40 Fed. 325, an indictment under this statute was held sufficient upon motion in arrest of judgment. But, in addition to the fact that the objection was made after judgment, it appeared that the defendant craved oyer of the paper before trial, and the court compelled the district attorney to produce and file the same for the defendant's inspection some days before the trial. Moreover, there was not an entire failure in that case, as in this, to describe the obscene writing in question. The paper was described as "a publication of an indecent character, beginning with the words following, to wit: 'As long as there is life, there is hope.'" In that case the court said:

"An allegation that a publication complained of is too indecent to be spread on the record merely obviates the necessity of setting out the contents of the publication in full, as would otherwise be required. It does not excuse the pleader for wholly omitting to describe it, or for describing it in language too general to advise the accused what particular publication or paper is intended."

These views are sustained in *Com. v. Wright*, 139 Mass. 382, 1 N. E. 411, and in *People v. Hallenbeck*, 52 How. Prac. 502, where statutes in terms like the one in question were under consideration.

In this case there is no attempt to describe the letter or writing upon which the charge is founded. It does not appear that this paper was without an address or signature or date. These are all means of identification. Even the absence of such features from the writing might aid in distinguishing it from other writings. The purport or meaning of a writing, however obscene, is capable of explanation in decent language, or at least of some explanation that will suffice to establish its identity. The demurrer is sustained.

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#### ALLINGTON & CURTIS MANUF'G CO. v. BOOTH.

(Circuit Court, D. Vermont. March 4, 1896.)

##### 1. PATENTS—PRELIMINARY INJUNCTION AGAINST USER.

The prosecution of a suit against the manufacturer to an opportunity of appeal by the defendant, which is declined, is sufficient diligence to warrant the granting of a preliminary injunction in a suit against a user, especially where the patent has been sustained in other suits on final hearing.

## 2. SAME.

The fact that defendant is only a user is not sufficient to defeat a motion for a preliminary injunction, for infringement by a user may be as irreparable as any. *Birdsell v. Shaliol*, 5 Sup. Ct. 244, 112 U. S. 485, followed.

This was a suit in equity by the Allington & Curtis Manufacturing Company against J. R. Booth for alleged infringement of a patent. Plaintiff has moved for a preliminary injunction.

Albert H. Walker and C. K. Offield, for plaintiff.  
Geo. B. Parkinson, for defendant.

WHEELER, District Judge. This cause has been heard on a motion for a preliminary injunction against infringement of several patents for improvements in dust collectors. They have been sustained on final hearing in the circuit court for the Northern district of Illinois by Judge Grosscup (*Knickerbocker Co. v. Rogers*, 61 Fed. 297), and in the circuit court for the district of Connecticut by Judge Townsend (*Manufacturing Co. v. Lynch*, 71 Fed. 409); and no appeal has been taken, as there might have been.

The principal objections to the motion are that the defendant is a user, and a suit against the manufacturer is not diligently prosecuted, and that the plaintiffs are not in danger of irreparable injury. The prosecution of a suit to an opportunity of appeal by the defendant, which is declined, seems to be sufficient diligence towards those defending that suit, as here; and infringement by a user may be as irreparable as any. *Birdsell v. Shaliol*, 112 U. S. 485, 5 Sup. Ct. 244. The defendant should be as diligent in taking an appeal as the plaintiff should be in prosecution, to have an injunction stayed for ultimate decision; and compensation in damages may fall far short of equaling preventative relief.

The plaintiff has offered to replace the collectors used by the defendant for \$1,600, deposited in court to abide the event of the suit, or to license the use of them for \$1,200. In view of these offers, the deposit of \$1,200 as a license fee, to abide such event, would seem equitable in place of an injunction. Unless \$1,200 is deposited in court within 10 days, to abide the event of the suit, as a license fee, let an injunction then issue, as prayed.

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WILGUS v. GERMAIN et al.

(Circuit Court of Appeals, Ninth Circuit. February 10, 1896.)

No. 223.

## 1. ESTOPPEL BY RECORD—STOCKHOLDER OF CORPORATION.

Upon the trial of an action against G., N., and M., as copartners, for damages for the infringement of a patent,—one of the defenses being anticipation by a prior patent to one C., the plaintiff offered in evidence the records of two actions brought by him against two several corporations, in one of which the defendant G., and in the other the defendant N., was a stockholder. It appeared that G. and N. were present, testified, and took leading parts in the trials of such actions; that the actions were brought against the corporations for infringement of the plaintiff's patent



by the sale of articles bought from the firm composed of G., N., and M.; and that the same defense of anticipation was set up, and adjudged against the defendants, in each case; and it was claimed that such adjudications constituted an estoppel, against the defendants in the pending suit, to set up the same defense. It did not appear that either G. or N. had any control or management of the defense in the former actions, or appeared by counsel therein. *Held*, that G. and N. were not estopped by the judgments in the former actions to set up the same defense, and that it was not error to exclude such judgments, especially as G. and N. were sued in this action as partners with M., and were not shown to have acted for the firm in taking such part as they did in the former actions.

2. EVIDENCE—INFRINGEMENT OF PATENT—PRIOR USE.

It is not error, in an action for damages for the infringement of a patent, to admit evidence showing public use of the plaintiff's invention more than two years before his application for his patent, though no notice of such testimony has been given, when the testimony is admitted, not to prove such public use, but to sustain the defense of anticipation, by showing that plaintiff's invention was adapted from another which was known.

In Error to the Circuit Court of the United States for the Southern District of California.

This was an action by Daniel C. Wilgus against Eugene Germain, Isaac B. Newton, and William H. Mitchell for damages for the infringement of a patent. Judgment was rendered in the circuit court for defendants. Plaintiff brings error. Affirmed.

Cole & Cole, for plaintiff in error.

White & Monroe and Graff & Latham, for defendants in error.

Before McKENNA and GILBERT, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge. The plaintiff in error brought an action against the defendants in error for damages for the alleged infringement of letters patent No. 443,734, issued December 30, 1890, for an improvement in lawn sprinklers. The defendants denied that the patentee was the inventor of the lawn sprinkler so patented, denied infringement, and alleged that, prior to the date of said alleged invention, letters patent had been issued from the United States to one Clement Gauthier for an invention substantially identical with that described in the plaintiff's patent. The cause was tried before a jury, and a verdict was rendered for the defendants. The principal question presented upon the writ of error is whether or not the defendants in the action were estopped to introduce proof of the Gauthier patent, and its identity with the improvement covered by the plaintiff's patent, by reason of judgments rendered in prior actions in the same court in the case of *Wilgus v. Germain Fruit Co.*, a corporation, and in the case of *Wilgus v. Harper & Reynolds Co.*, a corporation, the judgment in which latter case was subsequently affirmed on writ of error to this court. *Harper & Reynolds Co. v. Wilgus*, 6 C. C. A. 45, 56 Fed. 587. It appeared that Newton, one of the defendants in this action, was a stockholder of the Harper & Reynolds Company, and was its secretary and treasurer, and was present in court when the cause of Wilgus against that company was tried, and was a witness in the case, and that

the defendant Germain was a stockholder in the Germain Fruit Company, was in court at the time of the trial of said prior causes, and was a witness and took a leading part in said case against his company; and it was shown by the testimony of said witness Newton, in said prior action, that the Harper & Reynolds Company, defendant in that case, had purchased the lawn sprinklers, the sale of which was alleged to have been made in infringement of the Wilgus patent, from the defendants in this action, who were then, and are now, doing business under the firm name of the Crown Sprinkler Company. The record of said prior actions, when offered for the purpose of showing that the matters in litigation in this action had been adjudicated against the defendants herein, was excluded by the court, and that ruling is assigned as error.

It is not claimed that either of the defendants in this action was a party to the prior litigation, but it is contended that two of them were so intimately connected with the trial of the former cases that they are now precluded from saying that the judgment in those actions is not conclusive of the issues presented in this. In order that one not a party may be precluded by a former adjudication, he must have been privy to the former proceedings, or connected therewith in such a way that he had the right to control the litigation, or at least the right to appear by counsel and make motions and offer evidence and examine witnesses. In *Miller v. Tobacco Co.*, 7 Fed. 92, Judge McCrary said: "It is not reasonable to say that a man should be bound by an adjudication, unless he has all the ordinary rights of a litigant with respect to the adjudication." In *Robbins v. Chicago City*, 4 Wall. 657, it was held that the parties who are estopped by a judgment are those who had "a right to make demands, control proceedings, examine and cross-examine witnesses, and appeal from the judgment. Persons not having those rights, substantially, are regarded as strangers to the cause." In *Litchfield v. Goodnow's Adm'r*, 123 U. S. 549, 8 Sup. Ct. 210, it was held that one who was not a party to the suit in which the adjudication was had, but who interested himself in securing the same, and paid part of the expenses of the suit, was not bound thereby, and that "those only who are represented by the parties, and claim under them or in privity with them, are bound by a judgment." It is not shown in this case that either of the defendants in this action had any control or management of the defense in either of the prior cases. It is not shown that they appeared, in person or by counsel, to offer evidence or to cross-examine witnesses, or that they could have done so. The whole extent of their connection with the former litigation consists in the fact that Newton was the secretary and treasurer of the Harper & Reynolds Company, and was a witness in that cause, and that the defendant Germain was a stockholder in the Germain Fruit Company, and was in court at the time of the trial, and was a witness in that case, and took a leading part in the defense, and that it appeared that the defendants who are now defending this action had sold the lawn sprinklers which were the subject of the prior actions to the corporations defendant in those actions. This falls short of establishing the facts

on which an estoppel by record must depend. To prove that one was a witness in a cause, and took a leading part in the defense thereof, without further information concerning the nature of his connection therewith, is not equivalent to proof that he had or assumed the right to control the proceedings, or to adduce or cross-examine witnesses, or to appeal from the judgment; and there is no such privity between a private corporation and its stockholders that a judgment obtained against the one is *res judicata* as to the other, except in cases where the law gives to a creditor of such corporation the right of recourse against the individual stockholders for the satisfaction of the judgment debts of the corporation. *Hawkins v. Glenn*, 131 U. S. 329, 9 Sup. Ct. 739; *Schrader v. Bank*, 133 U. S. 67, 10 Sup. Ct. 238; *Glenn v. Liggett*, 135 U. S. 533, 10 Sup. Ct. 867; *Hawes v. Petroleum Co.*, 101 Mass. 385.

But, if it be conceded that the defendants Newton and Germain each took such part in the defense of the prior actions that they are to be deemed to have been parties defendant thereto, it does not follow that the judgments in those cases are admissible as *res judicatae* against the defendants in the present case. This action is brought against a copartnership consisting of three members, doing business under the firm name of the Crown Sprinkler Company, to recover damages for acts done by the firm. The two members of the firm who took part, respectively, in the two prior actions are not shown to have acted for or represented the firm or their copartners in so doing, or to have had other interest in such litigation than such as belonged to them in their attitude of stockholders in the respective corporations defendant therein. The parties, therefore, are not the same, and the judgments do not estop the present defendants.

It is contended that the court erred in permitting the introduction of the Gauthier patent in evidence, for the reason that that patent is for an entirely different invention from the invention in controversy, and was so adjudged in the patent office at the time of the Wilgus application. The records of the patent office disclose only the fact that a patent was issued to Wilgus upon an application in which he stated that he was aware of the Gauthier patent, and called attention to the features which distinguished his invention from that of Gauthier. The issuance of the patent, under these circumstances, created only a *prima facie* presumption that the invention of the patentee was not anticipated by the prior invention. *Corning v. Burden*, 15 How. 265; *Miller v. Manufacturing Co.*, 151 U. S. 208, 14 Sup. Ct. 310; *Boyd v. Tool Co.*, 158 U. S. 260, 15 Sup. Ct. 837; *Pavement Co. v. Elizabeth*, 4 Fish. Pat. Cas. 189, Fed. Cas. No. 312; *Ransome v. Hyatt*, 16 C. C. A. 185, 69 Fed. 148. It was clearly no error, therefore, to permit the introduction of the prior patent in evidence.

It is said that the court erred in admitting the testimony of one Lyall to show the public use of the plaintiff's invention more than two years prior to his application for a patent, inasmuch as no proper notice of such testimony had been given. The record shows, however, that the testimony of the witness was admitted, not for the purpose of showing such prior use, but to show that the Wilgus invention was directly adapted from the Gauthier patent by Lyall at the suggestion

of Wilgus, who was then Lyall's employer. For such purpose it was undoubtedly admissible.

It is also assigned as error that the court admitted in evidence testimony of the sale and transfer of the Wilgus invention to Lyall. It is objected that the assignment could not be set up in defense of the plaintiff's title, and that evidence of such assignment was not available to set aside the plaintiff's patent. It appeared, however, that this evidence was admitted only for its corroboration of Lyall's testimony in regard to the adaptation of the Gauthier patent, and his experiments therewith under the direction of Wilgus.

There are several assignments of error which challenge the ruling of the court in giving and refusing instructions. It will be unnecessary to refer to them in detail. They are all based on the general assertion and contention of the plaintiff in error that there is no similarity, in name, shape, size or construction, between the inventions of Gauthier and Wilgus. It is urged that the Gauthier patent is intended for spraying trees and plants; that it differs in shape from that of Wilgus, and that it delivers the fluid in the form of mist, whereas the Wilgus sprinkler delivers water for sprinkling purposes only, and in the form of drops; that in the one patent the opening for the discharge of the fluid is smaller than the opening for its inlet into the nozzle, while in the other the reverse is true. Other points of difference are pointed out. All these questions were properly submitted to the jury. There was evidence to the effect that the principle of both sprinklers was the same, and that their operation was the same. It does not follow as a rule of law, that because the Gauthier sprinkler was used in sprinkling trees, and delivered the fluid in the form of mist, the Wilgus sprinkler, which was used to sprinkle lawns, and delivered the water in drops, was not anticipated in the prior invention. *Tucker v. Spalding*, 13 Wall. 453; *Smith v. Nichols*, 21 Wall. 112; *Machine Co. v. Murphy*, 97 U. S. 125; *Machine Co. v. Keith*, 101 U. S. 479. The judgment must be affirmed, with costs to the defendants in error.

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NEWTON v. BUCK.

(Circuit Court, N. D. New York. March 16, 1896.)

No. 6,248.

1. ASSIGNMENT OF PATENTS—EXCLUSIVE LICENSE.

A written instrument transferring the exclusive right to make, use, and sell machines under certain patents, is in fact an assignment of the patents, and vests in the assignee a title in the patents themselves, with a right to sue infringers in his own name.

2. SAME—RECEIVERS.

An assignment of a patent can only be made by the actual owner thereof. Rights under the patent do not vest in a receiver, and no title can be transferred under a sale by him pursuant to an order of court.

3. SAME—EQUITABLE RIGHTS.

Defendant, by written instrument, transferred to a firm the exclusive right to make, use, and sell machines in accordance with certain patents. By inadvertence, one patent included in the agreement was omitted from the conveyance. Afterwards a judgment was recovered against a person holding the entire interest of the firm in the patents, and a receiver was appointed in supplementary proceedings under the New York Code.

The receiver, by order of court, sold the interest of the debtor in the omitted patent, and the purchaser transferred the same to defendant. *Held*, in a suit for infringement, that defendant's claim of right under the patent could not be supported on the theory that the right to have the patent inserted in the conveyance was an equitable right, which could pass to the receiver, and, through his sale, to defendant; for this would be to allow defendant to profit by his neglect to do what it was his duty to do under the original agreement.

This is a suit in equity by Addie Newton against James A. Buck and others for infringement of a patent.

Walter E. Ward, for complainant.

George A. Mosher, for defendant.

COXE, District Judge. This is an equity action of infringement, based on letters patent, No. 301,087, granted to the defendant James A. Buck, July 1, 1884, for an improvement in machines for sanding brick molds. The validity of the patent and its infringement are admitted. The only question of fact has reference to the title.

On March 6, 1889, the defendant by written instrument transferred to the firm of A. H. Newton & Bros. the exclusive right to make, use and sell machines in accordance with certain designated patents. The complainant asserts that through inadvertence and mutual mistake the patent in controversy, No. 301,087, was omitted from this instrument. The answer denies this. Upon the issue thus formed, the proof is overwhelmingly with the complainant. The record shows that the parties had been connected in business for six or seven years prior to the 1889 agreement. The history of this business, when considered in connection with the intent and purpose of that agreement, is wholly inconsistent with the defendant's theory. The object, unquestionably, was to vest in Newton Bros. the exclusive right to manufacture under all the defendant's patents during their entire existence, the defendant being paid \$12.50 royalty on each machine. It is simply impossible to suppose that men who are actuated by the rules which govern human conduct would enter into an agreement of this kind and omit from it a patent which would at any time enable the defendant to render the agreement utterly worthless. No man of common sense would make such a contract as is alleged by the defendant. These parties are all men of common sense, and, at least, of ordinary intelligence and prudence.

But the matter is not left to presumption. Eight witnesses testify that the parties intended that all the defendant's patents should be transferred, that it was talked over and fully understood at the time, and that the defendant after the agreement stated repeatedly that the entire business and all of his patents were in the hands of the Newtons and he had only to draw his royalties. This testimony is wholly uncontradicted. The defendant was not sworn and does not deny complainant's version of the agreement. He does file a short affidavit, which, by stipulation, is given the effect of proof, in which he swears that after the agreement he never said, "either in words or substance, that he had sold, or disposed of, or that he had intended to sell or dispose of all his right, or an exclusive right, in all his patents, or the patent in suit, either with or without the reservation of a royalty." It is doubtful whether this vague and general lan-

guage can be considered as denying the specific statements, giving time and place, of the witnesses for the complainant, but assume that it can; it certainly denies nothing essential to the complainant's case. It does not deny statements and facts before, but declarations made after, the agreement was signed. And this is all. This affidavit is the be-all and the end-all of the defendant's answer to the complainant's proofs. There can be no doubt that the patent in question was omitted through mistake, and, when it is considered that the agreement was drawn up by an attorney in Washington and added to and executed in Cohoes, the mistake is not an unnatural one. The agreement should be considered as if the number and date of the patent in controversy appeared in the first paragraph.

The only other question argued in the defendant's brief has reference to the alleged title derived from a receiver in the state courts. In the autumn of 1891 a judgment was recovered against A. H. Newton, who then held the entire interest of the firm in the patents; supplementary proceedings were instituted and a receiver was appointed. The receiver was, by order of the state court, permitted to sell the interest of Newton in the patent in question. On the 30th of April, 1895, he sold to one Vermilyea, who, on the 6th of May, 1895, sold to the defendant. This was subsequent to this action which was begun July 1, 1894. On the 1st of March, 1893, Newton assigned his interest in the patent to one Dooley, and on the 24th of February, 1894, Dooley assigned to the complainant. It is argued that the title of A. H. Newton vested in his receiver, and is now owned by the defendant; that complainant has no title because the assignments under which she holds were made after the receiver had been appointed. The agreement of March 6, 1889, though called an "exclusive license," is in fact "an assignment, properly speaking, and vests in the assignee a title in so much of the patent itself, with a right to sue infringers \* \* \* in the name of the assignee alone." *Waterman v. Mackenzie*, 138 U. S. 252, 11 Sup. Ct. 334. Section 4898, Rev. St. U. S., provides that "every patent or any interest therein shall be assignable in law, by an instrument in writing" made by the patentee or his assigns or legal representatives.

It would seem that the contention based upon the receiver's supposed title must proceed upon the theory that Newton obtained title under the agreement of 1889. If Newton had no title surely his receiver acquired none. If Newton had title it must be traced back to that agreement, and upheld by sustaining the complainant's contention that No. 301,084 was omitted by mistake. In other words, if the patent was correctly omitted, the receiver gets no title, for Newton had none. If, on the other hand, the patent was assigned to Newton, no one could acquire title except by an assignment from Newton, his representatives or assigns. In short, if the complainant has no title, it is an end of the action. If she has a title which enables her to maintain the action, it is a title which cannot pass to a receiver in supplementary proceedings. The court understands that this proposition is not seriously disputed if it be assumed that the patent was actually transferred by the 1889 agreement. But it is said that the patent did not appear in that agreement, the right to have it inserted was an equitable right, which passed to the receiver and

from the receiver to Buck. The court cannot assent to this view. If there were no other objection, it enables the defendant to take advantage of his own wrong and actually profit by his neglect to do what it was clearly his duty to do. Equity will not permit a failure of justice upon such narrow grounds. As between the complainant and Buck the assignment should be treated as having been made on the 6th of March, 1889.

It is unnecessary to determine what might have been the result had the state court by decree in equity compelled Buck to assign to Newton and Newton to the receiver, for no such decree was made. The receiver's title rests solely upon the order of the state court in proceedings supplementary to the execution. The rule seems to be well settled that an assignment can only be made by the actual owner of the patent. That rights under the patent cannot be sold by a sheriff on execution, and do not, like other incorporeal rights, vest in a receiver. They may, however, in a proper case, be reached by creditors' bill. Walk. Pat. (3d Ed.) § 156; Rob. Pat. § 766; Ager v. Murray, 105 U. S. 126; Gordon v. Anthony, 16 Blatchf. 234, 248, Fed. Cas. No. 5,605. It is thought, therefore, that the defendant took nothing by his assignment from the receiver. At all events every one who had a vestige of interest in the patent is now before the court; the mutual mistake, in leaving out the patent in question from the 1889 agreement, has been established beyond the peradventure of a doubt and almost without contradiction; the equities are with the complainant, and no serious objection can be urged to the settlement of the rights of all parties at this time upon equitable principles. What the defendant should have done in 1889 may be done now *nunc pro tunc*. The royalties due to the defendant can be taken care of on the accounting.

The complainant is entitled to a decree in accordance with the prayer of the bill.

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STIRLING CO. v. PIERPOINT BOILER CO. et al.

(Circuit Court, W. D. Pennsylvania. August 13, 1895.)

No. 15, May Term, 1893.

1. PATENTS—CONSTRUCTION OF CLAIMS—INFRINGEMENT.

Where the claims of a patent for a water-tube boiler were limited to a combination having "the single mud drum," substantially as described, *held*, that the patent could not be construed to cover a boiler having three mud drums.

2. SAME—INFRINGEMENT SUITS—BURDEN OF PROOF.

Where the question of infringement of a patent for a water-tube boiler depended upon the existence of a particular circulation of the water in defendant's boiler, *held*, that the burden of proof was on complainant to establish the fact of its actual existence, and not merely the possibility or probability of its existence.

3. SAME—WATER-TUBE BOILERS.

The Stirling patent, No. 407,260, for an improvement in water-tube boilers, is not for a pioneer invention, but covers a structure combining simplicity, economy, and effectiveness; and, assuming that the combination involves novelty and patentability, the owner thereof will be protected as against others using substantially the same elements, or their equivalents, to accomplish the same result in substantially the same way.

## 4. SAME.

The Stirling patents, No. 407,260 and No. 479,678, for improvements in water-tube boilers, construed, and *held* not infringed.

This was a suit in equity by the Stirling Company against the Pierpoint Boiler Company and others for alleged infringement of certain patents for improvements in steam boilers.

Banning & Banning, Kay & Totten, and Henry W. Blodgett, for complainant.

Bakewell & Bakewell, for defendants.

Before ACHESON. Circuit Judge, and BUFFINGTON, District Judge.

BUFFINGTON, District Judge. On July 10, 1889, letters patent No. 407,260, and on July 26, 1892, letters patent No. 479,678, issued to Allan Stirling, assignor to the International Boiler Company, for improvements in steam boilers. This bill is filed by the Stirling Company, to which the patents have been duly assigned, against the Pierpoint Boiler Company and the officers thereof, alleging infringement of all the claims of said patents. The answer denies novelty and patentability; avers anticipation in certain prior patents of the United States and France; that every substantial element of the second patent was disclosed in the first; and asserts that, in view of the prior state of the art, the claims cannot be so construed as to make respondents' structures infringements. The boilers of both parties are water-tube boilers; that is, water is confined in banks of tubes, the outer surfaces of which are exposed to the flame, as distinguished from locomotive or fire-tubes boilers, in which heating gases pass through tubes surrounded by water. Water-tube boilers include two classes,—those whose tubes are horizontal, or substantially so, and connected at the ends by headers, and those whose tubes are vertical, and connected at the ends to cylindrical drums. The boilers of the present case are of the latter type.

From the specification of the first patent it would seem Stirling conceived there were three objectionable features in prior boiler construction, which he proposed to improve or obviate, namely: First, lack of circulation through the mud drum; secondly, lack of compactness of construction; and, thirdly, difficulty in cleaning. He sets these forth in the specification of the first patent as follows:

"Heretofore, in the so-called 'water-tube' boilers, in which the water is in the tubes and the flame outside, the tubes have usually been inserted in headers made of cast metal, so arranged that a number of tubes have only one outlet to the steam and water space above and of the mud drum beneath. In these boilers there is no circulation through the mud drum, and the enormous velocity of the currents in the outlets to the steam and water space is detrimental to the boiler, and precludes a proper circulation. Water-tube boilers, as heretofore constructed, have also been found objectionable because of the large space which they occupy, and the large number of hand-holes with covers and bolts necessary to get at the inside of the tubes for cleaning; and it has also been found impossible to get at the outside of the tubes to clean them from soot. These disadvantages have been obviated by my invention."



The alleged defects he overcomes by a new arrangement of parts in what is well termed a "fan-shaped" boiler. In the first patent, back of the grate a mud drum is shown, from which series of tubes extend upward, incline forward, and connect with two steam and water drums (the rear of which is a feed drum) adjacent to each other on the same plane. The steam and water spaces of these two are respectively connected by steam and water tubes. Each of the drums has a manhole for access to its interior. Over the grate is a fire-brick arch, intended to confine the flame and insure combustion of the gases at that point, and force them against the lower portions of the tubes leading from the mud drum to the front steam and water drum. A baffle, or fire-brick wall, at the back of these tubes, extending upward about two-thirds of their height, forces the gases to pass along the entire tube length. A shelf or apron projecting from the middle of the rear side of this baffle drives the gases against the upper portion of the tubes extending from the feed drum to the mud drum, and forces them along the entire tube surface to a flue back of the mud drum. Of the operation of the boiler the specification says:

"From this description it will be seen that in my boiler each of the water tubes, B, has an independent outlet to the steam and water space above, and also an independent outlet to the mud drum below, the boiler being constructed of wrought metal, and so arranged that the water is forced to pass through the mud drum, and deposits its sediment therein. Only three manholes are necessary for complete access to every part, and the outside of those water tubes on which the soot is formed can be readily cleaned by means of the steam nozzles, H. The two sets of tubes are connected into the upper drums, so as to allow for the expansion and contraction. For this purpose each of the water tubes, B, is curved at one or both ends. The brick arch, D, of the furnace aids materially in the proper combustion of the gases, and the peculiar arrangement of this arch and the fire-brick partition directs the gaseous products of combustion, so that they pass over every part of the heating surface, and so break up the currents as to extract the available heat therefrom."

While the course of the water circulation is not specified in the patent, and while the banks of tubes may at times be subjected to relatively different stages of heat than those assumed below, thereby causing different circulation, yet, as describing the usual main circulation of the boiler shown in the patent now under consideration, we quote the views of Prof. Cooley, complainant's expert, who says:

"It is sufficient for the present to state that the front bank absorbs several times as much heat as the rear bank, and, in consequence, the water is caused to ascend through the front bank with great velocity into the front steam and water drum, where the steam which has been formed in the front bank of the tubes is liberated, the water passing through the connecting water pipes to the rear steam and water drum or feed drum, thence downward again through the rear bank of the tubes to the mud drum. The steam which separated from the water in the front drum may pass through the upper connecting steam pipes to the rear drum, whence it may pass off into the main steam pipe leading from the boiler. This arrangement of drums, tubes, and connecting pipes appears to be a convenient arrangement, and peculiarly adapted to secure this rapid and complete circulation of water with separation of steam, together with a corresponding complete and rapid circulation of gases with abstraction of heat."

Upon this device two claims were allowed, viz.:

"(1) A water-tube boiler consisting of the single mud drum, A, the two elevated steam and water drums, A<sup>1</sup> A<sup>2</sup>, the water tubes, B<sup>1</sup>, connecting the water spaces of the steam and water drums; the steam tubes, B<sup>2</sup>, connecting the steam spaces of said steam and water drums, and two sets of water tubes, B B, directly connected, respectively, at their upper ends, with the steam and water drums, and both sets connected at their lower ends with the single mud drum, substantially as described."

"(2) A water-tube boiler consisting of a furnace structure, a single mud drum, A, the two elevated steam and water drums, A<sup>1</sup> A<sup>2</sup>, having their steam and water spaces respectively placed in communication; two sets of water tubes, B B, directly connected, respectively, at their upper ends, with the steam and water drums, and both sets connected at their lower ends with the single mud drum; the fire-brick arch, D, extending over the fire-place from the wall of the furnace structure to the front set of water tubes; and the fire-brick partition C, inclined between the two sets of water tubes, and located between the single mud drum and the two steam and water drums, substantially as described."

Bearing in mind what was well understood in boiler construction at the time Stirling's patents issued, namely, that in a boiler having several banks of rising tubes connected at the ends to drums or headers, there is a circulation upward of water through the tubes exposed to the greatest heat and downward through those exposed to the least, in our judgment the improvements disclosed in the patent and embodied in the claims are set forth and specified in language wholly void of uncertainty. Measured and limited by his own statement, what the patentee disclosed to the public, and what he claimed a limited monopoly for from the public, was to insure the circulation (then well understood) through the mud drum, and secure the deposit of sediment and scale, to compact a boiler into the narrow compass of a triangular structure, and to afford facility for cleaning and repairs. To accomplish these objects we find a structure specified and claimed in which are the elements of "a single mud drum" and "the water tubes, B<sup>1</sup>, connecting the water spaces of the steam and water drums." Concededly, the boiler devised by Stirling is a meritorious one, and embodies many desirable points not shown in combination in the previous art; and, assuming for present purposes the novelty and patentability of the combinations claimed, yet, in view of the prior art, the claims are not to be expanded beyond the specified combinations claimed or the substantial equivalents thereof. To an examination of this prior art we now turn. As early as 1871, Griffith and Emery secured patent No. 111,639 for a sectional steam boiler. In it fire-brick baffle walls divide the inclined tubes into thin banks or sections, and cause gases to circulate longitudinally along them, and pass through them back and forth three times. One of the stated objects of the patent is "the arrangement of one or more tubes in each section, wholly or partially out of direct contact with the flames or heated gases, and in such manner as to return the water from one tube head to the other, and thus complete the circulation." The method of doing this and the process of circulation are set forth quite explicitly:

"As the water in the tubes receives heat its density is diminished, and it is forced by the heavier water in the rear tube heads, C, out of the tubes and up the front tube heads, B, into the steam drum, D, where the steam escapes and the water flows over a cross partition or dam, E, and enters the upper

tubes, A<sup>1</sup>, which return it to the rear tube head, C, and thus maintain the circulation. The tubes, A<sup>1</sup>, in the upper row are wholly or partially screened from the flames and heated gases by the partition, F, made wholly of fire brick or tile. This is done for the reason that, if heat is admitted by the tubes, A<sup>1</sup>, the density of the water in the descending current will be diminished, and the rapidity of the circulation correspondingly lessened. By the construction shown, a heavy and light column are continually maintained, the water in the first continually displacing that in the other, and thus making a free circulation. It is not essential that the tubes, A<sup>1</sup>, should be entirely screened from the heated gases, but in no case should they receive sufficient heat to form steam bubbles."

This device shows a complete main rectangular circulation, theoretically understood and mechanically applied, and the same stimulated by the distribution and absorption of heat through the agency of bafflers. While the method employed is faulty as compared with Stirling's, in that the hottest gases come in contact with the pipes containing the coldest water, yet that principle was theoretically well understood at the time of the Stirling patent, as evidenced in Rankine's work on the Steam Engine, and was practically applied in the French patent of Grenier, hereafter referred to. Rankine says:

"When heat is to be transferred by convection from one fluid to another through an intervening layer of metal, the motions of the two fluid masses should, if possible, be in opposite directions, in order that the hottest particles of each fluid may be in communication with the hottest particles of the other, and that the minimum difference of temperature between the adjacent particles of the two fluids may be the greatest possible. \* \* \* In a steam boiler it is favorable to economy of fuel that the motion of the water and steam should on the whole be opposite to that of the flame and hot gas from the furnace. Thus, if there is a 'feed-water heater' consisting of a set of tubes through which the water passes to be heated before entering the boiler, that apparatus should be placed in or near the foot of the chimney, so as to be heated by gas that has left the boiler, and thus to employ heat that would otherwise be wasted. The coolest—that is, the lowest—portions of the water in the boiler should, if practicable and convenient, be contiguous to the coolest parts of the furnace and heating surface."

We next find—1875—the first patent to Firmenich, No. 165,222, for a steam generator, which was exhibited at the Centennial Exhibition of 1876, and whose workings were described in subsequent literature of the art. It is a sectional boiler, having upper connected steam and water drums and lower connected mud drums. Between these upper and lower drums are vertical connecting water tubes along which gases are made to travel in two passes by a mediately placed partition wall with a down-take flue. Of the tubes the patent says:

"The last one, or more vertical, heating tubes in each set are embedded in the rear or front wall of the masonry, and, being kept at a considerable lower temperature than the lower tubes, serve as circulating tubes."

The functional action of these circulating tubes is carried into one of the claims, viz.:

"The arrangement, with the steam and water receptacle, D, of the circulating end tubes, C, inclosed by the brick wall or walls, L, and a mud drum, A, situated below the fire line of the steam generator, substantially as described, and as for the uses and purposes set forth."

In describing the prior art in his patent, Stirling, as we have seen in an extract quoted above, stated that in the header type of tubular

boilers there had been no circulation through the mud drum. If inferentially this statement was meant to apply to water-tube boilers with upper and lower drums, it was a mistake, for the Firmenich device certainly shows a main rectangular circulation through a mud drum. In this type we also find an advance in compactness of structure and facility of cleaning over the "header" type. As showing also the vigorous circulation inherent to the general construction, it should be noted that in boilers subsequently built by Firmenich the imbedded rear circulating pipes were found needless, and were omitted, the heat difference between the front and rear vertical tubes being sufficient to produce circulation.

Three years later—1878—we find in Firmenich's second patent, No. 210,312, a further advance in the line subsequently pursued by Stirling. In it we have the first development of the compact triangular or fan-shaped structure of the Stirling patents. In the latter the single mud drum is the center, from which the water tubes and two connected steam and water drums diverge upwardly, while in Firmenich's the conditions are reversed, and the single upper steam and water drum is the center from which the water tubes and two connected mud drums diverge downwardly. In Firmenich's the grate space is within the triangle, and by means of a mediately placed fire-brick partition wall the flames follow longitudinally and in two passes along and across the water tubes, first the front tubes on the upward pass, and next the rear tubes on the downward; while in the Stirling the fire chamber is outside the triangle, and the flame first impinges transversely on all the tubes on one side of the triangle, and next on all the tubes on the other. While no mention is made in the patent of the circulation, yet, as that principle was well understood in the art, and was set forth, as we have seen, in the prior Firmenich patent, and as the later patent states "the invention has special reference to improvements upon our recently patented steam generators," the principle of circulation may be assumed as a constituent part of the device shown in the second patent. In it, therefore, we find a main circulation of such strength from the inherent character of construction that the down-flow pipes of prior constructions, imbedded in walls to subject them to less heat than that of the combustion chamber, were dispensed with, and the structure adapted in its several parts to absorb all the heat possible in the chamber. We find also the circulation through the mud drums, and, indeed, the two mud drums connected by a pipe which, from its relative scale size, as shown in the drawing, and from its being deemed worthy of mention in the specification, was obviously not a mere supply pipe for water which every boiler must have, but must have had a functional duty in the subsequent operations of the structure. The statement in Stirling's patent that "water-tube boilers, as heretofore constructed, have also been found objectionable because of the large space which they occupy, and the large number of hand-holes with covers and bolts necessary to get at the inside of the tubes for cleaning," if meant to apply to boilers other than the header type, is not a correct statement of the prior art, for in this

later Firmenich device we have a compactness of structure akin to that of Stirling, and also access for cleaning by the same number of manholes, and in the same way. The proofs show that Firmenich boilers, built substantially on the lines of the first patent, have been in highly successful operation at the American Cutlery Works in Chicago for upwards of 16 years; that they have not required any repairs of moment in 10 years; that no scale forms on the tubes, and scrapers are not required to clean them; that they are washed with hose, and entrance is had through a manhole at the end of each drum. But the development did not cease with these patents. In 1880 we find the Fowler boiler of patent No. 233,228. While it has faulty features, yet, on the whole, it contains evidence of advance. In its two upper and two lower drums we have a departure from the compact triangular construction first shown, but we note for the first time several features which were afterwards modified and carried forward in the Stirling. The cylinders are placed at right angles to the course of the flames, as the patent says, "to cause the flames and gases to break up and pass around among the tubes." We also find the water tubes are bent at both ends, for the express purpose of "spreading out and affording room for the action of the products of combustion," "of entering the shells at the proper angle," and to counteract the "injurious effects of the expansion and contraction of the tubes under variations of temperature." We also note for the first time the forward pitch of the water tubes and upper cylinder so as to be over the flame, and the backward pitch of the furnace wall facing them, or, as the patent expresses it:

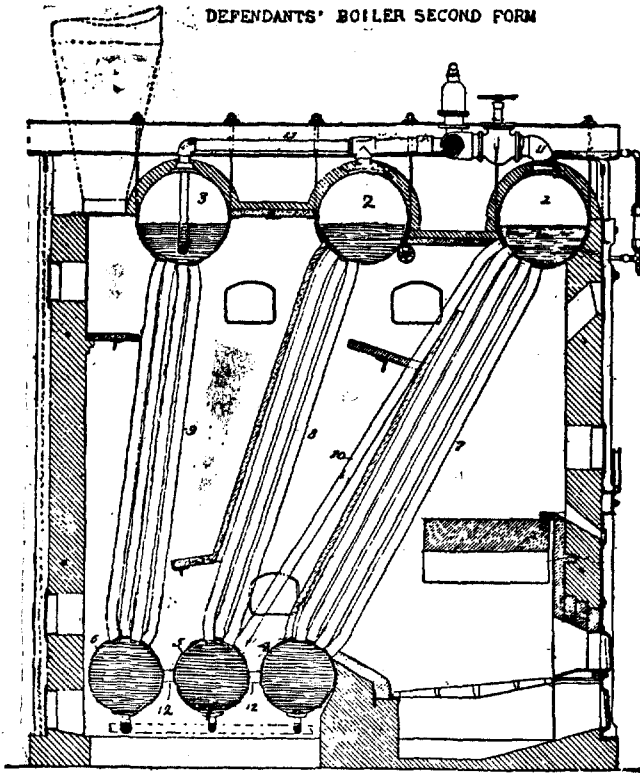
"The front and back walls are vertical, as shown at d, d, to a point above the level of the fire door, from which point they incline toward the top cylinders at about the same angles as that at which the cylinders are set. I thus obtain room for a large furnace which is so inclined as to force all the flames toward the boiler tubes, and also bring the tubes, to a certain extent, over the fire."

The steam spaces, but not the water spaces, of the upper drums are connected, and there are imbedded side pipes at each end "to provide for the downflow of the water." It would also appear that, although there was a connection between the mud drums, the main circulation was not crosswise through it, but that there were two rectangular main circulations endwise through each bank of tubes to their respective connecting upper drums down the side pipes to the mud drums, and through them to the water tubes again. In the inclination of the furnace wall we have a step forward towards the perfected function of the retarding brick arch over the fire chamber in Stirling's patent, which, however, in 1888, was shown by Hanrez in the arch V of his patent No. 384,972.

This brief review of the art, which by no means embraces all the patents pertinent thereto, and the satisfactory character of the results attained in the same general lines which Stirling followed some years later, show the field was so fully occupied that the advance made by him was the gradual step of the improver, not the stride of the pioneer. Singly considered, the elements of

his combination were old. He did not discover the principle of circulation, nor was he the first to devise means to effect it; circulation through a mud drum was not original with him; bafflers and means for effectually distributing the heat to the water tubes were known before; compactness of structure and facility of access for cleaning had been attained, and the deposit of scale secured. That he united all these desirable points in a structure combining simplicity, economy, and effectiveness is true; that his combination showed novelty and patentability is, for present purposes, assumed; and to the extent of his specified combinations, and to others using substantially the same elements, or their equivalents, to accomplish the same result in substantially the same way, his rights will be enforced. Further than this we cannot go, nor are his claims entitled to a broader construction.

Construing the claims thus, we turn to the question whether infringement is shown? It is needless to consider respondents' first form of boiler. It was never manufactured or sold, and all purpose to do so was long since abandoned. In the second form there are three connected mud drums, from which three banks of water tubes extend to three upper cylinders, the steam, but not the water, spaces of which are connected. From the water space of the front



upper drum a bank of tubes, designated in the proofs as "tubes 10," pass back of the baffler wall, and enter the second mud drum. An additional baffler wall is placed back of the middle bank, by means of which the flames are carried down and go in a third pass through and along the water tubes connecting the rear drums. Of this construction complainant's principal expert says: "In the defendants' boiler shown we find in the three connected mud drums an equivalent of the single mud drum shown in the Stirling patent." If this be true, then, to our mind, the most vital and marked feature of the Stirling device is gone. We lose at once the compactness of structure, the economy of construction, the small number of man-holes, and the triangular circulation, which differentiated it from prior structures, and constituted the grounds of alleged novelty. If the single drum is the same as three connected mud drums, then, manifestly, we sap away the life of the Stirling patent, for how could it have issued in view of the prior art, if this be true? But the three mud drums are not the same as one. Conceding the rear drum performs no necessarily individual functional part, that it could be dispensed with, and the tubes from the rearmost upper drums carried into the middle mud drum, the fact still remains, the functional operations of the two remaining mud drums are not the same. The expert for complainant admits, if tubes 10 were introduced into the front drum instead of the second drum, it would make a substantial difference in principle. If this be so, and if, consequently, each of these mud drums exerts a separate, distinct, and individual function, owing to their separation and relative relation to other parts, how can it be said that their separation is a matter of indifference, and that the sum of their individual and separate functions is the function of the single mud drum of the Stirling patent? If infringement occurs when tubes 10 enter drum 5, and noninfringement when they enter drum 4, what follows when the drums are merged in the single drum of the Stirling construction, and tubes 10 enter it? Does the substituted single drum take upon itself the infringing character of drum 5 or the noninfringing of drum 4? But, apart from all theory and speculation in this regard, the all-sufficient answer is that complainant limited his claims by the element of a single mud drum, and the claim means just what it says. "The claim is a statutory requirement, prescribed for the very purpose of making the patentee define precisely what his invention is; and it is unjust to the public, as well as an evasion of the law, to construe it in a manner different from the plain import of its terms." *White v. Dunbar*, 119 U. S. 47, 7 Sup. Ct. 72; *Stutz v. Robson*, 54 Fed. 506; and *Keystone Bridge Co. v. Phoenix Iron Co.*, 95 U. S. 274. So, also, we do not find in respondents' device "the water tube, B<sup>1</sup>, connecting the water spaces of the steam and water drums." Can language be more explicit than these words? Can there be any doubt what the patentee meant, specified, claimed? The words "tube" and "connecting" when applied to two inclosures, imply passage from the one to the other through the medium of such tube. There can be no doubt what the connecting water tubes specified by the patentee

were, and their function is explicitly stated by Prof. Cooley, who says:

"The circulation of water is as follows: The feed water enters the rear upper drum, and passes thence down through the feed-water tubes to the mud drum. It then passes forward and up through the front bank of tubes to the front steam and water drum, thence back through the connecting water pipes into the feed-water drum, again down into the mud drum; forward and up through the front bank of tubes, and so on continuously. \* \* \* This arrangement of drums, tubes, and connecting pipes appears to be a convenient arrangement, and peculiarly adapted to secure this rapid and complete circulation of water," etc.

In point of fact such a connecting tube in form does not exist in respondents' boiler. Does it in substance? Its equivalent is found by complainant's experts in tubes 10, the mud drum 5, and the front tubes of bank 8, and the triangular circuit found in Stirling's device is claimed to exist in respondents' structure from the front mud drum up tubes 7 to front drum 1; thence down tubes 10 to mud drum 5; thence up the front tubes of bank 8 to steam and water drum 2; thence down the rear tubes of bank 8 to steam drum 5; thence through nipple 12 to mud drum 4, the starting point; and thence forward in circuit.

Conceding, what we are by no means prepared to concede under the prior art, and in the absence of all mention of a triangular circulation in Stirling's patent, that the double quadrilateral circulation as alleged above could be held, in substance, the equivalent of the triangular circulation of the Stirling structure, does such circulation exist? In this connection we cannot too strongly emphasize the law that the burden of affirmatively establishing the fact of its actual existence—not of its mere possibility or probability—rests on the complainant. Does a fair preponderance of the proofs affirmatively show this? Without at length reciting or analyzing the testimony on that point, or without discussing the experiments and tests which are alleged to be confirmatory of the existence of such a circulation, all of which we have patiently considered, we are satisfied that the complainant has not met the burden of proof imposed upon it by the law, and has not shown by a preponderance of proof that the circulation alleged by it does take place in respondents' boiler. Indeed, the weight of the testimony in this regard is, in our judgment, with respondents. Such being the case, infringement of the first claim of the patent has not been shown, nor, in our view, has infringement of the second claim been established. In it we find "the single mud drum, A," and "the two elevated steam and water drums, A<sup>1</sup>, A<sup>2</sup>, having their steam and water spaces respectively placed in communication." This latter element, under the prior art and the specification, we must construe as meaning the connecting steam and water tubes of the prior claim. Thus construing the claim, infringement has not been shown.

The same conclusion must follow with the second patent. It is expressly stated to embody "certain improvements in that class of steam boilers, which I have described in letters patent No. 407,260." To the construction therein shown there is added a third upper drum, A<sup>3</sup>, used as a feed-water heater, connected to the next



forward steam and water drum by a steam pipe,  $b^3$ , and to the single mud drum, A, by water tubes,  $B^3$ , along which the gases are made to travel by an additional baffle placed back of the tubes, connecting the mud drum, A, and the upper drum,  $A^2$ . It specifically refers to the steam and water drums as connected "with each other by steam pipes,  $b^1$ , and water pipes,  $b^2$ ." There is no mention of a triangular circulation, and the only reference to circulation is what would possibly be purely local ones, respectively, in the tubes connecting the mud drums with the two forward steam and water drums, viz. the water "enters the mud drum, A, in a heated state, and from the drum the water rises through the tubes,  $B^1$ ,  $B^2$ , into the drums,  $A^1$  and  $A^2$ , and it reaches these drums comparatively free from mud." In this patent two claims were allowed, viz.:

"(1) A water-tube boiler consisting of a single mud drum, A, two elevated steam and water drums,  $A^1$   $A^2$ , having their steam and water spaces, respectively, placed in communication; the water tubes,  $B^1$   $B^2$ , extending from the mud drum to the drums,  $A^1$   $A^2$ ; the feed drum,  $A^3$ ; the water tubes,  $B^3$ , extending from the mud drums to the feed drums; and the pipes  $b^3$ , connecting the feed drum with one of the steam and water drums,—substantially as described."

"(2) A water-tube boiler consisting of a furnace structure, a single mud drum, A; the elevated steam and water drums,  $A^1$   $A^2$ , having their steam and water spaces respectively placed in communication; two sets of water tubes,  $B^1$   $B^2$ , directly connected at their upper ends with the steam and water drums, and both sets connected at their lower end with the single mud drum; the feed drum,  $A^3$ ; the water tubes,  $B^3$ , connecting the feed drum with the mud drum; the brick arch, D, extending over the fire place, from the wall of the furnace structure, close to the front set of water tubes,  $B^1$ ; the fire-brick partition, C, inclined between the two sets of water tubes,  $B^1$   $B^2$ ; and the fire-brick partition E, situated between the water tubes,  $B^2$  and  $B^3$ ,—substantially as described."

The additions thus made to the former device were not in themselves novel. Rankine, as we have already seen, had taught that in boiler construction the motion of the steam and water should, on the whole, be opposite to that of the flame and hot gases of the furnace, and had advocated placing feed-water heaters in the line of gas leaving the boiler. The French patent of Grenier, No. 153,938 (1883), went a step further, and showed in a water-tube boiler a progressive circulation of water forward from the rear, and a circulation of the gases in the opposite direction, and the feed-water section made an integral part of the boiler itself.

In view of what has existed in the art, in which must be included the first patent to Stirling himself (James v. Campbell, 104 U. S. 382; McCreary v. Canal Co., 141 U. S. 459, 12 Sup. Ct. 40), the only novelty shown was in the combination claimed. As we read the claims, "the single mud drum, A," is an express element, and "the elevated steam and water drums,  $A^1$ ,  $A^2$ , having their steam and water spaces respectively placed in communication," must be construed as noted in disposing of the second claim of the first patent.

The views expressed heretofore render needless a discussion of respondents' third form of boiler. What has been already said applies to it, with the additional fact that the rearmost of its three

lower drums is disconnected entirely from the mud drum adjoining it. They are separate and separated chambers, with individual functions, and receive separate deposits of scale and sediment. The water once in mud drum 5 could never pass again through drum 6.

On the whole case, we are of opinion infringement has not been shown, and the bill must be dismissed. Let such a decree be drawn.

I am authorized by Judge ACHESON to note his concurrence.

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THE ADVANCE.

THE ALLIANCA.

THE VIGILANCIA.

THE SEGURANCIA.

HUNTINGTON et al. v. PROCEEDS OF THE ADVANCE. SAME v. PROCEEDS OF THE ALLIANCA. SAME v. PROCEEDS OF THE VIGILANCIA. SAME v. PROCEEDS OF THE SEGURANCIA.

(Circuit Court of Appeals, Second Circuit. March 3, 1896.)

SHIPPING—EQUITABLE LIEN—EXPRESS CONTRACT.

One who, in the home port, at the request of the owner, and for the purpose of preventing seizure and sale of the vessels in a foreign port, guaranties letters of credit, upon an express contract which gives him a lien on the freight alone, does not thereby acquire an equitable lien, superior to a prior mortgage, on the vessels themselves, even if he supposed at the time that he would have a maritime lien on both freight and vessels.

Appeal from the District Court of the United States for the Southern District of New York.

This was a petition by Collis P. Huntington and Pratt & Co. to assert an equitable lien against the proceeds of the steamships Advance, Allianca, Vigilancia, and Segurancia. The district court dismissed the petition, and the petitioners appeal.

Robt. D. Benedict and Maxwell Evarts, for appellants.

Lewis Cass Ledyard and Walter F. Taylor, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. After the district court dismissed the petitions of C. P. Huntington and Pratt & Co., which were founded upon an alleged maritime lien upon the proceeds of the Advance, Allianca, and Vigilancia (see 63 Fed. 726, affirmed in 72 Fed. 793), the same petitioners filed in the district court a petition which, relying upon the same facts as those previously set forth, asserted that they constituted an equitable lien upon the proceeds of the same three vessels, and of the Segurancia, another steamer of the same line, and prayed that such equitable lien might be preferred in order of payment to the lien of the mortgagee. From the decree of the district court, which dismissed the petition, this appeal was taken.

The district court referred the petition to a commissioner, to take proof of the allegations which it contained, and the record shows that

no new facts were either proved or were found to be true. Mr. Babidge testified again, but it is apparent that his memory of the previous transactions had not been modified. The facts upon which this petition must rest are therefore the same as those which were stated in the opinion of this court in the maritime lien cases. 72 Fed. 793. The position which the petitioners take is that they furnished the guaranties at the request of the owner of the steamships, to save them from being sold in a foreign port; that, by means of the aid thus furnished, a great benefit was conferred upon the vessels and upon their owner; that it would be inequitable to allow the owner to reap the benefit from payments which were made by the petitioners upon the supposition that they had a maritime lien upon the vessels, and thus compel them to endure a large loss; and that the mortgagee, who did not take possession of the ships, has no superior equity to that of the owner. The petitioners seek to bring their case within some of the circumstances which courts of equity have declared create equitable liens upon property, real or personal. For example, a vendor who has not been paid his purchase money for the land sold is entitled, as between himself and the purchaser, to a vendor's lien upon the land. A person who has advanced money for the benefit of an estate, upon the credit of the property, and upon the promise and the expectation of a mortgage thereon, is entitled to an equitable lien upon the estate, as between himself and the owner. *Perry v. Board*, 102 N. Y. 99, 6 N. E. 116. An assignee of a claim, holding it under an assignment supposed to be good, but afterwards adjudged to be invalid, who successfully prosecutes the claim, and protects and preserves it at his own expense from rival claimants, is entitled to a reimbursement of his expenses by the true owner, upon a settlement between them. A court of equity will compel the owner of land who comes into that court to obtain relief against a bona fide purchaser, under a title which has a latent defect, to make reasonable compensation for the improvements which the purchaser has made without notice of an adverse claim. *Williams v. Gibbes*, 20 How. 535. Circumstances which imply a contract between the parties to give a particular lien, and especially fraud practiced by the true owner of the property upon the nominal and bona fide owner, will incite the conscience of a court of equity to do justice between the parties. It is the province of such a court, under those and other like circumstances, to rectify a proposed wrong, to compel the parties to carry into effect their implied agreements, or to prevent one from asserting against another a defense which is both inequitable and unjust.

The question upon this appeal is whether the facts of the case can bring it within the remedial control of a court which is governed by the principles of equity. In the statement which has been given of the petitioner's case, as presented by them, one important fact was omitted, which is that the guaranties were given upon an express contract for security upon the freights, which has proved beneficial to the petitioners to the extent of about \$25,000. The effect which this fact has upon the claim of the petitioners that a maritime lien upon the vessels ought to supplement an express agreement for a maritime lien upon the freights has already been considered in the maritime

lien cases, and the result of this case has been foreshadowed. It would seem to be manifest that if the petitioners had taken, as their security, an express pledge of personal property, not maritime in its character, they could not, in the event of loss, resort to an unpledged maritime security. Neither can they, having taken one kind of maritime security which has not proved sufficient, turn to another, which it cannot be found was offered by the owner. It is, however, urged by the petitioners, that Huntington signed the second and became liable upon the third guaranty, upon the supposition, belief, or expectation that he was to have security upon the American ships, and paid his money in reliance upon that expectation, and that this fact brings him and his associate within the boundary of equitable liens. It is said that as in *Perry v. Board*, supra, the complainant advanced his money upon the expectation of a mortgage, so Huntington paid his money in reliance upon a lien upon the vessels. The difference between the case at bar and the well-established cases of equitable liens, of the class of which the *Perry Case* is an example, is that in the latter the equitable lienors had a just right to expect the security of the estate, whereas Huntington had no just right to rely upon the vessels, because he had made an express contract which limited his lien, and in view of that contract his expectations had no adequate or firm foundation.

The decree of the district court is affirmed, with costs.

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THE ADVANCE.

THE ALLIANCA.

THE VIGILANCIA.

HUNTINGTON et al. v. PROCEEDS OF THE ADVANCE. SAME v. PROCEEDS OF THE ALLIANCA. SAME v. PROCEEDS OF THE VIGILANCIA.

(Circuit Court of Appeals, Second Circuit. March 17, 1896.)

1. MARITIME CONTRACTS—LETTERS OF CREDIT—GUARANTY.

A letter of credit may be maritime or nonmaritime, according to the objects of the loan, the intent of the parties, and the circumstances attending it; and consequently a contract guarantying, on the express security of a vessel's freights, a letter of credit issued to enable her to pay her debts in a foreign port, and enable her to return home, is a maritime contract, enforceable in the admiralty.

2. MARITIME LIENS—SUPPLIES—CONTRACT IN HOME PORT.

The owner can, by express contract made in the home port, create a maritime lien for a loan of credit, whereby the vessel is enabled to procure necessary supplies in a foreign port; but in such case the prima facie presumption of necessity for the credit of the ship which arises when supplies are furnished in a foreign port on the sole order of the master does not apply, and on that question the claimant of the lien has the affirmative.

3. SAME.

A guaranty of letters of credit, in the home port, on the request of the known insolvent owner, for the purpose of enabling the vessel to pay her debts in a foreign port, and thereby escape detention, creates no

maritime lien on the vessel herself, where there was an express contract for a lien on the freights alone. 63 Fed. 726, affirmed.

4. SAME—SUBROGATION.

One giving a guaranty under an express contract whereby he is to have a lien on the freight alone is not subrogated to the rights of lienors in a foreign port, whose claims are paid with money obtained on the strength of the guaranty.

Appeal from the District Court of the United States for the Southern District of New York.

These were petitions by Collis P. Huntington and Pratt & Co. against the proceeds, respectively, of the steamships *Advance*, *Allianca*, and *Vigilancia*, to assert an alleged lien arising out of a contract whereby libelants guaranteed payment of certain letters of credit. The district court dismissed the petition (63 Fed. 726), and the petitioners have appealed.

Robert D. Benedict and Maxwell Evarts, for appellants.

Lewis Cass Ledyard and Chas. D. Wetmore, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. The United States & Brazil Mail Steamship Company, a corporation organized under the laws of the state of New York, had been engaged for some years prior to October, 1892, in the business of running a line of passenger and freight steam vessels between the city of New York and different ports in Brazil, with increasingly poor pecuniary success. Mr. Collis P. Huntington was a stockholder, a director, and the vice president of the company, but without any active share in its management, except to lend it money in its times of need, which he was in the habit of doing to a very large amount. He had advanced, during five or six years before October, 1892, about \$400,000. Charles Pratt & Co., of Brooklyn, were stockholders, who, like Mr. Huntington, loaned or advanced money largely to the corporation. Each of these persons was aware prior to October, 1892, that the corporation was insolvent, and in great financial straits, and had concluded to lend it no more money without security. Prior to October, 1892, the corporation had been in the habit of disbursing its ships in Brazil, with moneys derived from letters of credit issued by Brown Bros. & Co., bankers of New York, secured by a written hypothecation of the freight moneys of the line. This firm apparently grew restive and indisposed to increase their line of credit to the corporation, and it therefore became indispensable that it should obtain financial assistance elsewhere, for the purpose of enabling its vessels to pay their debts in Brazil, and return to New York. They must be kept in motion in order to keep the corporation alive. In this state of things, Mr. Huntington and Pratt & Co., in New York, at the solicitation of the steamship company, were induced to become guarantors of three other letters of credit issued by Heidelbach, Ickelheimer & Co., of New York, to the superintendents of the corporation at Santos and Rio, for the purposes of disbursing the vessels, and preventing their detention and sale at those ports. The whole history of this transaction in regard to guaranties, as given by the witnesses and as indicated by the circumstances, shows that

they were furnished in reliance upon the oral promise or pledge, in New York, of some security in addition to the bare credit of the steamship company. The particulars in regard to the use which was made of these letters are stated by the district judge in the case of the libels and petitions of different claimants of the freights of the vessels, as follows (Freights of *The Kate*, 63 Fed. 707):

"The first of the three letters of credit was for £4,000, dated October 14, 1892, and was sent by the steamship company to its agent at Santos; the second and third were for £8,000 each, dated January 9, 1893, and February 8, 1893, respectively, and sent by the steamship company to its superintendent at Rio. These letters authorized drafts within four months on C. J. Hambro & Son, of London, at 90 days' sight, and were accompanied by similar agreements of the steamship company to provide Heidelberg, Ickelheimer & Co., in New York, with funds to pay all drafts fifteen days before their maturity in London. They did not, however, contain any pledge or hypothecation either of ship or freight; but, instead of that security, they were accompanied by a written personal guaranty, the first two signed by Mr. Huntington, and the last by Pratt & Co., that the steamship company would perform its agreement, and that they, the guarantors, would pay the drafts in case of the company's default. Under the first of these three letters two drafts were drawn and negotiated at Santos, for £2,000 each, dated November 16, 1892, and December 2, 1892, which, on maturity, after the failure of the steamship company, were paid by Mr. Huntington, on March 1 and March 13, 1893, respectively. Under the second letter of January 9, 1893, five drafts, amounting in all to £8,000, were drawn and negotiated at Rio, from the middle of January, 1893, to about February 1, 1893, all of which were paid by Mr. Huntington at maturity, between May 6 and May 19, 1893. Under the last letter of credit of February 8, 1893, only three drafts were drawn, viz. on February 18th and 21st, and March 3d, amounting in all to £4,500, which, at maturity, were paid by Pratt & Co., from May 26 to June 5, 1893."

The steamship company failed in February, 1893. On March 18, 1893, Henry Winthrop Gray was appointed by the proper state court temporary receiver of the company, and this appointment was made permanent March 6, 1894. The steamships *Advance*, *Allianca*, and *Vigilancia*, owned by the company, arrived in New York on their last voyage from Brazil on February 21, 1893; were soon attached on libels for seamen's wages; and on March 18, 1893, were attached under libels in favor of Brown Bros. & Co. The vessels were sold, and the proceeds were paid into the registry of the district court, when a mass of litigation, consisting of more than 30 cases, ensued, at the instance of divers persons, who claimed maritime liens upon the freights or upon the vessels and their proceeds. Among those cases were five petitions of the present petitioners, to recover, from the freight moneys which had been received by the steamship company, the moneys paid by them upon their guaranties, it being alleged that the freights were a security which was given when the guaranties were signed, and upon which a maritime lien existed. These petitions were granted, upon a finding that the freights were expressly hypothecated to the petitioners, and that the lien upon them was maritime in its character. From the decree in that class of cases, no appeal was taken; the amount in controversy was divided between the lienors by agreement; and the present petitioners received, as their part of the fund, enough to pay the amount due upon the guaranty of the first letter of credit. The petitions which are the subject of the present appeals were

brought by Mr. Huntington and Pratt & Co., to obtain a decree for the repayment to them, from the avails of the Advance, the Allianca, and the Vigilancia, of the amount which they paid upon their guaranties, and which had been used, by means of the letters of credit, to pay for supplies and materials furnished the respective vessels in Brazilian ports, upon the ground that the petitioners were subrogated to the liens against the steamships for such supplies and materials. Upon the hearing before the district court, the questions of fact resolved themselves into the questions whether the guaranties were given expressly upon the credit of both freights and vessels, and whether, from the known circumstances of the transactions, the fact of a credit upon the vessels could not be fairly inferred. The district judge found that there was no pledge of the vessels, and dismissed the petitions. 63 Fed. 726. From those decrees, these appeals were taken.

The claimant and appellee is the Atlantic Trust Company, to which corporation, as trustee, the steamship company conveyed, by three mortgages, dated July 1, 1889, September 17, 1890, and June 5, 1891, the steamships named in these petitions, and the Finance and Seguranca, and the franchises of the company, and its property then in possession or thereafter to be acquired, to secure the payment of bonds to the amount of \$1,250,000. Default in the payment of interest occurred January 1, 1892. Before the mortgagee could gain possession of these vessels, they were attached by some of the libellants.

It appears from the foregoing facts that the cases stand on this wise: At the home port of a line of steamships which are in a foreign port, the insolvent owners of the vessels obtain from the petitioners, who know the owners' insolvent condition, indispensable means, by the aid of which the owners are enabled to discharge the liens resting upon the vessels in the foreign port, and to continue them in their business as seagoing vessels, upon the security either of the vessels and their freights, or of the freights alone, and the petitioners have paid the liabilities which they assumed upon the faith of the security. The mortgagee raises the preliminary question whether the security which the petitioners claim to have received can be regarded as a maritime lien, and says that the transaction with Heidelberg, Ickelheimer & Co. was an ordinary commercial transaction, not maritime in its character; that the guaranty was merely incidental thereto; was one simply of suretyship of letters of credit; that no money was to be paid in Brazil upon the letters, but was to be obtained there by means of drafts within four months upon named bankers of London, at 90 days' sight; that the guarantors' promise to ultimately pay these drafts is very remotely connected with the maritime destination of the money to be raised in Brazil; and that, as a result of these considerations, the guarantors' security, if any there was, was not a maritime lien.

It is obvious that the form by which, or the mode in which, the letters of credit were to be made available in Brazil, and the form in which Heidelberg, Ickelheimer & Co. furnished money to the steam-

ship company, whether by letter of credit or by a direct loan, are immaterial. The form adopted was the means by which the steamship company obtained money in Brazil to pay the Brazilian debts of the vessel.

The answer to the main question, viz. whether the transaction, so far as the petitioners and the steamship company are concerned, was a maritime contract, is so clearly stated in the opinion of the district judge in *Freights of The Kate*, 63 Fed. 707, that further discussion is unnecessary. The district judge said:

"A letter of credit, like a loan of money, is in itself indifferent in character. It may be maritime, or nonmaritime, according to the objects of the loan, the intent of the parties, and the circumstances attending it. Maritime contracts are contracts that pertain to maritime commerce and navigation. A letter of credit issued for the purpose of directly aiding the prosecution of current voyages, and upon the faith of the freights to be earned, as a part of the contract, is as purely maritime as a bottomry bond; and no commercial transactions are more characteristically maritime than these. Every loan, whether of credit or of money, to assist a vessel on her voyage, and on the pledge of her freights, is presumably a maritime loan. Mr. Justice Thompson, in the case of *The Mary*, 1 Paine, 671-673, Fed. Cas. No. 9,187, says: 'All civilians and jurists agree that maritime hypothecations fall under the denomination of maritime contracts.'"

After sustaining the maritime character of the contract with Brown Bros. & Co. by which the freights were expressly hypothecated to secure the repayment of the moneys advanced upon their letters of credit, and the maritime nature of the lien resulting from such hypothecation, the district judge further said:

"The company's contract with Mr. Huntington and Pratt & Co. to obtain their personal guaranties on the faith of a pledge of the freights is of the same maritime character. The letters of credit of Heidelberg, Ickelheimer & Co., considered by themselves alone, and independently of the guaranty by Messrs. Huntington and Pratt, and the pledge of the freights therefor, would have nothing about them necessarily maritime, since those letters were not accompanied by any kind of hypothecation; nor is there any evidence before me that Heidelberg, Ickelheimer & Co., in issuing their letters, had any reference to the maritime objects of the loan, or any interest in the appropriation of the moneys to the prosecution of these voyages, or that they issued their letters for that especial purpose, or upon the faith of any credit of ship or freight; and, in the absence of such evidence, their dealings should, perhaps, be treated as ordinary nonmaritime commercial dealings. But that fact does not in the least affect the nature of the additional arrangement between the steamship company and their guarantors as respects the latter's means of indemnity; and that additional agreement, and that alone, is what is sought to be enforced in these libels and petitions. That agreement contained two essential elements, in addition to the terms of the contract with Heidelberg, Ickelheimer & Co.: First, that the proceeds of the drafts were to be used to supply necessities to the company's vessels in foreign ports, to enable them to complete their voyages and earn freight; and, secondly, that the guarantors should enable these means to be procured by their guaranty, to be given upon the credit of the freights of the line. This contract, like that with Brown Brothers & Co., was a purely maritime agreement, and within the jurisdiction of this court, whether the contract between the steamship company and Heidelberg, Ickelheimer & Co. was so or not."

The question of the extent of the security upon which the guaranties were given is next to be considered. It is to be premised that it is not doubted that the owners can create a maritime lien



upon their vessels for necessary supplies furnished to them in a foreign port upon the credit of the vessels, and that the oral contract or agreement between the owners and lienors, whereby such maritime lien was created, may be made in the home port. It is also well understood that the same *prima facie* presumption of necessity for the credit of the ship which is applicable in the case of supplies furnished in a foreign port upon the sole order of the master does not apply in the case of supplies furnished in such port upon the express direction of the known owner, and therefore, in the absence of presumptions, the question is one in which the petitioners take the affirmative. At the threshold of the inquiry, three facts are manifest: Firstly, an absolute necessity, recognized by each, and consequent upon the known insolvency of the steamship company, of a maritime lien of some sort; secondly, that a maritime lien was given, which the district court has found to be, at least, upon the freights,—a conclusion which has now become *res adjudicata*, and in which our examination of the case leads to a full concurrence; thirdly, and one of great importance, that whatever security was given was expressly given. The contract between the parties was an express contract, entered into between the owner of the vessels and Mr. Huntington. The antecedent circumstances are valuable for the purpose of throwing light upon the probabilities of the contract, and in the ascertainment of what one party would have naturally proffered and the other party would naturally have insisted upon; but whereas, in many cases, courts, in consequence of the silence of the parties when the advances were made, or their subsequent forgetfulness of what occurred, are compelled to look at the inferences to be drawn from their conduct and acts, in view of the known insolvency of the owner, little resort can be had in this case to that class of evidence. There is a class of cases, in regard to maritime liens for supplies furnished to a vessel in a foreign port at the request of the owners or of their agent (of which *The James Guy*, 1 Ben. 112, Fed. Cas. No. 7,195, and 9 Wall. 758, and *The Patapsco*, 13 Wall. 329, are examples), in which there was not apparently an express contract between the owners and the material men for the credit of the vessel, but in which the lienors' knowledge of the insolvency of the owner was regarded as a very significant fact, from which the inference could naturally be drawn that credit must have been given in part to the vessel. In this case a court is able to ascertain what the owner offered, and what the lienors apparently accepted, as security, at the time when the contract was entered into. The terms of the express contract, when they can be accurately ascertained, must preclude the idea of a contract to be ascertained by inference for another and different security from the one contained in the express contract. It is true that Huntington's knowledge of the utter insolvency of the steamship company is important to show that he naturally would have wanted to get all the security which was available, but, if the evidence shows that he did content himself with the security of the freights, his lien must rest where he placed it.

The entire negotiations with the petitioners in regard to the three letters of credit, so far as the steamship company was concerned, were conducted by Mr. Babbidge, its secretary and treasurer. The conference in regard to the first guaranty was had with Mr. Pratt and Mr. Gates, who was Mr. Huntington's general assistant, and who, having a power of attorney from Huntington, signed, in his absence, the first guaranty. Mr. Huntington personally had conversations with Mr. Babbidge, which resulted in the guaranty upon the second and third letters of credit. Mr. Gates' information in regard to the result of these interviews was derived from the subsequent statements of Huntington and Babbidge. Mr. Pratt was not called as a witness by either party, so that the evidence in regard to the security must be derived from the three persons named. Inasmuch as the money paid by the guarantors upon the first letter of credit has been repaid from the moneys from the freights which were received as the result of a compromise agreement between all the parties, after the decree in the freight-money cases had been entered, it is not indispensable to know what the security was which Mr. Gates accepted, but knowledge of the character of the contract in which he participated is valuable as showing the probable character of the steamship company's proposition for security upon the next request for a guaranty; and, furthermore, the three contracts are closely connected in the mind of Mr. Babbidge, who regards the second and third as reproductions of the first. The first guaranty was obtained from Mr. Gates to meet the demands of the bankers for a guarantor, and it was then understood that Pratt and Huntington should, as between themselves, equally bear the burden upon that guaranty and any future similar obligations. It is apparent from the testimony of Babbidge that a great deal of persuasion was required to bring them to furnish the first guaranty, and that he informed them that, as Brown Bros. & Co. had a lien upon the freights for their letters of credit, he expected they would have a similar lien also. Gates corroborates this by the declaration that the earnings of the ship, on the voyage to be completed by means of the fund to be raised by the letter of credit, were to be security for the payment of any money which might be called for under that guaranty. The pledge of the freights was the only security offered, asked for, or given, when the first guaranty was signed. The testimony of Babbidge in regard to the conversations between himself and Huntington when the second and third guaranties were signed is of like import. It is not as positive in regard to a pledge of the freights, but it is apparent that, as the transactions lie in his memory, the negotiations proceeded in the same progressive steps as before. The recollection of Mr. Huntington, as disclosed in his testimony, is less clear and precise than that of Mr. Babbidge. His testimony is, indeed, in general terms, that he was to have a lien on the American ships and the freight list, but it is apparent that there is not in his mind a vivid remembrance of the negotiations. He remembers his conclusion or

supposition in regard to his security,—a conclusion or expectation which was in some measure founded upon his belief in the rights of material men who aided ships in foreign ports. That the first guaranty was not based upon or accompanied by a lien upon the vessels is perfectly manifest from the testimony of two of the parties to the transaction, each of whom is and was friendly to Mr. Huntington; and the probabilities are exceedingly strong that the second and third guaranties were not accompanied by a lien of a different character.

The appellants insist that a decree should have been rendered in favor of the petitioners upon the ground that the money which was obtained upon the strength of their guaranty went to pay and discharge maritime liens upon the vessels in a foreign port; that, by operation of law, these liens were assigned to them; and that they are subrogated to the rights of those lienors whose claims were paid by the money which they indirectly furnished. There is no adequate ground for this conclusion, because in this case there can be no implied assignments by operation of law, no succession to the position of the Brazilian lienors, and no subrogation to their rights, because the contract of lien under which the guaranties were given was expressly limited to the freights. A court of admiralty is compelled, therefore, to look at the contract; and, if it does, the right of subrogation disappears, for nothing in the negotiations supports the idea of subrogated liens. Inasmuch as the contract for lien, between the owner and the guarantor, was an express one, the lien which it created upon one thing cannot be supplemented by a lien, arising by operation of law, upon a different thing.

We concur in the conclusion of the district judge that, "for this guaranty and loan of credit, they [the guarantors] were entitled to just such liens as the agreement at the time of the negotiations gave them, and no more. For a loan of credit as guarantor only, upon a dealing exclusively with the owner, I find no principle or authority for recognizing any other maritime or equitable lien, either directly or by subrogation, beyond what their agreement gives; and that, in this case, was for a lien on the freights alone."

The decrees of the district court dismissing the petitions of Huntington and Pratt & Co., as respects the proceeds of the three vessels which have been named, are affirmed, with costs of this court.

**MOLONEY, Attorney General, v. AMERICAN TOBACCO CO. et al.**

(Circuit Court, N. D. Illinois. March 25, 1896.)

**REMOVAL OF CAUSES—CIVIL ACTION—ANTITRUST LAW.**

An information in equity to restrain violation of a state statute forbidding trust combinations is not a civil action, within the meaning of the removal act.

In Equity. On motion to remand.

Information in equity by M. T. Moloney, attorney general of the state of Illinois, against the American Tobacco Company and others, for violation of the antitrust law of Illinois.

Atty. Gen. Moloney, in pro. per.

Charles H. Aldrich, for defendants.

SHOWALTER, Circuit Judge. This proceeding is, in form, an information in equity by the attorney general of Illinois. It was commenced in the circuit court of Cook county, and thence removed to this court on petition of defendants, wherein they insist that a federal question is involved. The proceeding is grounded on section 4 of the act of 1893 of the Illinois legislature entitled:

"An act to define trusts and conspiracies against trade, declaring contracts in violation of the provisions of this act void, and making certain acts in violation thereof misdemeanors, and prescribing the punishment therefor and matters connected therewith."

Said section 4 is in words following:

"Every foreign corporation violating any of the provisions of this act is hereby denied the right and prohibited from doing any business within this state, and it shall be the duty of the attorney general to enforce this provision by injunction or other proper proceedings, in any county in which such foreign corporation does business, in the name of the state on his relation."

Section 1 defines what a trust is. Section 2 provides that any domestic corporation violating any of the provisions of the act shall forfeit its charter and cease to exist. And section 3 directs the attorney general to institute suit or quo warranto proceedings against any domestic corporation so violating the act. Section 5 declares any violation of any of the provisions of section 1 to be a conspiracy and a misdemeanor, and fixes a fine of not more than \$5,000 nor less than \$2,000 against "any person who may be or may become engaged in any such conspiracy or take part therein or aid or advise in its commission, or who shall, as principal, manager, director, agent, servant, or employé, or in any other capacity knowingly carry out any of the stipulations, purposes, prices, rates, orders thereunder or in pursuance thereof." And section 6 concerns the form of the "indictment or information for any offense named in this act." But no consequence, as against a domestic corporation, seems to follow the offense, other than the forfeiture of its charter, or, as against a foreign corporation, other than an inhibition from business in this state.

The American Tobacco Company, the principal defendant, is a corporation organized under the laws of New Jersey. It is said, in v.72F.no.7—51

the information, that this corporation was created by a combination of separate and previously competing concerns for the purpose of a monopoly in products made from tobacco, and, particularly, in cigarettes; that said combination practically controls the trade in the last-named commodity in the United States and in Illinois; that it carries on its trading operations in Illinois by the aid of divers persons and corporations domiciled here, each being under a contract of agency for the sale and handling of said product, and each having engaged with the company not to handle the goods of any other manufacturer. These agents are made co-defendants with said American Tobacco Company, and the prayer is that said company and said co-defendants be enjoined from conducting the cigarette business of said company in this state.

The right of a litigant to avail himself of the judicial power of the United States through the instrumentality of the circuit court of the United States is limited by federal legislation. Any suit "of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of \$2,000, and arising under the constitution or laws of the United States," may, within the limitations now current, be originally commenced in, or be removed from a state court and thenceforward be prosecuted in, the circuit court of the United States. A question here is whether or not the present proceeding is a suit of a civil nature. This court does not adjudicate upon penal or criminal statutes of a state. The purpose of this information is to enforce against the American Tobacco Company the prohibition from doing business in Illinois, and the cause of action alleged is conduct which, within the meaning of the act, if it have any meaning, is an offense or misdemeanor. The information does not show, as the ground of action, any contract right in the state, or any property right or easement vested in the state, as trustee, representing the public or otherwise. The action is based on a statute or rule of conduct which the state, as a governing agent, has prescribed, and the violation of which, on the theory of the information, is an offense or misdemeanor. This is not, in its nature, a suit to recover for, or stop the continuance of, an injury. It is the prosecution of an offender against a criminal statute. This defendant corporation is not bound to refrain from carrying on a monopoly in cigarettes because the state, as a sovereign, or in any other capacity, is damaged thereby, but because the state, as a sovereign, has made a rule to the contrary. The damage, whatever it may be, would be precisely the same if no such rule or statute had been enacted. Yet, in the latter case, there would be no action. The information, therefore, as already said, has no other purpose than the enforcement of a penal statute. The supreme court of the United States in *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 8 Sup. Ct. 1370, ruled that an action of debt by a state to recover on a judgment for a fine was not a suit of a civil nature. So, here, the circumstance that an injunction is the instrument, and apparently the only instrument, of the state's displeasure, does not change the essential nature of the conduct complained of, or of the legal sanction to which said conduct must be referred.

On the one hand, the state statute does not extend the equitable jurisdiction of the circuit court of the United States, nor does it create or vest in the state a new cause of action in equity, such as can be entertained in this court, or in the circuit court of the United States in New Jersey, for instance, or in any court of general jurisdiction in a state other than Illinois. On the other hand, the suit is not one of a civil nature. The first section of the act gives definitions of a trust; but said section does not, in terms, prohibit any person or corporation from entering into any one of the combinations so defined. The remaining sections are worded to meet "violations" of the first. If, for this reason, no offense is, in fact, made by the statute, then this information, since it avowedly rests on the statute, necessarily fails. In that event, no further question of any kind arises. If I should here hold that the statute, by reason of the omission referred to, is left meaningless and ineffectual, and thus retain the case here as a civil suit, then, by the selfsame ruling, there would be nothing left but to dismiss the information for want of equity. The cause is remanded to the state court.

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SCHIPPER et al. v. CONSUMER CORDAGE CO., Limited.

(Circuit Court, S. D. New York. November 23, 1895.)

REMOVAL OF CAUSES—TIME FOR REMOVAL.

An extension of the statutory time to answer by mere stipulation, and not by order of court, does not extend the time for removal. *Rycroft v. Green*, 49 Fed. 177, distinguished.

This suit was brought in a state court by Charles W. G. E. Schipper and another against the Consumer Cordage Company, Limited, and was removed to this court by defendant. A motion is now made to remand it, on the ground that the removal was too late, being after the expiration of the 20 days allowed for answer by the Code of Civil Procedure. The time for answering had been extended by stipulation, but not by order of court.

E. A. Bigelow, for libelants.

Charles L. Atterbury, for defendant.

LACOMBE, Circuit Judge. In *Rycroft v. Green*, 49 Fed. 177, it is stated to be the settled practice in this circuit to hold that extension of time to answer by order of court extends the time for removal. Such construction is within the language of the act of 1887, "before the defendant is required by the laws of the state or the rule of the state court \* \* \* to answer." But an extension of time to answer by stipulation only cannot be held to be an extension by rule of court. Motion to remand is granted.

**LAKE STREET EL. R. CO. v. FARMERS' LOAN & TRUST CO. et al.**

(Circuit Court, N. D. Illinois. March 16, 1896.)

**REMOVAL OF CAUSES—SEPARABLE CONTROVERSY—RAILROAD MORTGAGE.**

A railroad company which had given a mortgage to two trustees, one of which was a corporation of another state, brought suit to have such trustee removed, and also to restrain it from foreclosing the mortgage against the wishes of the other trustee and of a majority of the bondholders, *Held*, that the controversy between the railroad company and the former trustee was a separable one, to which the other trustee and the bondholders were not necessary parties.

**In Equity.** On motion to remand.

Knight & Brown and Chas. H. Aldrich, for complainant.

Runnells & Burry and J. J. Herrick, for defendant.

Dupee, Judah, Willard & Wolf, for Northern Trust Co.

**GROSSCUP**, District Judge. The bill is by the Lake Street Elevated Railroad Company, a corporation under the laws of Illinois, against the Farmers' Loan & Trust Company, a corporation under the laws of New York, the American Trust & Savings Bank, a corporation under the laws of Illinois, and the Northern Trust Company, a corporation under the laws of Illinois. The bill shows that the complainant is owner and operator of an elevated railroad, and as such has authorized the issue of \$10,000,000 of bonds, consisting of 100,000 bonds of the par value of \$100 each, to secure which complainant executed and delivered to the American Trust & Savings Bank and the Farmers' Loan & Trust Company, defendants, as trustees for the bondholders, its trust deed upon its property and appurtenances, situated in Cook county, Ill., which trust deed was duly accepted by the trustees therein named. The trust deed confers upon the trustees the usual power contained in such instruments, including the power, in case of default of interest for a period of six months, and upon the request of one-fourth in interest of said bondholders, to declare all the bonds immediately due and payable; also, upon a request of a majority of the bondholders, to enter upon and take possession of the road, and to foreclose the mortgage by the sale of the railway lands, franchises, etc., of the mortgagor. It is also provided that every holder of bonds secured by the mortgage accepts the same subject to the agreement that every right of action, whether at law or in equity, under the mortgage, is vested exclusively in the trustees. There is also a provision that in case either trustee shall resign or be removed, or otherwise cease to act, or become incapable of acting, the successor shall be appointed by the surviving trustee, or, in case no such appointment shall be made within 30 days, then by any judge of the United States circuit court for the Seventh circuit, upon the application of the holders of not less than \$1,000,000 of the principal of the bonds.

The bill avers that the Farmers' Loan & Trust Company has not complied with the laws of Illinois requiring a deposit with the auditor of public accounts of the sum of \$200,000 in securities, and

that the complainant, at the time of the execution, delivery, and acceptance of the trust deed, had no knowledge of this dereliction. The bill further avers that, of the \$10,000,000 of bonds authorized to be assessed, \$6,500,000 were issued and delivered to the trustees, and that afterwards additional bonds to the amount of \$1,074,000 were issued and delivered to the complainant, under the direction of the Farmers' Loan & Trust Company, as provided under the terms of the mortgage. It is shown by the bill that the complainant has built, and is now operating, an elevated railroad in the city of Chicago, and has been unable to earn sufficient money to pay the interest upon the bonded indebtedness, but that, notwithstanding such facts, one William Ziegler, of New York, in conspiracy with various other persons, representing and owning 610 of the total issue of 7,574 bonds, has made a demand upon the trustees that they proceed to foreclose the mortgage and take possession of the road under the authority of the trust deed, or to file a bill to foreclose such mortgage, and that the complainant has filed a bill in the circuit court of Cook county, Ill., against these bondholders, enjoining them and the trustees from taking any action to foreclose the mortgage upon the request or demand of such bondholders. The bill further avers that, notwithstanding no other demand for action has been made upon the Farmers' Loan & Trust Company, it is proposed by such trust company to file a bill for foreclosure, and that it intends, in violation of its duty, and with the effect of injuring and destroying the property and assets of the complainant, to proceed to take possession of the property or foreclose the trust deed, unless restrained by the court. It is shown by the bill that the holders of 6,574 of the bonds have specially requested the trustees to take no action whatsoever under the mortgage on account of the failure of the company to pay interest upon the overdue coupons, and that the American Trust & Savings Bank, in compliance with such request, and after a full examination of the affairs of the company, has declined and refused to join the Farmers' Loan & Trust Company in any proceedings to enforce the provisions of the mortgage. It is further shown that the holders of over 6,500 of the bonds desire that the Farmers' Loan & Trust Company should be removed as trustee, both because of its failure to comply with the laws of the state of Illinois respecting the deposit of securities, and because of its intention to act or take proceedings under the mortgage, in violation of the request of the holders of a majority of the bonds. The bill prays that a new trustee may be appointed; that an injunction pendente lite may be issued, restraining the Farmers' Loan & Trust Company from bringing or prosecuting any suit under the provisions and conditions of the mortgage; and that upon the final hearing thereof such injunction may be made perpetual; and for other and further relief. The Farmers' Loan & Trust Company, in apt time, filed its petition for removal of the cause to this court. This application the state court refused, and thereupon a transcript of the record in the state court was taken out, and docketed here. The petition shows the requisite jurisdictional amount involved, and diversity of citizenship, and avers that prior to the filing of the bill



in the state court a bill has been filed in this court by the Farmers' Loan & Trust Company for a foreclosure of the same mortgage. The files of this court show that such a bill is now pending. The Lake Street Elevated Railroad Company and the Northern Trust Company move to remand, and the American Trust & Savings Bank move to strike the case from the docket. Both of these motions involve the same question.

Both by the terms of the trust deed, and by the settled law of the supreme court respecting transactions of this character, the trustees are representatives of the bondholders. But they are more than that. They are, by the terms of the mortgage, intrusted with large discretionary powers touching the interest both of the mortgagor and the bondholders. It is not necessary to enumerate these powers. But that provision of the mortgage which, upon a default in the payment of interest, empowers the trustees at the instance of one-fourth of the bondholders, and requires them at the instance of one-half, to take proceedings towards foreclosure, is illustrative of their extent and potency. A wide margin of discretion is thus left to the trustees. The mortgage, indeed, is a contract between the mortgagor and the bondholder, definitely fixing, in many respects, the rights of each of the parties thereto, but leaving, in other important respects, these rights to the judgment and discretion of mutual trustees. The distinctive personality of such trustees—their integrity, experience in affairs of this kind, impartiality, and good judgment—are matters of vital consequence to both parties to the contract. It would be highly inequitable that such a vital element of the contract, viz. the personality of the trustees, should be expunged, at the instance of one party, without an opportunity to the other, or their representatives, of a hearing thereon. The trustee sought to be removed is not the only one interested. The parties to the contract whose interests are affected by the loss of the trustee's personality are at least equally interested. If the sole purpose of this bill were to remove the Farmers' Loan & Trust Company, as trustee under the trust deed, there could be no doubt of the indispensableness of either the bondholders, or their remaining trustee, as parties to the suit.

I am equally convinced that, if the basis for the action sought was the fraud or misconduct of both trustees, there could be no judgment upon that controversy, even though it ran against one of the trustees only, without the presence of the other in court.

But is the sole, or the principal, object of this bill the removal of the Farmers' Loan & Trust Company from its trusteeship under the mortgage? The bill, by showing that the mortgagor is in default on payment of interest, presents a case where it is exposed, under the terms of the mortgage, to liability of a proceeding by the trustees for a foreclosure. The bondholders, it appears, are divided respecting the wisdom or rightfulness of foreclosure at the present time; nearly nine-tenths opposing such a proceeding, and only about one-tenth urging it. The trustees have also divided, one determining to obey the voice of the large majority, the other intending to bring foreclosure proceedings at the instance of the

small minority. The situation is one that might well alarm the mortgagor, and greatly prejudice its important interests, if foreclosure were permitted. It is not difficult to imagine, in order to meet the practical possibilities of the situation, that the mortgagor's enterprise is at one of those critical periods when disturbances of its credit by foreclosure proceedings would make or unmake the success of the whole venture. The bill seeks an injunction—not simply temporarily, but permanently—against proceedings of foreclosure by the Farmers' Loan & Trust Company upon the present election of the minority of bondholders, and exhibits, as a reason for such injunction, not simply the incapacity of the trustee to act as such under the laws of Illinois, but also its supposable misconduct and bad faith in attempting so to act upon the voice of an inconsiderable minority, and against what may be argued to be one of the plain provisions or intendments of the mortgage. The remedy sought is not simply removal, but is an injunction; not an injunction either as an adjunct to the proceeding for removal to preserve the statu quo, but injunction as a definite end and object of the suit. The reasons, both of fact and law, for such injunction, are not the incapacity of the trustee only, but his supposed misconduct, in violating the provisions of the contract between the mortgagor and the bondholders, and thus jeopardizing the situation and interest of the mortgagor. Looking at the situation as a whole, I cannot escape the conclusion that the dominating purpose of the bill is not to remove the trustee, but to permanently restrain it from bringing, as matters now stand among the bondholders, a suit for foreclosure; that the principal controversy is not whether the trustee is incapable, under the laws of Illinois, of holding its place, but whether such trustee has the power and right, under the provisions of the trust deed, as applied to the situation disclosed, to set foreclosure proceedings in motion.

It is plain, therefore, that a controversy, wholly separate from the consequences of the trustee's possible incapacity under the laws of Illinois, is embodied in the averments of the bill. Strip the bill of every averment respecting the trustee's incapacity, and of the prayer for its removal, and there would remain a supposed case of intended misconduct and violation of duty, and a prayer for injunction against the consequences of the same. It is plain to me that the complainant, however the other question might go, would not resign its right of a hearing upon this. Indeed, these averments of misconduct and violation of duty, unless they constitute an independent or additional reason for the injunction, have no place in the bill, for they do not aid the complainant's contention that the trustee is incapable to act as such. If the laws of Illinois forbid the Farmers' Loan & Trust Company from acting as trustee, it could not proceed with foreclosure, whatever might be the character—rightful or wrongful—of its intended conduct.

Regarding the bill, then, as presenting this separate controversy, namely, the case of one of two cotrustees under a mortgage, who, in violation of the terms of the mortgage, and to the irreparable injury of the mortgagor, intends to initiate proceedings for a fore-

closure, on account of which, and against whom, an injunction is asked, I come to the question, are the bondholders and the cotrustee, not participating in such intention, but expressly opposed thereto, indispensable or necessary parties to the suit? Clearly, they are not parties on the same side as the trustee against whom the misconduct and the wrong is alleged. No remedy is asked against them, or would be proper. No conduct of theirs is called in question, or is even disclosed, except such as is calculated to commend the complainant's position. Their interest, if any they have, lies on the same side as their wish and choice, and is in such case with the complainant, as against the Farmers' Loan & Trust Company. The whole question is plainly one between the Farmers' Loan & Trust Company and the bondholders whose voice it chooses to obey, on the one side, and the mortgagor and the American Trust & Savings Bank, with the bondholders whose voice it chooses to obey, on the other side. The divisional line between these conflicting interests is distinct, and marks a controversy between citizens of New York on one side and citizens of Illinois on the other. It follows that the motion to remand and the motion to strike from the docket must be overruled.

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DUNCAN v. ATCHISON, T. & S. F. R. CO. et al.

(Circuit Court of Appeals, Ninth Circuit. February 17, 1896.)

No. 237.

1. CIRCUIT COURTS OF APPEAL—REVIEW ON ERROR—STATE STATUTES AND PRACTICE.

The authority of the circuit courts of appeal to review judgments of the circuit courts by writs of error and bills of exceptions is regulated and controlled exclusively by the acts of congress and the rules and practice of the United States courts, without regard to state statutes or practice.

2. APPEAL—FEDERAL COURTS.

The right of review is limited in the appellate courts of the United States to questions of law appearing on the face of the record, and does not extend to matters of fact or discretion.

3. SAME—TRIAL TO COURT—WAIVER OF JURY.

Alleged errors in the rulings of the circuit court at the trial of an action at law without a jury cannot be examined in the circuit court of appeals, unless it affirmatively appears from the record that there was a written stipulation, signed by the respective counsel, waiving a jury, as required by Rev. St. §§ 649, 700.

4. LIBEL—PRIVILEGED COMMUNICATIONS—PLEADINGS BEFORE INTERSTATE COMMERCE COMMISSION.

Alleged libelous statements contained in an answer filed in proceedings before the interstate commerce commission are absolutely privileged, under the California statute, which declares a privileged communication to be "one made \* \* \* in any legislative or judicial proceeding, or in any other official proceeding authorized by law." Civ. Code Cal. § 47.

5. APPEAL—TRANSCRIPT—CERTIFICATE OF CLERK.

The fact that papers not in the judgment roll are in the transcript, and certified by the clerk, does not make them any part of the record on appeal, when they are not brought into the record by any bill of exceptions or agreed statement of facts, or in some other way recognized by the rules or

practice of the federal courts. *Suydam v. Williamson*, 20 How. 427, followed.

In Error to the Circuit Court of the United States for the Southern District of California.

This was an action at law by Blanton Duncan against the Atchison, Topeka & Santa Fé Railroad Company and the Southern California Railway Company to recover damages for an alleged libel. The case was tried by the court without a jury, and judgment was given for defendants. Plaintiff brings error.

Blanton Duncan, in pro. per.

Wm. J. Hunsaker, for defendants in error.

Before McKENNA and GILBERT, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge. This is an action at law to recover \$50,000, damages alleged to have been sustained by plaintiff in error by reason of certain alleged libelous statements contained in an answer filed by the defendants in error with the interstate commerce commission, to a complaint instituted by the plaintiff at Washington, D. C., charging that defendants had been guilty of certain infractions of the provisions of the interstate commerce act. A demurrer to the jurisdiction, to misjoinder, and generally to want of cause of action, was overruled, and thereafter an answer was duly filed. After issue thus joined the cause was tried before the court, "a jury having been waived, by special leave of the court, by the oral consent of said counsel for all parties, which consent is hereby entered on the minutes." The court, after hearing the case, found as a fact:

"(3) That all of the allegations of the answer so filed by the defendant, of which the plaintiff in this suit complains, were and are privileged, for which reason it is not necessary to find upon any other issue made by the pleadings herein."

And, as conclusions of law, decided:

"(1) That all of the matters and things herein complained of were and are privileged. (2) That plaintiff take nothing by this action, and that defendants recover of plaintiff their costs and disbursements herein expended."

Judgment was rendered in accordance therewith in favor of defendants, for their costs.

The record, as presented to this court, contains the judgment roll and assignments of error. It also contains a number of other papers which do not constitute any part of the return to a writ of error. It is affirmatively shown by the judgment roll that evidence, both oral and documentary, was introduced on the part of the respective counsel, but there is nothing properly before us to show what this evidence was. There is no bill of exceptions. There is what purports to be a "statement of facts," signed by the plaintiff; but there is nothing to show that it was ever agreed to by counsel, or ever presented to or allowed by the judge.

There are six assignments of error, which may be summarized as follows: (1) The court erred in rendering judgment against

plaintiff on the ground that the allegations in the answer were privileged; (2) that the court erred in treating the interstate commerce commission as a court of civil jurisdiction; (3) that the court erred in denying plaintiff's motion to strike out pleading, and in rejecting a judgment by default tendered by plaintiff; (4) that the court erred in denying plaintiff's motion to strike from the files the answer of defendants; (5) that the court erred in rendering judgment against plaintiff for the sum of \$100 counsel fees, under the provisions of an act of the legislature of the state of California (St. Cal. 1871-72, p. 533); (6) that the court erred in not rendering judgment in favor of plaintiff for the sum of \$50,000.

Owing to the incomplete record that has been presented, we are first confronted with certain preliminary questions and objections, which involve our jurisdiction, power, and authority to review any of the assignments of error. The authority of this court to review the judgments of circuit courts by writs of error and bills of exceptions is regulated and controlled exclusively by the acts of congress, and the rules and practice of the United States courts, without regard to the state statutes, or the practice of the state courts. *Chateaugay Ore & Iron Co., Petitioner*, 128 U. S. 544, 553, 9 Sup. Ct. 150; *Andes v. Slauson*, 130 U. S. 435, 438, 9 Sup. Ct. 573. The right of review is limited, in the appellate courts of the United States, to questions of law appearing on the face of the record, and does not extend to matters of fact or of discretion. No alleged error concerning the rulings of the circuit court at the trial of a cause by the court without a jury can be examined in the circuit court of appeals, unless it affirmatively appears from the record that there was a written stipulation, signed by the respective counsel, waiving a jury, as required by the statutes of the United States. In *Bond v. Dustin*, 112 U. S. 604, 5 Sup. Ct. 296, the court said:

"By the act of March 3, 1865, c. 86, § 4, re-enacted in the Revised Statutes, it is provided that issues of fact in civil cases may be tried and determined by the circuit court, without the intervention of a jury, whenever the parties, or their attorneys of record, file a stipulation in writing, with the clerk of the court, waiving a jury; that the finding of the court upon the facts shall have the same effect as the verdict of a jury; and that its rulings in the progress of the trial, when excepted to at the time, and presented by bill of exceptions, may be reviewed by this court upon error or appeal. 13 Stat. 501; Rev. St. §§ 649, 700. Before the passage of this statute, it had been settled by repeated decisions that in any action at law in which the parties waived a trial by jury, and submitted the facts to the determination of the circuit court upon the evidence, its judgment was valid, but that this court had no authority to revise its opinion upon the admission or rejection of testimony, or upon any other question of law growing out of the evidence, and therefore, when no other error appeared on the record, must affirm the judgment. *Guild v. Frontin*, 18 How. 135; *Kelsey v. Forsyth*, 21 How. 85; *Campbell v. Boyreau*, 21 How. 223. The reason for this, as stated by Chief Justice Taney in *Campbell v. Boyreau*, was that, 'by the established and familiar rules and principles which govern common-law proceedings, no question of law can be reviewed and re-examined in an appellate court, upon writ of error (except only where it arises upon the process, pleadings, or judgment in the cause), unless the facts are found by a jury, by a general or special verdict, or are admitted by the parties upon a case stated in the nature of a special verdict, stating the facts and referring the questions of law to the court.' 21 How. 226. Even in actions duly referred

by rule of court to an arbitrator, only rulings and decisions in matter of law after the return of the award were reviewable. *Thornton v. Carson*, 7 Cranch, 596, 601; *Alexandria Canal Co. v. Swann*, 5 How. 83; *York & C. R. Co. v. Myers*, 18 How. 246; *Heckers v. Fowler*, 2 Wall. 123. Since the passage of this statute, it is equally well settled, by a series of decisions, that this court cannot consider the correctness of rulings at the trial of an action by the circuit court without a jury, unless the record shows such a waiver of a jury as the statute requires, by stipulation in writing, signed by the parties or their attorneys, and filed with the clerk. *Flanders v. Tweed*, 9 Wall. 425; *Kearney v. Case*, 12 Wall. 275; *Gilman v. Telegraph Co.*, 91 U. S. 603, 614; *Madison Co. v. Warren*, 106 U. S. 622, 2 Sup. Ct. 86; *Alexander Co. v. Kimball*, 106 U. S. 623, note, 2 Sup. Ct. 86."

In *Rush v. Newman*, 7 C. C. A. 136, 58 Fed. 158, 160, the circuit court of appeals said:

"There is in the record what purports to be a special finding of the facts by the court. But the record does not show that the parties, or their attorneys of record, filed with the clerk a stipulation in writing waiving a jury, as required by section 649 of the Revised Statutes of the United States. The recital in the record that 'both parties, in open court, having waived a jury, and agreed to trial before the court,' does not show a compliance with section 649. The following recitals in the record have been held insufficient for this purpose: 'The issue joined by consent is tried by the court, a jury being waived,' and 'the above cause coming on for trial, by agreement of parties, by the court, without the intervention of a jury,' and 'the parties having stipulated to submit the case for trial by the court without the intervention of a jury,' and 'said cause being tried by the court without a jury, by agreement of parties,' and 'upon the trial of this cause before the Hon. S. H. Treat, sitting as circuit judge, a jury being waived by both parties.' \* \* \* The sufficiency of the facts found by the lower court to support the judgment can only be considered by this court when a jury has been waived in writing, as provided in section 649. When a jury has not been thus waived, the facts found by the lower court cannot be noticed by the appellate court for any purpose, and the case stands as though the judgment of the lower court had been rendered on the general verdict of a jury."

See, also, to the same effect, *Investment Co. v. Hughes*, 124 U. S. 157, 160, 8 Sup. Ct. 377; *Spalding v. Maassse*, 131 U. S. 65, 9 Sup. Ct. 649; *Merrill v. Floyd*, 3 C. C. A. 494, 53 Fed. 172; *Branch v. Lumber Manuf'g Co.*, 4 C. C. A. 52, 53 Fed. 849; *Bowden v. Burnham*, 8 C. C. A. 248, 59 Fed. 753; *Cudahy Packing Co. v. Sioux Nat. Bank*, 16 C. C. A. 409, 69 Fed. 782.

From these decisions it necessarily follows that the findings of the circuit court, based upon the evidence in the case, cannot be reviewed by this court. But the general question of law involved in the first and second assignments of error, as to whether or not the allegations in the answer therein referred to were privileged, may be said to arise upon the pleadings. This question may be briefly disposed of. Section 47 of the Civil Code of California declares that "a privileged communication is one made \* \* \* (2) in any legislative or judicial proceeding or in any other official proceeding authorized by law." In *Ball v. Rawles*, 93 Cal. 222, 236, 28 Pac. 937, the supreme court, in construing this section, said:

"The effect of the provision is to make a complaint, in a court of justice which has jurisdiction of the offense charged, an absolute privilege, for which the complainant is not liable in a civil action. *Hollis v. Meux*, 69 Cal. 623, 11 Pac. 248."

Tested by the provisions of this statute, the conclusion of law arrived at by the circuit court, "that all of the matters and things herein complained of were and are privileged," and the judgment rendered thereon, were clearly correct; for, conceding that the interstate commerce commission is not a court of civil jurisdiction, it is nevertheless manifest that the pleadings herein complained of were filed in an "official proceeding authorized by law." The general rule of the common law, that no action will lie for defamatory statements made or sworn to in the course of a judicial proceeding before any court of competent jurisdiction, is well established. 13 Am. & Eng. Enc. Law, 407, and authorities there cited; Townsh. Sland. & L. § 221.

The other assignments of error do not relate to any matters appearing in the judgment roll, and could only be made part of the record by a bill of exceptions or an agreed statement of facts, or in some other way which is recognized by the rules or practice of the United States courts. In *Suydam v. Williamson*, 20 How. 427, 433, the court said:

"When a party is dissatisfied with the decision of his cause in an inferior court, and intends to seek a revision of the law applied to the case in a superior jurisdiction, he must take care to raise the questions of law to be revised, and put the facts on the record for the information of the appellate tribunal; and, if he omits to do so in any of the methods known to the practice of such courts, he must be content to abide the consequences of his own neglect. Evidence, whether written or oral, and whether given to the court or to the jury, does not become a part of the record unless made so by some regular proceeding at the time of the trial, and before the rendition of the judgment. Whatever the error may be, and in whatever stage of the cause it may have occurred, it must appear in the record, else it cannot be revised in a court of error exercising jurisdiction according to the course of the common law."

See, also, *Pomeroy v. State Bank*, 1 Wall. 592, 600; *Baltimore R. Co. v. Trustees*, 91 U. S. 127, 130; *Redfield v. Iron Co.*, 110 U. S. 174, 3 Sup. Ct. 570; *England v. Gebhardt*, 112 U. S. 502, 5 Sup. Ct. 287; *Evans v. Stettinisch*, 149 U. S. 605, 13 Sup. Ct. 931; *Dietz v. Lymer*, 10 C. C. A. 71, 61 Fed. 792; *Insurance Co. v. Conoley*, 11 C. C. A. 116, 63 Fed. 180.

The fact that the papers not in the judgment roll are in the transcript, and certified to by the clerk, does not make them any part of the record on appeal. *England v. Gebhardt*, supra; *Young v. Martin*, 8 Wall. 354; *Sire v. Air-Brake Co.*, 137 U. S. 579, 11 Sup. Ct. 195. The transcript of record in this case was prepared in utter disregard of the provisions of the United States statutes in relation to writs of error in cases tried before the court without a jury. There is no assignment of error properly before the court for review. For the reasons herein stated the judgment of the circuit court is affirmed, with costs.

## ROTHSCHILD et al. v. HASBROUCK et al.

(Circuit Court, S. D. Iowa, C. D. February 10, 1896.)

## 1. STATE COURTS—CONCLUSIVENESS OF DECISIONS.

The decisions of the highest court of the state, as establishing a rule of property, are controlling authority in the courts of the United States with regard to the construction and effect of a statute of such state regulating assignments for the benefit of creditors.

## 2. ASSIGNMENTS FOR CREDITORS—PREFERENCES—CONTEMPORANEOUS MORTGAGES.

One H., a clothing merchant, executed and delivered a general assignment for the benefit of his creditors. Within a few days before its execution, he had made three chattel mortgages upon his stock in trade to certain of his creditors, and another creditor afterwards brought suit to have the assignment and mortgages set aside, as constituting one transaction and giving preferences to the mortgagees. It appeared that, at the time of the execution of the several instruments, H. was insolvent; that he knew that the giving of the mortgages would so injure his credit, and precipitate action by his creditors, as to put an end to his business, unless he could raise money which he had no substantial expectation of raising. The creditors to whom the mortgages were given were pressing for the collection of their debts, knew that such collection might be jeopardized by the action of other creditors, and one of them had already given notice of suit. But H. denied that the mortgages were given in contemplation of the assignment, and testified that when they were given he believed he could proceed with his business if he could obtain money which he hoped to obtain. The creditors also testified that nothing had been said to them about an assignment, and that the mortgages were not given or accepted with reference thereto. *Held*, that the mortgages were not given in contemplation of the assignment, did not form a part of it, and said assignment was valid under the statutes of Iowa.

This was a suit by Emanuel and Abraham Rothschild against J. J. Hasbrouck, M. O. Barnes, and others, to set aside an assignment. The cause was heard on the pleadings and proofs.

Cummins & Wright, for plaintiffs.

Park & Odell, for defendants.

WOOLSON, District Judge. The bill alleges that plaintiffs, who compose the firm of E. Rothschild & Bros., are citizens of the state of Illinois, and were at the dates hereinafter named creditors of defendant J. J. Hasbrouck in the sum of \$3,487.70, for which they have recovered in this court, and now own, a valid and subsisting judgment against said Hasbrouck; that upon October 9, 1893, defendant J. J. Hasbrouck (at that date a citizen of the state of Iowa, and engaged in business as a clothing merchant at Corydon, Iowa) executed and delivered a deed of assignment for the benefit of his creditors to defendant M. O. Barnes, who is a citizen of said state of Iowa, which deed purported to convey to said assignee his entire property, except such as was exempt from execution under the laws of said state; that, prior to the said execution and delivery of said assignment deed, said Hasbrouck executed and delivered three several chattel mortgages to certain of his creditors, which mortgages were given upon his said stock of clothing, etc., then at his place of business at Corydon; that the execution of said assignment and of said chattel mortgages were parts



of the same transaction; that at the time of said chattel mortgages said Hasbrouck was insolvent, and had in mind and intended to execute said deed of assignment, and said chattel mortgages were so executed by said Hasbrouck, and were accepted by the several mortgagees thereof, with the intent thereby to give to said mortgagees preferences over the other creditors of said insolvent; that said mortgagees, at the time they accepted said mortgages, were aware of the insolvent condition of said Hasbrouck, and of his intention to execute a general assignment for the benefit of his creditors; that said transaction thereby became and was, as to said chattel mortgages and said assignment, fraudulent in law, and said instruments invalid and void under the laws of the state of Iowa. And decree is prayed declaring the same void. Said mortgagees are made parties to the bill, but are not brought in by subpoena, nor have they appeared herein. Pleas in abatement were filed by Assignee Barnes, and, upon hearing, were overruled (65 Fed. 283), whereupon said Barnes filed his answer, admitting the citizenship as claimed; admitting the execution of said chattel mortgages and said deed of assignment by Hasbrouck, but especially denying all allegations as to the said executions being parts of the same transaction; denying that at the time of the execution of said mortgages said Hasbrouck intended to execute said deed of assignment, or that unlawful preferences were by him intended, or were in fact given; and alleging the validity of said assignment deed, and that, as said assignee, he was lawfully proceeding, in the proper court of Wayne county, Iowa, and under the orders and direction of said court, to carry out the provisions of said assignment.

The evidence, as is usual in such cases, is conflicting on the decisive points herein involved. It would serve no useful purpose to detail the evidence. The insolvent condition of Hasbrouck at the date of the execution of said mortgages is fully established. He testifies that he then believed that he could proceed with his business if he could procure certain money as he then hoped. But it is beyond question, under the evidence, that he then recognized the fact that the giving of these mortgages on his stock in trade would probably so destroy his business credit as to prevent further purchases by him, and would also probably bring down upon him active efforts from his other creditors to secure or collect the debts owing to them. So that the evidence justifies the assertion that he knew the giving of these mortgages would so affect his business as that he must either raise the money to discharge them, or practically suspend business, and that he had no substantial expectation that he could raise the money. That the debts secured by these mortgages were actually outstanding, and bona fide, is not attacked by plaintiffs. One of these debts was being actively pressed, and Hasbrouck had been served with notice of the institution of suit thereon, and for a term of court to commence in a few days thereafter. The evidence is uncontradicted that the parties having the collection of these debts were pressing Hasbrouck for their payment or security. The exact dates upon which

these mortgages and the assignment were executed are not shown with certainty. The mortgages were dated October 6, and the assignment October 9, 1893. But the evidence might sustain the conclusion that in fact the assignment was signed on October 7th, the day following the execution of the mortgages, and was delivered to the assignee upon October 9th. Possession of the stock of goods was taken by the assignee on the latter date. If the statements of Hasbrouck—made two or three days after the assignee had taken possession, to representatives of other creditors—were to control, a finding that the mortgages were given in contemplation of the assignment, and for the purpose of giving unlawful preferences to these mortgagees, would be justified. But Hasbrouck denies such was his intention, and stoutly denies that he had in mind at the time the mortgages were given, or contemplated, the giving of the assignment. The persons in charge of the collection of these debts, to secure which the mortgages were given, each testify that at the time these mortgages were given nothing had been said by them to Hasbrouck, and he had said nothing to them, with reference to the making of an assignment by him. The testimony of these persons having these debts in charge is unshaken that these mortgages were not taken or accepted by them with reference to any expected or intended assignment by Hasbrouck, but that they were taken by them in the active attempt to secure the debts whose collection they recognized might at any time be jeopardized by proceedings by other creditors for the collection of other debts which Hasbrouck then had outstanding. The Iowa statute in force in October, 1893, relating to the matters herein involved, is section 2115 of Code of 1873:

No general assignment of property by an insolvent, or in contemplation of insolvency, for the benefit of creditors shall be valid, unless it be made for the benefit of all his creditors in proportion to the amount of their respective claims.

In *Lumber Co. v. Ott*, 142 U. S. 627; 12 Sup. Ct. 318, it is said:

The rights of the parties are determined by the local statute, and the construction placed thereon by the supreme court of the state is decisive. The question of the construction and effect of a statute of a state regulating assignments for the benefit of creditors is a question upon which the decisions of the highest court of the state, establishing a rule of property, are of controlling authority in the courts of the United States.

The Iowa statute above copied received extended consideration by the supreme court of the United States in the case just cited. The general propositions underlying this statute, as expounded by the supreme court of Iowa, up to the date of that decision, are clearly and comprehensively stated by Justice Brewer, and applied to the case then under consideration. These propositions are thus stated in the opinion delivered by Justice Brewer (I omit the citations of Iowa cases which are given as supporting these propositions):

First, this section does not prevent partial assignments with preferences, or sales or mortgages of any or all of the party's property in payment of, or security of, indebtedness. Its operation is limited to the matter of general assignments, and does not destroy that *jus disponendi* which is an incident to

title. Second, several instruments executed by a debtor at about the same time may be considered as parts of one transaction, and in law forming but one instrument; and if, as thus construed, they have the effect of a general assignment with preferences, they are within the denunciation of the statute. And, third, that although several instruments may be executed by the debtor at about the same time, they do not necessarily create one transaction, or are to be considered as one instrument; and whether they do or not, and whether they come within the denunciation of the statute, depend upon the character of the instruments, the circumstances of the case, and the intent of the parties.

In the Ott Case, *supra*, the acts by the insolvent (which are alleged to constitute parts of the same transaction with the execution of the general assignment, and therefore, as unlawful preferences, to invalidate the assignment) are conceded to have been performed by Ott "when Ott began to think that the end of his business career—at least, so far as his present undertakings were concerned—was at hand." These acts are stated as follows:

On the day before the assignment he gave to one Mueller, to whom he owed about \$9,000, drafts on his customers, for goods sold, to the amount of \$1,239.46. On the same day he gave to McClelland & Co., to apply on a debt of \$900, a like draft to the amount of \$660.80. And on the very morning of the assignment he sent a letter to George F. White, the agent of the railroad company, notifying him that he might hold four car loads of glass then in the possession and on the tracks of the railroad company, as security for the balance of between eight and nine hundred dollars of freight due.

The decision then proceeds:

Now, these transactions were but shortly prior to the assignment. They were, in a general sense, contemporaneous with it. They took place when Ott was conscious of the impending danger of the closing out of his business, and they operated as preferences to these creditors.

But, as leading the court to the conclusion reached, there is stated, as evidence in the case—

The positive testimony of Ott that, when he gave these drafts to Mueller and McClelland, he had not determined upon an assignment. He knew that he was in financial trouble, and considered himself under special obligations as to one, at least, of these debts. His purpose was simply payment, and that he had a right to make. He supposed he should have to stop business, but in what manner the close should be brought about—whether by the action of creditors, or his own voluntary transfer—was undetermined. He was waiting and considering, and only decided upon an assignment on the morning of the 27th. If such was the fact, then, within the rules laid down by the supreme court of Iowa, these preferences are not to be taken as part and parcel of the assignment, or as vitiating it. In reference to the letter from Ott to White, with respect to holding the four car loads of glass as security for freights, it is clear that this was only putting in writing an agreement made long before. For the testimony of White and Ott both show—and to their testimony there is no contradiction—that White, months before, had again and again urged prompt payment of freights, and that Ott had agreed to always leave on the track goods enough to secure any amount of freights that might be due. The prior agreement, though oral, was valid; and the letter was not a new contract giving them a preference, but only a written expression of that which had heretofore been agreed upon, and agreed upon when there was no thought of an assignment.

Plow Co. v. Breese, 83 Iowa, 553, 49 N. W. 1026, is a later case which throws valuable light on the question under consideration. There, as here, the attempt was, by bill in equity, to have declared void an assignment, on the grounds of unlawful preferences. The

defendant firm was insolvent, and, while the deed of assignment was being prepared, Healy, a creditor of the firm, who had become aware of such deeds being in process of preparation, caused an attachment levy to be made on some of the insolvent's property. At the time of the levy the assignment had been drafted, and one of the firm had signed the paper. Before the other member had affixed his signature the partners learned of the levy of the attachment. Thereupon, after conference with the attaching creditor, it was agreed that the firm should execute to the creditor a chattel mortgage of the attached property, in consideration of the creditor's releasing the levy of his attachment, and permitting the attached property to pass with the other property into the possession and control of the assignee. "The final signature to the assignment and the signature to the chattel mortgage were made at the same time." The supreme court of Iowa, having cited section 2115, *supra*, say:

Now, if, as part of the same transaction, and for the purpose of giving a preference to Healy, the partnership executed the mortgage to Healy, the assignment and mortgage would both be void, being within the provisions of the statute above cited.

The court (accepting, for the purpose of the case, what was evidently the belief and understanding of the parties at the time,—that the assignment must have the signature of both partners, to be valid) uphold the mortgage and assignment on the ground that there was no collusion between Healy, the attaching creditor, and the insolvent debtors:

The acts of the members of the firm and of the assignee amounted to a concession that the attachment was a valid lien on the property. They gave the mortgage because they believed it would be to the advantage of themselves and all the creditors to release the attachment. Finding as we do that the attachment was levied before the assignment was completed, and that it was competent for the parties to substitute the mortgage lien for the lien by attachment, it is an end of the case.

In the recent case of *Clement v. Johnson*, 85 Iowa, 566, 52 N. W. 502, the supreme court of Iowa again consider and announce the law of the state as settled by the decisions of that court. On the 28th day of November, defendants, then insolvent, executed and delivered to a creditor bank a chattel mortgage on their stock of merchandise at Centerville, Iowa. At the same time said insolvents executed and filed for record, but without the knowledge of the mortgagees therein, four several mortgages on real estate. And on the same day said insolvents executed 12 other mortgages, none of which, however, were delivered or recorded. The mortgages thus drawn included all or nearly all the property of said insolvents, and were designed to secure all their creditors, the home creditors having the first preferences. The insolvents then negotiated a sale of their stock of merchandise, which sale, however, failed to be completed. On the failure of this attempted sale, on the 1st day of December, the insolvents executed a general assignment for the benefit of their creditors, and the assignee took immediate possession thereunder. The contest now arose as to the validity of said assignment; plaintiff claiming it to be void,

among other reasons, because some creditors were preferred to others. The jury—the contest arose in an action at law—specially found, among other findings, that the intent to make a general assignment was formed after the mortgages were given. The supreme court, in sustaining the decision reached in the court below (upholding the assignment as valid), announced the law of the state, as decided in numerous cases cited in the opinion, as follows (page 569, 85 Iowa, and page 502, 52 N. W.):

It is true that, if the giving of the mortgages and the making of the assignment had been parts of a single transaction, it [assignment] would have been invalid under the rule announced by this court in numerous cases. \* \* \* But it is equally well settled that an insolvent debtor may convey his entire estate to pay one or more creditors, even though by so doing he defeat all other creditors in the collection of their claims. \* \* \* If the debtor, in giving security to a part of his creditors, does so without intending to make a general assignment for the benefit of all of them, the transaction is valid, even though within a brief time thereafter, and on the same day, he forms and executes the purpose of making such an assignment.

In the case at bar the assignment, according to its terms, is general, and “for the benefit of all creditors, in proportion to the amount of their respective claims.” On its face, therefore, it is not in violation of the statute. Upon plaintiffs is the burden of proving that what preceded and accompanied the making of the assignment constituted one transaction; that is, that the giving of the mortgages and the making of the assignment were “parts of a single transaction.” While the evidence contains some contradictory features, upon the whole case the evidence does not convince me that, at the time the chattel mortgages in question were executed and delivered, Hasbrouck contemplated or intended to make an assignment for the benefit of his creditors. He was then intending only to secure certain creditors, who were actively and persistently pressing him for security of their claims. The preponderance of the evidence leads me to the conclusion that the assignment was not contemplated by Hasbrouck at the time he executed said mortgages, but that the making of this assignment was a subsequent and different transaction. I find, therefore, the equities herein with the defendants. Let a decree be entered dismissing the bill at costs of plaintiffs; to all of which plaintiffs except, and are given 60 days from entry of judgment within which to have signed and filed a bill of exceptions.

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#### CAPITAL CITY GAS CO. v. CITY OF DES MOINES.

(Circuit Court, S. D. Iowa, C. D.)

**1. MUNICIPAL ORDINANCES—REVIEW.**

The reasonableness of rates fixed by a municipal ordinance as maximum rates for gas companies is a matter for judicial determination.

**2. SAME—EFFECT—LAW OF STATE.**

A municipal ordinance, passed in accordance with statutory requirements, under asserted powers delegated to the municipality and in the direction where such powers might lawfully be delegated, is a “law” of the state within the inhibitions of the federal constitution.

## 8. SAME—CONSTRUCTION—CONSTITUTIONALITY.

Where a municipal ordinance is attacked as unconstitutional because of alleged unreasonableness of rates fixed therein, the controversy is a constitutional question, and not an ordinary issue of fact, even though the reasonableness of such rates, in the operation and effect of the ordinance, cannot be decided from an inspection of the ordinance itself, but requires for its decision the determination and application of extrinsic facts.

## 4. FEDERAL COURTS—JURISDICTION—FEDERAL QUESTION.

A bill inequity was filed by a gas company against a municipal corporation of the same state, under whose laws the gas company was organized, alleging that certain prices for gas had been fixed by the municipal corporation, under a state statute authorizing such municipal corporation to regulate the price of gas to be charged by companies operating within its borders; that such prices were not reasonable, and would not afford the gas company a revenue sufficient to pay expenses, fixed charges, and a reasonable profit; and that the ordinance fixing such prices violated the constitution of the United States by impairing the obligation of the contracts of the gas company with the state in its charter, and with the city in an agreement for the use of the streets, by taking the property of the plaintiff without just compensation, depriving it of its property without due process of law, and depriving it of the equal protection of the laws. *Held*, that such bill presented a controversy arising under the constitution of the United States, of which the federal courts had jurisdiction, irrespective of the citizenship of the parties.

Plaintiff is a corporation for pecuniary profit, organized and existing under the statutes of the state of Iowa. The defendant is a municipal corporation organized and existing under said Iowa statutes. Plaintiff seeks to have declared invalid an ordinance passed by the city council of defendant, wherein is fixed, with penalties named for its violation, the maximum price of gas within said city at \$1.40 per 1,000 for illuminating purposes and \$1.10 for fuel purposes, with a discount of 10 cents per 1,000 on all bills paid by the 15th of the month following; and asks for preliminary writ of injunction restraining the defendant city from enforcing such ordinance pending this suit, and for permanent writ on final hearing. The present hearing is on the application for preliminary writ. The sole question involved in the present demurrer is the jurisdiction of this court.

Cummins & Wright, for plaintiff.

J. K. Macomber, City Sol., and Wm. Conner, for defendant.

WOOLSON, District Judge (orally). The courts of the United States have limited jurisdiction; that is, their jurisdiction extends only where the statute confers it. But when that jurisdiction once attaches, then these courts become courts of general jurisdiction thereunder. The great mass or portion of jurisdiction over controversies resides in the state courts; and properly so, since all powers not delegated by the constitution to the United States reside in the people of the states. Therefore, if jurisdiction is not clearly apparent in the federal courts, or if there arises reasonable doubt as to whether such courts have jurisdiction in any controversy, those courts should not assume jurisdiction. It is very important, at the threshold of this action, that this question of jurisdiction be settled, for in the further progress of the action, in whatever appellate

tribunal the action may be pending, if such tribunal should discover a lack of jurisdiction in the federal court, this action would be dismissed, and thus years of labor, and large expenses, might prove in vain.

By the statutes (commonly termed the "Removal Acts") of 1887 and 1888, the state courts are given concurrent jurisdiction with the federal courts of certain matters therein included. Had plaintiff begun this action in the state court, instead of this court, that court would have had undoubted jurisdiction, and could have proceeded to judgment. The same allegations of fact which are made in bill herein as to violation of provisions of the constitution of the United States could have been there made; and if, in the progress of the litigation, the supreme court of the state had decided adversely to plaintiff's claim,—that is, held the action of the city council valid, and not violative of the federal constitution,—plaintiff could have carried its contention as to this question to the supreme court of the United States for its authoritative, binding decision; and thus, through that channel of litigation, might the final decision have been reached in this controversy, and by the same tribunal wherein such final decision may be reached, if carried on in this court. This consideration makes the action of this court, if adverse to plaintiff on the subject of jurisdiction, not a deprivation of its right to have the controversy heard, but merely compels plaintiff to pursue its remedy through another court. Since, therefore, this action will be hereafter dismissed, if in this court, or in any court to which the action may be carried, it is determined that this court is without jurisdiction herein, and since other courts are open to plaintiff where the jurisdiction is unquestioned, this court ought not to proceed further, but at the very threshold should stop and refuse to act on the merits of the controversy, unless this court is clearly satisfied that it has jurisdiction. All reasonable doubts on this subject must be solved against such jurisdiction. But if this court has jurisdiction, which plaintiff has chosen to invoke, as in such case it might properly do,—for of the two jurisdictions, if both are open to it, it may make its lawful selection,—then this court may not refuse to do its duty. The court must perform that which plaintiff had a right to demand, retain the action, proceed to the consideration of the merits of the controversy and the administration of justice between the parties, as under its view of the law and the evidence which may be submitted it may find the rights of the parties. That its docket is crowded with cases pressing for trial, and the time and strength of the court burdened with actions already submitted for decision, will not justify striking this cause from the calendar. For the purpose of present decision, which is merely as to the jurisdiction of this court, certain facts are conceded. I do not mean that the defendant city has in any manner waived its defense on the merits of the action; but I may not now in any wise consider the merits involved in the action, until first is determined my right to attempt such consideration. If such right does not exist, then I may not hear testimony, nor consider the merits of the controversy. If, however, there is jurisdiction to hear

the case, then all defenses, whether of law or fact, which it may be advised to make, are open to the city.

For the present consideration the following facts are conceded: Plaintiff, a corporation for pecuniary profit, organized under the laws of the state of Iowa, and the defendant city, a municipal corporation organized under the laws of said state, are both citizens of the state of Iowa. Under permission of the defendant city, plaintiff erected its works, and laid its gas mains in the streets of said city, and has been, and now is, distributing and selling its gas product to its consumers, residents of said city. In May, 1895, said city, by its city council, acting under the forms of law, and assuming as its authority therefor a statute of the state of Iowa (contained in the Session Laws of 1888) wherein authority is conferred upon it to "regulate the price of gas," passed an ordinance which fixes the maximum prices which plaintiff might thereafter charge for the gas by it so distributed and sold. Previous to the passage of this ordinance, a contract had been in force between plaintiff and defendant, fixing the maximum rates plaintiff might charge for its gas. But the period by this contract provided for such rates had expired when the ordinance now in question was passed. Plaintiff now claims that the rates fixed by said 1895 ordinance are not reasonable, in that the same will not afford to plaintiff a sufficient amount to enable plaintiff to pay the operating expenses of its plant and its fixed charges, and afford a reasonable compensation to plaintiff for the services by it performed in manufacturing and furnishing such gas; and that, because such rates are not reasonable, under the circumstances, such ordinance is invalid, as being in violation of the constitution of the United States, and should be so declared, and said city be enjoined and restrained from enforcing it. Defendant concedes that, if the parties to this action were of diverse state citizenship, this court would have jurisdiction, but claims such jurisdiction does not exist because both parties are citizens of the state of Iowa. It is, however, conceded that, if the bill presents or tenders a controversy arising under the constitution of the United States, jurisdiction attaches to this court. The question to be now determined is, therefore, does the bill, with its exhibits, present or tender a controversy which arises under such constitution?

The particulars enumerated by plaintiff wherein, as it declares, the enforcement of the ordinance in question will violate constitutional provisions, are: (1) As impairing the obligation of the contract existing between plaintiff and the defendant city and between plaintiff and the state of Iowa, growing out of plaintiff's incorporation under the statute, and of the city ordinance giving the right to plaintiff to lay its mains and supply gas to the residents of said city; (2) as taking property of plaintiff for public use, without making just compensation therefor; (3) as depriving plaintiff of its property without due process of law; and (4) as denying to plaintiff the equal protection of the law. If such ordinance violates any of these constitutional provisions as properly applied to plaintiff and its rights thereunder, such ordinance is invalid, and must be so declared by any court having jurisdiction to hear and determine the



matter. Under the later decisions of the supreme court of the United States, the reasonableness of rates established by statute or by due municipal ordinance, and whether for common carriers or gas companies, is a matter for judicial determination. *Chicago, M. & St. P. Ry. Co. v. Minnesota*, 134 U. S. 419, 10 Sup. Ct. 462, 702; *Reagan v. Trust Co.*, 154 U. S. 362, 14 Sup. Ct. 1047; *Ames v. Railway Co.*, 64 Fed. 165. The last case was decided by Justice Brewer; and, unless set aside by the supreme court, furnishes the law for this circuit. The rates fixed in the statute or ordinance are *prima facie* reasonable. On the party alleging that the rates are not reasonable is cast the burden of proving that fact. But a court of competent jurisdiction is authorized to hear and determine as to whether the rates are reasonable. The court, however, has no power to fix rates. It may not declare what rates would be reasonable, and by its decree establish those rates as the rates to be charged. Its power is exhausted on this point when it has duly passed on the reasonableness of the rates as fixed in the ordinance. If, under the evidence presented, the court should find the rates to be reasonable, the bill of the plaintiff is dismissed, and the ordinance stands as valid. If the finding is that such rates are not reasonable, the ordinance on that point is decreed to be invalid. But the right and power of the city council to fix other and reasonable rates would remain unimpaired, and the council would be free to exercise that power in the passage of a new ordinance. It is claimed the constitutional prohibitions invoked by plaintiff are as to state action, and that the bill presents no action by the state. The fourteenth amendment to the United States constitution provides, "No state shall make or enforce any law, \* \* \* nor deny to any person," etc. The reasoning on this point is substantially this: The state acts through its legislative body. Such body has established no rates for gas. That body did, however, by its statute of 1888, delegate to certain city councils of the state (that of Des Moines being included) the express power to regulate the price of gas within their city limits. But the power to regulate is a power to establish reasonable rates. If the council fix rates which are not reasonable, it is not acting within the power so delegated to it, but has acted beyond and without such delegated power; and, *ex necessitate*, such action is invalid, because not within the delegated power. Therefore, the argument proceeds, all that is required is to ascertain the reasonableness of the rates; and as that is determined, so is determined whether the council has acted within or beyond the power delegated to it. Thus no federal question under the United States constitution is involved, but the question is simply and only, is the action of the city council within the power thus delegated to it? If the rate is reasonable, yes; if unreasonable, no. This argument has at least plausible force. It deserves close examination.

Another branch of the same general line of reasoning may be here stated. Assuming that whatever action the city council may take as to fixing rates is under the delegated authority conferred by the statute of 1888, above referred to, such regulating or fixing price

for gas under the statute, is only a power to fix reasonable rates. And if a rate is fixed which is not reasonable, then, as this act of the council is not that contemplated or authorized by the statute, it cannot be said that the rate is fixed by the state. The act is not authorized by the state, and so the state has not deprived plaintiff of property, etc. Therefore such fixing of rates is not within the constitutional prohibition relating to action by the state.

The test which shall determine the correctness of this reasoning is not of difficult application. Had the lawmaking power of the state by statute fixed the rates, and such rates were not reasonable,—and by the term “not reasonable” rate as I am herein using it is meant a rate so low as not to afford a proper and reasonable return, under the circumstances, for service performed, including gas furnished,—if the statute rates were not reasonable, manifestly the law might be decreed invalid, under the doctrine so clearly announced by Justice Brewer in *Ames v. Railway Co.*, 64 Fed. 165. The general assembly—as the lawmaking power of the state—might have enacted a statute which by its terms would fix the rates in Des Moines to be charged for gas, and the reasonableness of those rates would be open to judicial investigation. But every statute, by the terms of the state constitution, must be a general law, and be of uniform operation throughout the state. Const. Iowa, art. 3 (Leg. Dep.) § 30. Necessarily, and because of the great variety and large number of differing circumstances which enter into the local situations of the cities in the state, a general statute, fixing the price of gas, could scarcely be so drawn as satisfactorily to adapt itself to each city; and therefore, for convenience of exercise of power to fix rates, as well, perhaps, as to permit the rates to be fixed with greater flexibility, and with more special reference to what local situations might require, the general assembly delegated this power to fix these rates to the several municipal corporations, to be exercised through their respective city councils. That this delegation was a valid exercise of legislative power is conceded by counsel herein. Indeed, if not such valid exercise, it might well be claimed that the defendant city would have no power to pass an ordinance fixing rates for gas. If, then, a statute enacted by the lawmaking department of the state is open to judicial examination as to reasonableness of rates therein fixed, how can it be that an ordinance so passed by a municipal corporation is not at least equally open to like examination? Is it possible that an immunity, a freedom of action, in this respect surrounds the municipal creature which is denied to the legislative creator? Had the general assembly so desired, it might have established a board of gas commissioners, and charged it with the duty of supervising gas companies, and of fixing rates to be charged by such companies for gas furnished, after the general method adopted in establishing the board of railway commissioners in this state. And since the general assembly could not itself, by valid statutes, have fixed other gas rates than such as are reasonable, it could not have conferred on its gas commissioners power to fix other than reasonable rates. Supposing, however, those gas commissioners should fix rates which are not reasonable, can

there be doubt, since the supreme court delivered its decision in *Reagan v. Trust Co.*, 154 U. S. 362, 14 Sup. Ct. 1047, as to the power of a court having competent jurisdiction to judicially examine into and declare that fact and decree such action and rates invalid? But here, equally as in the case of a municipal corporation, would the argument apply that the only matter to be determined was the reasonableness of the rates so fixed. If unreasonable, then the commissioners had gone beyond the power delegated to them, and all that would be required would be to so find, and thereupon, and because of that fact, declare the rates invalid, etc. Yet such was not the method pursued in the *Reagan Case*. There the supreme court pursued their inquiry substantially on the lines adopted by the bill in the pending action. In the *Reagan* opinion the supreme court manifestly reason upon the theory that the rates fixed by the commissioners were, according to the provisions of the constitution of the United States, a "law" of the state, though the commissioners exceeded the power delegated to them when they fixed the rates which the court in that case declared to be not reasonable, and therefore invalid. Thus, also, in the various decisions to which counsel upon either side have directed the attention of the court in the argument just completed, the action of commissioners in fixing rates has been regarded as such action on their part as that the rates, so fixed by them had had the force of a "law" of the state, within the meaning of that term as used in the constitutional provisions. The opinion of the supreme court rendered in *Hamilton Gaslight & Coke Co. v. Hamilton City*, 146 U. S. 258, 13 Sup. Ct. 90, justifies the assertion that the ordinances of a city, when passed in accordance with the forms of law and under assumed and asserted powers delegated to it, and in a direction wherein such powers might be delegated, is the "law" of the state, within the meaning of that term, as used in the constitutional provisions. While an ordinance, to which the state has not, by delegation of power to the city, given or attempted to give the force of law, will not fall within the constitutional prohibitions, yet a municipal ordinance, passed under supposed and asserted authority delegated by the state, will be regarded as a "law," and is the act of the state within such constitutional inhibitions. As stated by Judge Cooley (Const. Lim. 198):

"The restrictions imposed by the constitution of the United States, which directly limit the legislative power of a state, rest equally upon all the instruments of government created by the state. \* \* \* If a state cannot pass an ex post facto law, or law impairing the obligation of contracts, neither can any agency do so which acts under the state by delegated authority."

So the supreme court, speaking of a legislative grant of franchise (*Wright v. Nagle*, 101 U. S. 791),—and the principle applies equally in matters of fixing rates,—say:

"The legislature may exercise this authority by direct legislation, or through agencies duly established, having power for that purpose. The grant, when made, binds the public, and is, directly or indirectly, the act of the state. The easement is a legislative grant, whether made directly by the legislature itself or by any one of its properly constituted instrumentalities."

I have not deemed it necessary, in passing upon the question now before us, to follow counsel into the interesting field of inquiry as

to whether the power to fix gas rates within a city is one of the "police powers." Some difference of opinion between counsel has appeared in argument as to the proper boundaries of "police powers" as thus applied. For a clear, positive, discriminating discussion of this term, and the extent of its proper application, we may turn to the opinion, written by that eminent jurist, the late Justice Miller, as found in the Slaughterhouse Cases, 16 Wall. 62. This court need not here attempt to decide upon the conflicting views of counsel. This much must be conceded: That if the action, as to which the jurisdiction of this court is to be now decided, presents a controversy in which it becomes material to determine whether the constitutional provisions brought in question do or do not affect the matters herein claimed on the one side and denied on the other to be police powers, then jurisdiction attaches; for it cannot be denied that the question just suggested involves a construction of these constitutional provisions. The determination whether the exercise of such powers, in the manner alleged in the bill herein, is or is not under constitutional prohibition, necessarily involves a construction of the constitution. And if it be granted—as for the present it must be—that the averments in the bill are true, then one construction of the constitution as to the inclusion or exclusion of the exercise of such powers maintains, while the opposite construction defeats, recovery herein. Thus, on this point, is met the test of jurisdiction now to be determined.

Counsel for the city have pressed with elaboration and great force the proposition that when the supreme court of the United States have once decided a question, that question is no longer a "controversy," but must be considered settled; and that this court must and will assume that all courts, state as well as national, will thereafter acknowledge the binding force, under the constitution of the United States, of such decision as "the supreme law of the land," and follow it. And therefore, as to such point, thereafter no such controversy remains as will of itself confer jurisdiction on this court where jurisdiction does not otherwise attach. The decision in *Shreveport v. Cole*, 129 U. S. 36, 9 Sup. Ct. 210, is cited as conclusively sustaining this proposition; and that, the supreme court having settled the point that rates such as those fixed in the ordinance in question must be reasonable rates, no controversy exists herein as to any constitutional question. Hence this court has no jurisdiction herein in this suit between citizens of the same state. The difficulty here experienced is not with the proposition, but with its proper application to the case now before the court. The experience is not uncommon that opposing counsel agree on a proposition of law, but radically disagree as to its proper application to the facts of a case. If counsel for the city limit the application of this proposition to a case wherein the ordinance or statute once construed by the supreme court is again involved in its application to the same state of facts, the proposition may be accepted as undoubtedly correct. For illustration, we may suppose the supreme court, at the suit of plaintiff herein, to have passed on and settled the questions presented by the bill herein, with regard to

the validity—i. e. constitutionality—of this ordinance of the city of Des Moines. If thereafter are presented, by another gas company (a citizen of the same state with the defendant city), the same general questions of fact and law, under this ordinance, it may be well assumed, if not positively declared, that this court would refuse to entertain jurisdiction; and for the reason that the decision of the supreme court would have placed beyond controversy the constitutional questions tendered in the new action. But if the city council pass a new ordinance, though it be claimed to differ but slightly from the old, we may now have, and probably would have, a new controversy, in which the provisions of the constitution, as settled and applied to the ordinance in question in the former suit, must now be applied to the differing ordinance provisions in the new. Hence, at least on the face of the matter, jurisdiction might attach to this court; for then, as in the former suit, the test is met that one construction of the constitution, in its application to the new facts, would sustain, while the opposite construction would defeat, a recovery. If this reasoning be not correct, how can we account for the historical fact that the supreme court has again and again passed—and without suggestion on part of court or counsel as to jurisdiction being wanting from the cause above stated—on the question as to validity of action by a state or its properly constituted subordinate instrumentalities, in granting new charters or new franchises, where, as was claimed, exclusive grants, then yet operative, had theretofore been granted? But the reports of the supreme and circuit courts of the United States teem with such cases. So, again, as to fixing of rates for common carriers by the state, either directly by its lawmaking body, or indirectly by commission. Again and again, with regard to differing rate charges thus established, the courts of the United States have assumed jurisdiction, and determined the merits as presented in the actions pending before them. I do not overlook the suggestion of counsel that in all these rate-charge cases jurisdiction might have been sustained because of diverse state citizenship. But it must be noted that in all those cases a controversy is recognized as existing; and, if a controversy involving the construction of the constitution of the United States (and that was the theory of the cases), then jurisdiction would have attached equally had the state citizenship not been diverse.

The opinion delivered by Circuit Judge Thayer in *Hastings v. Ames*, 15 C. C. A. 628, 68 Fed. 726, 728, may assist in the determination of the question here involved. In some respects this opinion has peculiar application to the views so forcibly presented by counsel for the defendant city. From the decrees in *Ames v. Railway Co.*, *supra* (and associated cases), appeal was taken to the circuit court of appeals for this circuit. The point decided in the opinion rendered in the *Hastings' Case* was as to the jurisdiction of the circuit court of appeals. And it will be noticed that this opinion deals squarely with the question,—here also presented by counsel for defendant,—that whether the rates complained of and prescribed by the statute are unreasonable and unjust “is not a constitutional question, but an ordinary issue of fact.” After synop-

sising the issues, showing that the decrees appealed from were solely on the ground that the statutory rates were unreasonable and unjust within the meaning of the constitutional prohibition, Judge Thayer, in pronouncing the unanimous judgment of the circuit court of appeals, says:

"It is manifest, therefore, that the suits at bar are cases in which it was claimed that a law of a state contravenes the constitution of the United States. The relief prayed for by the plaintiffs was predicated on the express ground that the statute which the appellants were about to enforce was in violation of the federal constitution, and the relief sought was granted by the circuit court on that ground, and for no other reason. \* \* \* In opposition to this view it has been suggested that the question which arises on these appeals is simply whether the rates prescribed by the Nebraska statute are unreasonable and unjust, and that this is not a constitutional question, but an ordinary issue of fact. It is true, no doubt, that the issue is one of fact. But a finding is required upon that issue solely for the purpose of deciding the ultimate question which arises in the several suits,—whether the state statute prescribing the rates is constitutional or otherwise. When the validity of a statute is challenged on the ground that it violates the organic law, it is ordinarily the case that the question can be determined by a simple inspection of the statute; but it may happen, as in the present case, that it can only be determined in the light of extrinsic facts which serve to demonstrate the necessary effect and operation of the statute. Now, it matters not, as we think, how a decision in such cases is to be reached; whether it be by a simple comparison of the statute with those limitations upon legislative power which are imposed by the constitution, or by an investigation and decision of a preliminary issue of fact. If, in a given suit, the ultimate question involved is whether a state statute is void, either because it impairs rights that are guaranteed by the federal constitution or because the legislature of a state has assumed to exercise powers that have been surrendered to the general government, then the case is one which does not fall within the appellate jurisdiction of this court,"—citing several cases.

I am not unmindful of the force of the argument that great inconvenience may result to the courts, in the loading of their dockets with cases, under the view I am now presenting. Yet, if such be the result, is not that a minor matter, when compared with the right of a citizen of the United States to have his controversy heard and determined in accordance with law? Is such inconvenience to the court to be accepted as sufficient reason why such court shall decline to entertain and decide the controversy, if such duty is imposed by the constitution and the statutes enacted thereunder? After all, is such inconvenience a serious one? Is it not imaginary, rather than real? For the amount involved must exceed \$2,000 before the courts of the United States are open to such controversy. When congress has opened the door of the court to a litigant, may the court bar his entrance because of mere inconvenience or heavy burden to the court?

It may not be improper here to notice the statement of Justice Miller, found in *Chicago, M. & St. P. Ry. Co. v. Minnesota*, 134 U. S. 419, 10 Sup. Ct. 462, 702, as to the proper method which is to be pursued in matters such as are presented in the bill herein. The question under consideration related to rates which had been fixed by the railway commissioners of the state of Minnesota as maximum rates for the railways within that state. Having remarked that, "until the judiciary has been appealed to to declare the regulation

made, whether by the legislature or the commission, voidable for unreasonableness, the tariff of rates so fixed is the law of the land, and must be submitted to both by the carrier and the parties with whom he deals," Justice Miller outlines the method by which that "appeal to the judiciary" is to be made, as follows:

"The proper, if not the only, mode of judicial relief against the tariff of rates established by the legislature or by its commission is by a bill in chancery, asserting its unreasonable character and its conflict with the constitution of the United States, and asking a decree of the court forbidding the corporation from exacting such fare as excessive, or establishing its rights to collect the fare as being within the limits of just compensation for the service rendered."

The bill in suit appears to have been framed on the line marked out in the extract just given.

In the course of the discussion counsel has submitted, in manuscript, unpublished opinions of Judges Jackson and Phillips, as to questions of jurisdiction in suits pending before them. Such suits appear to have been, in each case, brought by a gas company, a citizen of the same state with the defendant therein, against a city, to enjoin the city from enforcing ordinances fixing gas rates, on the same grounds which plaintiff herein alleges in the pending action. The decision of Circuit Judge (afterwards Justice) Jackson appears to have been orally given in 1881; that of Judge Phillips in 1895. In neither of these opinions is the question as presented in the pending action discussed at length. But both opinions, as applied to the suit at bar, would seem to sustain the jurisdiction of this court. In the brief time permitted since the close of the argument upon yesterday I have again examined the many cases cited by counsel, but find nothing therein which would justify a different conclusion from that herein reached. These cases are many, and have extended over a wide range of discussion. I have not the time at my command for a review of these authorities this morning. Nor do I believe any such special benefit would result from attempting a review of them as to justify the delay in the present hearing, which would necessarily result. The conclusion reached is that the bill in this suit presents a controversy arising under the constitution of the United States, so involving a construction of the constitution as, in my judgment, to clearly give the court jurisdiction herein. The demurrer of defendant as to jurisdiction must be overruled, to which defendant excepts.

If consistent with my views of duty, I would gladly have accepted relief from the labor which necessarily must attend the consideration of this suit. My hands are already filled and my time burdened with other important pressing matters. But I may not consult personal convenience, and am now ready to enter on the consideration of the merits of the pending hearing.

## CAPITAL CITY GASLIGHT CO. v. CITY OF DES MOINES.

(Circuit Court, S. D. Iowa, C. D. January 8, 1896.)

**1. CORPORATIONS—CHARTER—IMPLIED POWERS.**

When a company is incorporated, either by a special act, or under the general laws of a state, with the power to manufacture and sell gas, the power to charge and collect reasonable rates for the gas manufactured is implied, and forms a part of its contract with the state.

**2. CONSTITUTIONAL LAW—IMPAIRING OBLIGATION OF CONTRACTS—ACT OF MUNICIPAL CORPORATION.**

An ordinance of a municipal corporation regulating the exercise of the franchise of a private corporation within its limits, adopted in pursuance of authority delegated by the legislature of the state, is the act of the state, and, if in excess of its power to regulate or modify such franchise, is void, as impairing the obligation of a contract. *New Orleans Waterworks Co. v. Louisiana Sugar-Refining Co.*, 8 Sup. Ct. 741, 125 U. S. 18, followed.

**3. EQUITY PRACTICE—PRELIMINARY INJUNCTION—REASONABLE RATES.**

The C. Gas Co. brought suit against the city of D. to restrain the enforcement of an ordinance fixing the prices of gas. The right of the plaintiff to the relief sought was found by the court to depend upon the reasonableness of the rates fixed. Upon an application for a preliminary injunction, the proof left some doubt upon the question of the amount which the plaintiff was entitled to regard as its investment, as well as upon the actual cost of producing the gas. It appeared, however, that the rates fixed by the ordinance would permit some profit over cost of production, and that the plaintiff would not be irreparably damaged by the enforcement of the ordinance. *Held*, that taking into consideration these facts, and also that the ordinance was *prima facie* valid; that its actual effect in increasing consumption and net profits, or the reverse, could not be known, except by experience; and that a final hearing, upon full proof, could be had without great delay,—the preliminary injunction should be refused.

Cummins & Wright, for plaintiff.

J. K. Macomber and William Connor, for defendant.

**WOOLSON**, District Judge. The plaintiff above named, a citizen of the state of Iowa, is a corporation organized September 10, 1875, under the general statutes of that state, with a corporate term of 50 years, providing for the incorporation of "corporations for pecuniary benefit." The defendant, a citizen of the said state of Iowa, is a municipal corporation incorporated under the general statutes of that state providing for the incorporation of cities. Under the classification established by said statutes, the defendant is a city of the first class. On March 20, 1876, the defendant city, by its municipal council, duly passed an ordinance whose details need not be set out in full. The second section of such ordinance declared the above-named plaintiff to be "hereby vested with the right of building and operating gasworks in the city of Des Moines, and of using the streets and alleys of said city as now or hereafter to be laid out, for the purpose of laying gas mains and service pipes to provide said city and its inhabitants with illuminating gas," etc. In section 4 of said ordinance it is provided that, "in consideration of the privileges herein granted to said company, said company agrees to bind



itself to and with the said city to furnish said city with all the gas the city may use in its public lamps, buildings, and offices," etc., for the term of 10 years. The price is fixed to be charged to the city for said gas for the said term of 10 years. Section 6 provides that the "privilege and license hereby granted is upon the condition that said company shall," on or before December 1, 1876, have their works "in condition to supply gas," etc. This ordinance also fixes the price of gas to the individual consumers. It further provides for the lessening of price of gas, if, by subsequent discoveries in the process, etc., of manufacturing gas, the cost of such manufacture shall be materially reduced, etc. The gas company duly accepted the provisions of said ordinance, and proceeded to perfect its gas plant, extend its mains, etc. On January 9, 1885, said city, by its said council, duly passed an ordinance repealing the ordinance above described, and substituting another in its stead. The latter ordinance, in its general terms, except as to price to be charged for gas, is similar to that which is repealed. Some of its details slightly differ, but, so far as pertains to the matter now on hearing, the ordinances, except as to price of gas, are substantially the same. Price of gas to the city and to the consumer is fixed for 10 years thereafter. Section 7 provides that the privilege and license thereby granted are upon the condition that the company shall at all times, unless temporarily prevented by unavoidable accident, have its works in condition to supply all the gas which may be required by the city, or citizens thereof, etc. The gas company duly accepted the provisions of this ordinance, according to the manner prescribed therein. On February 22, 1892, said city, by the said council, passed another ordinance, by whose terms it was provided that "every person, firm, or corporation furnishing to the inhabitants of Des Moines illuminating gas \* \* \* shall be entitled to charge and receive therefor" prices therein named, which prices were much lower than those named in the ordinance of January, 1885. Litigation followed the attempted enforcement of the ordinance of February, 1892; resulting in a decree of the district court in and for Polk county, Iowa, which declared said 1892 ordinance invalid, and enjoined the said city from enforcing the same. On May 16, 1895, the said city, by its council, passed another ordinance (being the ordinance in controversy herein), which was approved by the mayor, and has been duly published. The scope of such ordinance is well stated in its title:

"To fix the price of illuminating gas, and to prescribe the conditions under which persons and corporations dealing in illuminating gas can occupy and use the streets and alleys of the city of Des Moines."

#### Section 1 provides—

"That every person, firm, or corporation furnishing to the inhabitants of the city of Des Moines illuminating gas shall be entitled to charge and receive therefor the following prices, and no more, viz.: For illuminating purposes, \$1.40; for fuel purposes, \$1.10,—per thousand cubic feet, with a discount of ten cents per thousand cubic feet, if paid on or before the 15th day of the month following that in which the gas is furnished. The above prices are for illuminating gas being an illuminating power of not less than twenty-four candle power; gas having less candle power shall be furnished at a proportionate less rate per candle power."

Other sections fix the price of gas furnished to the city; provide for filing reports of all gas furnished, the furnishing and placing of meters, of service pipes, etc. Section 4 provides:

"Any person, firm, or corporation which shall accept the rights and privileges provided for in this ordinance, and which now has its service pipes in the streets and alleys of the city of Des Moines, may, when necessary, continue to lay its gas pipes and service pipes in the streets and alleys of the city: provided, that they are so laid that they do not obstruct the water and other pipes and sewers laid on the streets and alleys, and other necessary pipes which may be laid: provided, that nothing contained in this ordinance shall be construed to grant any rights or franchises other than the right to continue to furnish the city and its inhabitants with illuminating gas so long as the city may consent thereto: and provided, nothing herein shall abridge the right of the city of Des Moines to make such further additional regulations as it may deem to be necessary to fully protect its citizens."

Section 5 provides:

"In the event that any person, firm, or corporation shall refuse to furnish gas at the rate herein prescribed, the city reserves the right to declare a forfeiture of all rights granted and exercised by such person, firm, or corporation, and to compel said person, firm, or corporation to vacate the streets and alleys of said city within a reasonable time after the passage of a resolution directing the same."

The bill herein filed by plaintiff is to restrain the defendant city from enforcing said ordinance of May, 1895, and the present hearing thereon is on plaintiff's application for a temporary injunction. A demurrer to the jurisdiction of this court was presented by the city, and, after extended hearing, was overruled. Thereupon a large mass of testimony was introduced in support of and in opposition to the application for preliminary injunction; such testimony including a large part of the evidence introduced on the trial above referred to, before the district court of Polk county, Iowa, as well as affidavits and testimony here originally presented. Plaintiff's claim is that the ordinance of May, 1895, is invalid because it is in violation of the constitution of the United States, in the following respects: (1) Impairs the obligation of the contract held by said company; (2) takes the private property of said company for public use without just compensation; (3) deprives said company of its property without due process of law; and (4) denies to said company the equal protection of the laws. Counsel upon either side have favored the court with elaborate briefs, and have pressed for decision the questions involved herein with the ability and energy their importance merits. These questions have largely come into public importance in the later years. "The lamps of precedent," as has been aptly stated, "afford us but a dim and glimmering light" in our endeavors to ascertain much of the true way in this investigation. But the general legal questions involved present far less of difficulty in their solution than in their application. Counsel do not so much disagree on what the law is, as to what part of it is applicable herein, and the manner of its application.

That the charter of an incorporation is a contract, was placed beyond controversy in the celebrated Dartmouth College Case, 4 Wheat. 518. Whether a charter is given directly, by act of the legislative body, or whether articles of incorporation or association are

adopted under general statutes theretofore enacted by such legislative body, is not material on this point. In *Miller v. State*, 15 Wall. 478, when speaking of a railway company which was organized under the general statutes of the state of New York providing for incorporation of railroad companies, the supreme court say:

"Undoubtedly, the powers and privileges of the railroad company in this case are the same as they would have been if the company had been incorporated by a special act; and it may be conceded that the charter, when the articles of association were filed in the office of the secretary of the state, became an executed contract," etc.

So, in *Chicago, B. & Q. R. Co. v. Iowa*, 94 U. S. 155, Waite, C. J., says:

"The Burlington & Missouri River Railroad Company, the benefit of whose charter the Chicago, Burlington & Quincy Railroad Company now claims, was organized under the general corporation law of Iowa, with power to contract, in reference to its business, the same as private individuals, etc. This is, in substance, its charter, and to that extent it is protected as a contract; for it is now too late to contend that the charter of a corporation is not a contract, within the meaning of the clause of the constitution of the United States which prohibits a state from passing any law impairing the obligation of a contract."

Included in the present problem are two factors,—one, the charter and articles of incorporation of plaintiff; the other, the ordinances of the city. By the statutes of the state, the control over the streets and alleys of the city is vested in the city council. Without the city's assent, plaintiff might not lay its mains, etc., in such streets and alleys. The ordinance above described assented to such use. Plaintiff claims, as to these two factors, that by the charter plaintiff became and was authorized, during its corporate life, and as a part of its contract with the state, to manufacture and sell gas products, and to charge and collect reasonable rates for the gas it manufactured and sold, and that by its acceptance of, and expenditure of funds, etc., in carrying out, the provisions of said ordinances of 1876 and 1885, such contract became effective, and included the right to plaintiff to manufacture and sell gas products, during its corporate life, in the city of Des Moines, and to charge and collect reasonable rates therefor. Counsel have not referred the court to any authoritative case which has squarely decided the points just named. But the reasoning of the courts in a number of cases is strongly persuasive of the view just stated. In *Reagan v. Trust Co.*, 154 U. S. 393, 14 Sup. Ct. 1047, Justice Brewer, in delivering the unanimous opinion of the court, with reference to the railroad company, against whom the state attempted to enforce the schedule of rates for carriage of freight, says:

"The railroad company is a corporation created in the state of Texas. The charter which created it is a contract whose obligations neither party can repudiate without the consent of the other. All that is within the scope of the contract need not be determined. Obviously, one obligation assumed by the corporation was to construct and operate a railroad between the termini named; and, on the other hand, one obligation assumed by the state was that it would not prevent the company from constructing and operating the road. If the charter had in terms granted to the corporation power to charge and collect a definite sum per mile for the transportation of property, it would not be doubted that the express stipulation formed a part of the obligation of the state, which it could not repudiate. Whether, in the absence of an express stipula-

tion of that character, there is not implied, in the grant of the right to construct and operate, the grant of a right to charge and collect such tolls as will enable the company to successfully operate the road and return some profit to those who have invested their money in the construction, is a question not as yet determined."

In *Peik v. Railroad Co.*, 94 U. S. 164, Chief Justice Waite apparently states the point in stronger language than that of inquiry, as raised in the *Reagan Case*. Having quoted a statement of counsel as to the intention of the legislature in reserving the right to amend laws pertaining to corporations, he further quotes counsel:

"The privilege, then, of charging whatever rates it may deem proper, as a franchise, may be taken away under the reserved power; but the right to charge a reasonable compensation would remain as a right under the general law governing natural persons, and not as a special franchise or privilege."

The learned chief justice then proceeds to state:

"Without stopping to inquire whether this is the extent of the operation of this important constitutional reservation, it is sufficient to say that it does, without any doubt, have that effect."

In *Stone v. Trust Co.*, 116 U. S. 307, 6 Sup. Ct. 334, 388, 1191, after stating the principle relating to exemption in the charter from subsequent regulating or altering legislation, the court say:

"Such being the rule, such its practical operation, we return to the special provisions of the charter on which this case depends, and find, first, the authority given the corporation to carry persons and property. This, of itself, implies authority to charge a reasonable sum for the carriage."

When plaintiff incorporated, the state had neither fixed the prices for the sale, nor attempted to regulate the sale, of gas products. The state has since then enacted no such statute. But in 1888 a statute was passed conferring on defendant and other cities of the first class the "right to regulate the price of gas." Laws 22d Gen-Assem. Iowa, c. 16. Section 1090 of the Code of Iowa (section 1640, McClain's Code) was in force at date of incorporation of plaintiff. By that section the state reserved to itself to amend, alter, abridge, etc., all articles of incorporation, and to regulate or subject to conditions every franchise thereafter obtained. Without such reservation, the general assembly might itself have imposed a reasonable rate as a maximum charge for gas. This principle has been frequently declared by the supreme court. Under this right reserved to the state to alter, regulate, etc., this statute of 1888 is conceded to be valid, in the power conferred on the city "to regulate the price of gas." And this statute, enacted under the right which the state thus reserved to itself, does not impair its contract with the plaintiff, but is in accordance therewith.

Previous to the enactment of the last-named statute, the defendant city had, by its ordinance, agreed with plaintiff as to prices which plaintiff might charge for 10 years thereafter, to wit, until 1895. Counsel are agreed that the prices named in such ordinance were the contract prices, as between the city and gas company, until the expiration of said ordinance period. Now, let us suppose the city, at the end of such term, had passed no other ordinance as to rates to be charged for gas. Under the theory advanced by

counsel for the city, no ordinance provision as to rates would then be in force, and the company would have the right to charge reasonable rates, and no more. This, I understand, is also conceded by counsel for the gas company. In the absence of agreement on rates, between the city and the company, what authority had the city under the statute of 1888? It was authorized "to regulate the price of gas." Counsel upon both sides concede that under this authority the city could legally fix, as a price for gas, only such price as was a reasonable rate or price therefor. Counsel may and do differ as to what elements properly enter into the reasonableness of such price or rate. But the city had the power "to regulate" by fixing by ordinance, in the manner attempted, a reasonable price or rate. If the rate or price is so low that it is not reasonable, then counsel for city concede the city has not acted under and in accordance with the authority granted. (It is due to counsel that I add, as touching such concession, that they claim, however, this court has not jurisdiction herein, to determine the question of such unreasonableness of price, unless the same shall be, in effect, confiscatory.)

Counsel for the city contend that the company has no contract rights which have been, or are susceptible of being, impaired by the city, even should the rates fixed by the ordinance of May, 1895, be declared unreasonable; in other words, that no contract rights, as to price of gas, are possessed by the company, and that, so far as impairing the contract is concerned, the city is not limited as to the price it may establish. The reasoning underlying this case seems to me to establish the contrary. Under its articles of incorporation, the company was authorized and empowered—such was the contract of the state—to construct and operate, within the state, and during its corporate life, said gas works, conformably to its articles and to the laws of the state. The state reserved the right to alter and amend those articles, and to modify or change the franchise or contract the company held thereunder. But the state has not attempted such modification. The state exercised the power it possessed as to fixing the price of gas, not by a statute directly fixing therein such price, but by delegating that power or right to the city. But this in no manner changed the franchise or contract held by the company. It had theretofore the right to charge reasonable rates. It yet had that power, and to the city was delegated the authority to fix or establish what such reasonable rates were. The state might have created a state gas commission, after the general nature of the railroad commission heretofore created in this state. To this gas commission might have been entrusted the fixing or regulating prices for gas, and the general supervisory control of gas companies, within the state. But, instead, the state delegated to the several cities of the first class this right or authority to regulate the price for gas. The validity of such act of the state is conceded in this action. But the city does not claim that by this statutory delegation of authority the city was authorized to do what the state could not legally do directly, viz. fix a rate which is not reasonable, nor that the right

of the gas company to charge and collect reasonable rates is altered or abridged by such statutory delegation. Whatever contract theretofore existed, if any, in favor of the company, in that direction, and arising out of its incorporation, still existed, with unimpaired force. The city ordinance established rates which were thereafter, *prima facie*, reasonable rates. But, from the very nature of the business for whose transaction the company was incorporated, the locality of such business must be in a city. Only in localities where citizens are closely and numerously located can such business profitably be carried on. The statutes of the state, at the time of the company's incorporation, gave to the cities such control of their streets and alleys,—such general authority within their boundaries,—as that, without the consent of the city, the company could not carry on its business within such city. Hence the necessity for such consent as was given in the ordinances of 1876 and 1885. By those ordinances the city expressly contracted with this company for the erection and operation, within such city, of its gas plant, and the putting down in the streets and alleys of the city, of its main and other gas pipes. The gas company perfected its plant, and so laid its pipes, under such consent. Thus, there came to the gas company—subject, of course, to any lawful act of the general assembly of the state as to amendment of the statutes relating to incorporation thereunder and franchises obtained therefrom, and thus affecting the statutory rights of plaintiff—the contract rights: (1) As a corporation, under its articles of incorporation, to exist and carry on its business within the state during its corporate life; and (2) as a corporation, under said ordinances, to exist and carry on its business within said city. I do not mean that the city had no control whatever with reference to the manner in which plaintiff should carry on its said business within the city. But such control must be so exercised that plaintiff will not be thereby deprived of the exercise of its right to properly and lawfully carry on such business. But, say counsel for the city, the statute, in authorizing the city to fix or regulate the price of gas within its municipal boundaries, conferred only the right or authority to fix reasonable rates; hence, if the city shall fix rates which are not reasonable, such municipal action is not in accordance with the statutory delegation of authority, but in excess of and outside of such delegation, and hence is not authorized by the statute, and is not the act of the state, and therefore there is no action of the state impairing any obligation of contract. This point received consideration in *New Orleans Waterworks Co. v. Louisiana Sugar-Refining Co.*, 125 U. S. 18, 8 Sup. Ct. 741. Mr. Justice Gray, speaking for a unanimous court, says:

"In order to come within the provision of the constitution of the United States which declares that no state shall pass any law impairing the obligation of contracts, not only must the obligation of a contract have been impaired, but it must have been impaired by a law of the state. \* \* \* As later decisions have shown, it is not strictly and literally true that a law of a state, in order to come within the constitutional prohibition, must be either in the form of a statute enacted by the legislature in the ordinary course of legislation, or in the form of a constitution established by the people of the state

as their fundamental law. In *Williams v. Bruffy*, 96 U. S. 176, 183, it was said by Mr. Justice Field, delivering judgment, 'Any enactment, from whatever source originating, to which a state gives the force of law, is a statute of the state, within the meaning of the clause cited, relating to the jurisdiction of this court.' \* \* \* So a by-law or ordinance of a municipal corporation may be such an exercise of legislative power delegated by the legislature to the corporation, as a political subdivision of the state, having all the force of law within the limits of the municipality, that it may properly be considered as a law, within the meaning of this article of the constitution of the United States."

To the same general effect is the opinion of the supreme court rendered in *Hamilton Gaslight & Coke Co. v. Hamilton City*, 146 U. S. 258, 13 Sup. Ct. 90.

In *Wright v. Nagle*, 101 U. S. 791, the supreme court, speaking of a legislative grant of franchise, say:

"The legislature may exercise this authority by direct legislation, or through agencies duly established, having power for that purpose. The grant, when made, binds the public, and is, directly or indirectly, the act of the state. The easement is a legislative grant, whether made by the legislature itself, or by any of its properly constituted instrumentalities."

And it does not appear why the same reasoning shall not apply equally in the matter of fixing rates of gas.

The conclusion necessarily follows, under the pleadings in this case, that the ordinance in controversy is, within the meaning of the constitutional provision, the law of the state, for the purposes of the action. If it impairs the obligation of the contract held by the city, it must be declared invalid. And if the rates therein fixed are unreasonable, to such extent as to justify such action, the restraining writ of this court must be issued, because of said ordinance impairing contract obligations to whose enjoyment the plaintiff is entitled.

Passing now to the consideration of the remaining points of attack made herein by plaintiff, and for the present deferring the consideration of the evidence introduced, we may, without detriment to plaintiff in this action, eliminate from our inquiry the second point,—whether the private property of plaintiff is, by the ordinance in question, taken for public use without just compensation. Indeed, we may pass over so much of argument of counsel on either side as relates to this point. For, if the ordinance is violative of the United States constitution as to either of the other two points (depriving plaintiff of its property without due process of law, or denying to plaintiff the equal protection of the laws), the ordinance must be decreed to be invalid in so far as it thus operates. And, without attempting to particularize, it is apparent from argument of counsel that counsel upon either side agree in the position that, unless the evidence shall sustain one or both of the two points named, it would, in this action, fail to sustain that as to the taking of plaintiff's property for public use without just compensation. It is therefore unnecessary to decide, as between conflicting claims herein, whether the constitutional prohibition just stated could be properly applied in the action. Defendant contends that "taking of property without due process of law" is but an equivalent phrase for its "practical confiscation." In their printed ar-

gument, counsel for defendant say, after quoting the provision of the United States constitution, "Nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws" (Amendment 14, § 1):

"We understand the foregoing provisions of the constitution to be violated only when, as applied to the facts in the case, the rate fixed by the council would afford no compensation whatever, or only a nominal compensation upon the actual investment."

Under the view hereinafter presented of the matters now in hearing, it becomes unnecessary for us to follow the line of argument presented by counsel as establishing the foregoing proposition. The opinions filed by the supreme court have not presented—at least, in express language—the views held by that court on the proposition of counsel just quoted. But, if I correctly apprehend the argument of counsel, an error is committed when counsel seek to measure the jurisdiction of this court in this case by the remarks of the supreme court in regard to the jurisdiction possessed by them in cases brought into that court by writ of error from the highest court of a state. Whatever doubt may have obtained, none now exists, under repeated decisions of the supreme court, that the jurisdiction of that court in the last-described class of cases is solely where the decision of the state court has been based on the constitution, statute, or treaty of the United States, and such decision has sustained the claim that the act or law complained of in the court below was not in violation of the federal constitution, statute, etc. In other words, the supreme court does not sit as a court of errors to review the action of the state court on matters of general judicial action, nor as applied to whether the decision of such state court is correct according to the state constitution or the state statutory enactment. But the sole, exclusive jurisdiction of the federal supreme court, in the class of cases named, is where there is actually involved in the controversy, and the state court has based its decision on, some portion of the United States constitution, statute, or treaty, and that decision has sustained and upheld, as valid and constitutional, the act or statute which had been attacked as unconstitutional. In *New Orleans Waterworks Co. v. Louisiana Sugar-Refining Co.*, 125 U. S. 18, 8 Sup. Ct. 741, the supreme court distinguish and declare how different is their jurisdiction when a case is taken from this court on writ of error. Their appellate jurisdiction on writ of error from this court, if the case is reviewable by law, properly taken to that court, is practically limited only by the assignments of error.

Counsel for defendant insist that this court may not pass, in this cause, on the question of the reasonableness of the rates fixed in the ordinance in controversy; that, since the citizenship of the parties is not diverse, this court has not herein the general power, as a court of equity, with which it would be clothed if the parties hereto were of diverse citizenship. I do not regard it necessary to follow this argument to its full length. For manifestly, if a controversy herein is pending as to which one construction of this constitution will



sustain, while a different construction will defeat, the action, then a constitutional question is presented, which confers on this court jurisdiction herein, without regard to citizenship of the parties. This point was considered at some length on the decision herein rendered, sustaining the jurisdiction of the court as against the demurrer of defendant attacking the same. Now, when jurisdiction has thus attached in this court, then any matters which affect the constitutional questions presented are properly before the court for consideration. Charges are here directly presented by the plaintiff, that, by the ordinance in controversy, plaintiff is deprived of its property without due process of law, and is denied the equal protection of the laws. The words of Chief Justice Marshall are here pertinent:

"The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of the jurisdiction which is given than to usurp that which is not given. The one or the other would be treason to the constitution." *Cohens v. Virginia*, 6 Wheat. 264.

Let us gather a few of the expressions of the courts as to what is included in the terms "depriving without due process of law," and "denying equal protection of the laws."

In *Chicago, M. & St. P. Ry. Co. v. Minnesota*, 134 U. S. 458, 10 Sup. Ct. 462, 702, Justice Blatchford, delivering the opinion, says:

"The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness, both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law, and in violation of the constitution of the United States; and in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the law."

Justice Miller, concurring:

"(3) Neither the legislature, nor a commission acting under authority of the legislature, can establish arbitrarily, and without regard to justice and right, a tariff of rates for such transportation which is so unreasonable as to practically destroy the value of the property of persons engaged in the carrying business, on the one hand, nor so exorbitant and extravagant as to be in utter disregard of the right of the public for the use of such transportation, on the other."

In *Stone v. Trust Co.*, 116 U. S. 307, 347, 6 Sup. Ct. 334, 338, 1191, Chief Justice Waite, delivering the opinion, says:

"From what has thus been said, it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and profits, the state cannot require a railroad corporation to carry persons or property without reward. Neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law."

In *Railway Co. v. Gill*, 156 U. S. 657, 15 Sup. Ct. 484, Justice Shiras, delivering the opinion, says:

"This court has declared in several cases that there is a remedy in the courts for relief against the legislature establishing a tariff of rates which is so unreasonable as to practically destroy the value of the property of companies engaged in the carrying business, and that especially may the courts of the United States treat such a question as a judicial one, and hold such acts of legislation to be in conflict with the constitution of the United States, as depriving the companies of their property without due process of law, and as depriving them of the equal protection of the laws."

In *Ames v. Railway Co.*, 64 Fed. 176, Justice Brewer says:

"The idea of reasonableness is justice, and that which is unjust cannot be reasonable; and, when the strong arm of the legislature is laid upon property invested in railroad transportation, it must be so laid as to do justice to such investors. There can be no justice in that which works to such investors a practical destruction of their property thus invested. It must be borne in mind that property put into railroad transportation is put there permanently. It cannot be withdrawn at the pleasure of the investors. Railroads are not like stages or steamboats, which, if furnishing no profit at one place, and under one prescribed rate of transportation, can be taken elsewhere, and put to use at other places and under other circumstances. The railroad must stay, and, as a permanent investment, its value to its owner may not be destroyed. The protection of the property implies the protection of its value."

In *Reagan v. Trust Co.*, 154 U. S. 397, 14 Sup. Ct. 1047, Justice Brewer, delivering opinion, says:

"The courts are not authorized to revise or change the body of rates imposed by a legislature or commission. They do not determine whether one rate is preferable to another, or what, under all circumstances, would be fair and reasonable as between the carriers and the shippers. They do not engage in any mere administrative work. But still there can be no doubt of their power and duty to inquire whether a body of rates prescribed by a legislature or a commission is unjust and unreasonable, and such as to make a practical destruction to right of property, and, if found so to be, to restrain its operation."

And on page 399, 154 U. S., page 1047, 14 Sup. Ct., the same justice, in delivering the unanimous opinion of the court, says:

"The equal protection of the laws, which, by the fourteenth amendment, no state can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is, without compensation, wrested from him for the benefit of another, or of the public. This, as has been often observed, is a government of law, and not a government of men; and it must never be forgotten that, under such a government, with its constitutional limitations and guaranties, the forms of law and the machinery of government, with all their reach and power, must, in their actual workings, stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property legally acquired and legally held."

In *Railway Co. v. Dey*, 35 Fed. 879, Judge Brewer declared:

"The rule to be laid down is this: That where the proposed rates will give some compensation, however small, to the owner of the \* \* \* property, the courts have no power to interfere. Appeal must then be made to the legislature [in the pending case to the city council] and the people. But, where the rates prescribed will not pay some compensation to the owners, then it is the duty of the court to interfere, and protect the companies from such rates. Compensation implies three things: Payment of cost of service, interest on bonds, and then some dividend."

He closes this branch of his discussion in these words, as applicable to the payment of interest on bonds:

"While, by reducing the rates, the value of the stockholder's property may be reduced, in that less dividends are possible,—and that power of the legislature over property is conceded,—yet if the rates are so reduced that no dividends are possible, and especially if they are such that the interest on the mortgage debt is not earned, then the enforcement of the rates means either confiscation, or compelling, in the language of the supreme court, the corporation to carry persons or property without reward."

But still the question remains whether the matters presented show the ordinance in question impairs the obligation of the contract, deprives plaintiff of property without due process of law, or denies to plaintiff the equal protection of the laws, so that at this point in the case a preliminary injunction should issue. In the question just stated are included so many factors, the application of the general principles embraced therein so strongly differ, as the peculiar circumstances and conditions of the cases differ; there is absent any special, unfailing test or standard of measurement; in short, each case presented is so largely, and almost wholly, of its own peculiar kind, and the constitution, congress, and the courts have all failed to minutely and specifically define these constitutional provisions, that a court may well approach the matter with great reluctance. The ordinance in controversy is *prima facie* reasonable, in the rates imposed. On plaintiff is the burden of proving the contrary. Unless, when the case is finally submitted on the merits, the plaintiff shall have satisfied the court, by a fair preponderance of the proof, that the rates by the ordinance so fixed, or some of them, are not reasonable, and are so unreasonable as to justify the court in staying its operation, the decree must be for defendant, and the court must refuse to interfere with the enforcement of the ordinance. We are not, at this point in the case, to determine what decree shall pass on the merits. The action now to be taken may be in harmony with, or contrary to, the final action; that is, should a preliminary injunction now issue, yet the final decree—the decision on the merits of the case, after evidence has been fully introduced on both sides—may dissolve this injunction, and find for defendant, that the ordinance is valid and enforceable. While, if the application now pending for a writ of injunction be denied, yet the final decision on the merits may decree the ordinance invalid, as to rates therein fixed, and its enforcement to be stayed. The extraordinary process of the court—which, if issued, is to stay, until decree herein, the enforcement of the ordinance—may not lightly issue. The court is bound to assume, until the contrary be proven, that the council of the defendant city have acted with due regard to the rights of the plaintiff, and have established reasonable rates. The proof introduced on the application now to be decided has not been full or satisfactory in many points, or the case might now be submitted for final decision. It is not the practice, nor is it expected, that the proof submitted on the application for a preliminary writ shall fulfill all the requirements of the proof to sustain the decree and the permanent writ. If, on the showing now made, the case presented is such that, were the same convincing judgment present at the final hearing, the writ would be decreed, and the preliminary writ is found necessary for plaintiff's protection meanwhile, such writ may

issue. This is a statement of largest generality. But, as in all such statements, there are many qualifying exceptions and particulars. If the writ shall not issue, will plaintiff suffer irreparable injury? Taking the attitude of the two parties to the suit under the showing now made, how are the two before the court, as to equities, looking at their respective situations if the writ shall, and if it shall not, now be ordered? I think I am safe in saying that the court must be pressed by the proof into finding the preliminary writ necessary to prevent grave and practically irreparable injury to the plaintiff, or the preliminary writ will not issue against the opposition of defendant, however strong the showing. But the parties will be remitted to the decree for settlement and adjudication therein of all matters involved in the suit. In this case the plaintiff has some 2,500 consumers. Of these, at time of hearing the evidence on pending application, only 17 had refused to pay to the plaintiff the old rates. Since then, according to the affidavit filed by plaintiff, though filed without leave, and out of time, the number has risen to 229 refusals, with 144 offering to pay the ordinance rates. Defendant has been given no opportunity to meet the statement of this last affidavit, but the tendency therein shown to refuse to pay old rates, we may safely assume, will probably result in increasing refusals to pay in excess of the new ordinance rates until this cause is decided. How shall the reasonableness or unreasonableness of the ordinance rates be determined? By what test or standard is this fact to be decided? Counsel radically differ in the views presented on this point in the forcible and elaborate printed briefs presented, aggregating over 300 pages. Mr. Justice Brewer, in *Ames v. Railway Co.*, supra, when speaking of rates for transportation of freight on that railway, says:

"What is the test by which the reasonableness of the rates is determined? This is not yet fully settled. Indeed, it is doubtful whether any single rule can be laid down applicable to all cases. If it be said that the rates must be such as to secure to the owners a reasonable per cent. on the money invested, it will be remembered that many things have happened to make the investment far in excess of the actual value of the property,—injudicious contracts, poor engineering, unusually high cost of material, rascality on the part of those engaged in the construction or management of the property. These and many other things, as is well known, are factors which have largely entered into the investments with which many railroad properties stand charged. Now, if the public was seeking to take title to the railroad by condemnation, the present value of the property, and not the cost, is that which must be paid. In like manner, it may be argued that, when the legislature assumes the right to reduce, the rates so reduced cannot be adjudged unreasonable, if, under them, there is earned by the railroad a fair interest on the actual value of the property. It is not always easy to determine the value of railroad property, and, if there is no other testimony in respect thereto than the amount of stock and bonds outstanding, or the construction account, it may be fairly assumed that one or the other of these represents it, and computation as to the compensatory quality of rates may be based upon such amounts. In the cases before us, however, there is abundant testimony that the cost of reproducing these roads is less than the amount of the stock and bond accounts, or the cost of construction, and that the present value of the property is not accurately represented by either the stock and bonds, or the original construction account. nevertheless, the amount of money that has gone into the property—the actual investment, as expressed, theoretically, at least, by the amount of the stock and bonds—is not to be ignored, even though such sum is far in excess of the

present value. It was said in the case of *Reagan v. Trust Co.*, 154 U. S. 412, 14 Sup. Ct. 1059: 'It is unnecessary to decide, and we do not wish to be understood as laying down as an absolute rule, that in every case a failure to produce some profit to those who have invested their money in the building of a road is conclusive that the tariff is unjust and unreasonable. And yet justice demands that every one should receive some compensation for the use of his money or property, if it be possible, without prejudice to the rights of others.' "

In the case at bar, the proof shows the capital stock of plaintiff to be \$300,000, and outstanding bonds \$200,000. The amount of cash invested in the entire plant,—I now refer, as I have heretofore referred, to the gas plant alone, eliminating entirely the electric plant,—in the entire gas plant, as shown by the construction account of the company, appears a cash investment of \$466,532.93, and patent rights purchased of \$172,096.94, aggregating \$600,000. None of the experts place the cost of reproducing the plant at a sum equal to the stock and bonds. The bonds outstanding were issued almost entirely in payment of certain patent rights which were sold to the gas company. The proof shows that a part of those patents—the exact part is not shown—has expired, so that their present value to the gas company is greatly below the amount of outstanding bonds. Whether, at the time of the purchase of these patent rights,—that is, the right to use the improvements secured by the patents,—the value of the patents to the gas company was properly measured by the bonds given for such purchase, is not fully apparent, but the testimony strongly tends to show that at least it was then so regarded by the parties to the transaction. Yet the circumstances surrounding such transaction have this peculiarity: A Pennsylvania corporation, known as the United Gas Improvement Company, is the owner or manager of a large number of gas plants at different points in the United States, the plaintiff being one of that number. The patents were sold by the United Gas Improvement Company to the plaintiff. While this fact does not of itself impart to the transaction any fraud or bad faith, it nevertheless suggests and demands a more searching inquiry into the details, and a more careful weighing of the facts involved. As to the consideration of such bonds,—I mean, the consideration which is proper to be here considered, and included in the value of this gas plant at present, or on which interest is to be allowed,—the proof does not satisfy me. Such of the bonds as were issued in purchase of patents now expired cannot here be considered, in the attempt to ascertain the basis on which the reasonableness of rates is to be determined, for those patents have now no market value. And if more was originally paid for such expired patents than at the time of their purchase was justified by their importance to plaintiff, and by the length of life they then possessed, an element thereby enters into the loss column of plaintiff's profit and loss account, and is not now to be considered as an active element in fixing reasonable rates. Besides, the proof is that these bonds were issued in purchase of "all the patents that the United Gas Improvement Company owns"; not alone the "patents in use in the city of Des Moines," but also "whether used in this city or elsewhere." Testimony of Lillie (interrogatories 24, 25, 29). So that, confessedly, a

part of the bonds was issued for patents not used at all by plaintiff. Manifestly, these should not be included in arriving at the basis we are now seeking. Nor should there be included any amounts expended or investments made by plaintiff in its attempt or experiment, however laudable these attempts may have been, to supply fuel gas to the citizens of Des Moines, and which were expended or invested in directions not now required, or not properly serviceable for the company's present uses. These must be laid aside, among any other unprofitable investments in the history of the company. These may evidence the creditable desire of the company to keep its works fully abreast with progressive idea of gas making. But they are now of no market value. In other words, the court may not now regard the rates as properly to be increased above what would otherwise be reasonable for the purpose of allowing plaintiff to recoup losses heretofore incurred in any unfortunate or unprofitable investments it has made, or to charge and receive interest on losses thus incurred. In this connection I wish to say that the proof presented on the hearing fully absolves the plaintiff from any rascality on the part of those engaged in the construction or management of plaintiff's property. Having quoted from Justice Brewer, wherein he has used those words, it is but just to plaintiff to state that the proof, without contradiction, shows no presence of dishonest methods or management in plaintiff's business methods or affairs, but, on the contrary, an honest and most creditable business management. In the opinion delivered by Justice Brewer in the case last quoted from (*Ames v. Railway Co.*), the learned justice, after having considered at some length different elements claimed to be legitimate factors in the basis from which the reasonableness of rates was to be determined, says (page 178):

"Considerations such as these compel me to say that I think there is no hard and fast test which can be laid down to determine in all cases whether the rates prescribed by the legislature [city council] are just and reasonable. Obviously, however, the effect of the reduction upon earnings is the first and principal matter to be considered."

Perhaps the factors which affect the question of earnings—that is, the reasonable cost of manufacture, etc., as applied to income—are not more difficult in this case than generally may be anticipated in like cases. But, between the extremes of the expert testimony introduced on either hand, we have here irreconcilable differences. The cost of manufacture involves many matters wherein this difference of judgment will arise, however honest the expert, and his attempt at unprejudiced opinion, for the basis of the opinions on either hand are from radically differing standpoints of view. Under the proof presented, the plant is in excellent condition and efficiency, and the cost of its reproduction appears to be the substantial equivalent of its value. The estimated cost of reproducing the present gas plant of plaintiff varies, under the proof as presented by the company, from about \$450,000 to \$500,000. Some proof has been introduced by defendant which places the cost of erecting a plant, laying the mains, and placing the plant in same operative condition in which plaintiff now is, at about \$330,000. The evidence, without

contradiction, shows that the plant, under present management, is in excellent condition. Some criticism appears as to whether plaintiff has thrown a proper share of the expense upon the electric light company, which offices with plaintiff, has its works on plaintiff's real estate, and, to a considerable extent, is officered and managed by the same persons as plaintiff. But I see little cause of complaint in this respect. Apparently, the accounts of the two concerns are kept separate, and each charged with its own expense. Except as to a charge—not shown to be made, but which should be made—for use of plaintiff's real estate by the electric light company's works, no improper or unfair element appears, as between these two plants. Defendant insists that a part of the present gas plant is not only unnecessary for present use in supplying gas in Des Moines, but also for probable use in the near future, and that that part of the plant devoted to manufacture of coal gas should not be included in any computation for determining the money value, or in any basis used for determining on what plaintiff may rightfully ask income or profits. The fact that plaintiff has at Des Moines, in operation, two distinct or separate parts of its gas plant,—one for manufacturing coal gas, the other for water gas,—has served to increase greatly the difficulties attending a decision of this matter. If I remember rightly, all the witnesses agree that, the coal-gas plant having been erected and being on the plaintiff's ground, they would not recommend its destruction. There exists a marked difference of opinion among the experts as to whether, if erecting a new plant, they would advise such coal-gas plant to be included as a part of it. The trend of proof is to the effect that the later-built plants are almost exclusively for the manufacture of water gas. But on this point I am not satisfied that it would be improper to include the coal-gas plant, and therefore, for present hearing, retain it as a part of the property to be considered in our calculations as to rates. But its retention complicates the decision herein, for there is thus retained an element whose exclusion would take with it many obstinate and perplexing questions. Returning to the attempt to ascertain the cost of present reproduction of plaintiff's gas plant, or rather of a gas plant which shall be equally efficient and capable in supplying gas to the defendant and its citizens, and examining the proof for that purpose as introduced by plaintiff and defendant, I conclude that suitable and proper real estate could be obtained, and such plant erected, mains laid, etc., with same efficiency to meet demands of the city as that now possessed by plaintiff, for \$400,000. The experts sworn on plaintiff's behalf have varied in their figures from about \$450,000 to about \$500,000. From these estimates must be taken that part of the present plant which was used for fuel gas, and is now not available for present use; also, the overestimate by them made on the real estate; and also making allowance for storage capacity on the holder last erected beyond what seems, under present circumstances, profitably necessary. On the whole proof, I reach the conclusion above announced. The profit and loss statement intro-

duced by plaintiff for the years 1891 to 1894 shows that plaintiff received for gas supplied as follows: 1891, \$1.50 per 1000 feet; 1892, \$1.55 per 1,000 feet; 1893, \$1.59 per 1,000 feet; 1894, \$1.56 per 1,000 feet. By reference to this statement for 1894, it will be noticed that plaintiff has charged, as against the gas used by itself, almost 69½ cents per 1,000 feet. I am not authorized, under the proof as to its cost, to assume that this rate was so taken by plaintiff because it regarded that as the actual cost per 1,000 of the gas used by it. But I am not advised why the charge for this gas is thus made. Making allowance for the proportionate discount as shown in such statement, it will be seen that the remainder of gas,—that supplied to city and citizens,—as shown in this 1894 statement, brought to the plaintiff the net rate per 1,000 of \$1.57½. By thus charging gas used by plaintiff at the same rate as that supplied to city and citizens, the average rate obtained for gas supplied would be increased by something over 1 per cent. additional.

We now turn to the cost of making and distributing gas. Here we have the proof by plaintiff, based on its statement of actual expenditures, showing the cost as follows: 1891, \$1.056; 1892, \$1.15; 1893, \$1.23; 1894, 93 cents. Plaintiff insists that the cost (93 cents), as thus shown in the last year named, cannot be taken as a correct basis for the future, because, as it is claimed, of that year's unusually low cost of materials which enter into the manufacture of gas. Plaintiff insists that the correct average, as to cost of gas hereafter, would be the average of these four years, or \$1.09 per 1,000 feet. It may be conceded that there appears no full and satisfactory explanation for the dropping from \$1.23 in 1893 to 93 cents in 1894. Perhaps one of the reasons may be found in the affidavits of Manager Pratt and Foreman Pugh, and in the tables presented as to the results accomplished under Foreman Pugh's supervision. Certain it is that better results have been accomplished than theretofore seemed possible. The proof fails to show such reductions in material as thereby to account for this decrease in cost to plaintiff for that year. I may here say that all the expert witnesses—even those who testified at the instance of defendant—testify to the manifest ability and efficiency, and the apparent economy, of Mr. Pratt's management. I am not inclined to include in this hearing for the writ, as one of the proper elements relating to cost of gas, the rental of land paid by plaintiff for that part of the real estate on which plaintiff holds a purchase option, but which was not actually and properly occupied by plaintiff in the operation of its gas plant. This rental has been included by plaintiff as one of the expenses, in arriving at the cost of gas as it has given it. While it may be, as claimed, good business policy on part of plaintiff to hold this land under the present option, looking to its purchase hereafter in the growth of the plant, I question whether plaintiff may at this time rightfully insist that this rental shall be placed among its proper expenses, in estimating which proof is not clear but that a small portion of this land was actually and necessarily occupied by plaintiff in operating its gas plant. But I am not able to determine from the proof what part and value, if any,



was thus occupied. This rental, as given in plaintiff's proof, was in 1891 and 1892 \$2,502.95; in 1893, \$2,428.76; and in 1894, \$2,184.91. If these items are disallowed in gross, such disallowance would reduce the actual cost, as given by plaintiff, nearly 5 cents per 1,000 feet in 1891 and 1892, and nearly 4 cents in 1894; thus bringing the cost, in plaintiff's proof, to \$1 (about) in 1891, and to 89 cents (about) in 1894.

Turning to the testimony of the experts who testified on behalf of plaintiff as to what, in their judgment, is, or should be, the actual cost in Des Moines of manufacturing and distributing gas, we have the following results: Butterworth, 88 to 94 cents per 1,000 feet; Cowdery, 90 to 98 cents per 1,000 feet; Harper, 90 to 95 cents per 1,000 feet; White, 90 to 95 cents per 1,000 feet; Faber, 90 to 95 cents per 1,000 feet; Wallbridge, 90 to 95 cents per 1,000 feet; Chollar, 92 to 96 cents per 1,000 feet. I will not attempt recapitulation of the evidence of other witnesses, who placed the cost yet lower (some of that evidence bears marked indication of mere speculation on the subject), but will, for present purposes, take 90 cents as the cost per 1,000, in the belief that, under the proof thus far presented, this will be sustained as a fair estimate, and as not below the cost. The proof introduced by plaintiff shows that about 70 per cent. of the gas sold by it was at illuminating gas rates, and about 30 per cent. at fuel gas rates. Applying this percentage to the net rates of the 1895 ordinance, we have each 1,000 feet of gas bringing \$1.21 per 1,000 feet. At a cost of 90 cents per 1,000, there will remain 31 cents per 1,000 of profit, or, at the output for 1894, a profit of \$17,546. If we now take the cost of reproduction of plaintiff's gas plant, as hereinbefore found, the per cent. of profits on output for 1894, at the 1895 ordinance rates is .0438, or  $4\frac{1}{3}$  per cent. on cost of reproducing such plant. Under the present state of the proof, I am not satisfied that any allowance should be made on the present hearing for interest on outstanding bonds. The evidence hereafter presented may convince me that this interest, or some part thereof, should be included, in determining what are reasonable rates herein.

It is insisted by defendant that the reduction in price of gas will work a corresponding and large increase in amount consumed, resulting in increase of net profits as well. That some increase in consumption will follow reduction in price, plaintiff admits, but insists that there is no basis for believing such increase will be large, or that the net profits will increase at all. What will be the amount or per cent. of increase in consumption, and whether any increase in profits will result from reduction of rates, is, and must at present be, an uncertain matter. In *Railway Co. v. Wellman*, 143 U. S. 343, 12 Sup. Ct. 400, Mr. Justice Brewer inquires:

"Must it be declared, as matter of law, that a reduction of rates necessarily diminishes income? May it not be possible—indeed, does not all experience suggest the probability—that a reduction of rates will increase the amount of business, and therefore the earnings? At any rate, must the court assume that it has no such effect, and, ignoring all other considerations, hold, as a matter of law, that a reduction of rates necessarily diminishes the earnings?"

The same learned justice, in the opinion rendered by him on this circuit, as circuit judge, in *Railway Co. v. Dey*, 35 Fed. 881, when speaking of the application in that case of the possible increase of business as following reduction of rates, uses this language:

"Again, it is said that it cannot be determined in advance what the effect of reduction in rates will be. Oftentimes it increases business, and who can say that it will not in the present case so increase the volume of business as to make it remunerative,—even more so than at present? But speculations as to the future are not guides for action. Courts determine rights upon existing facts. Of course, there is always a possibility of the future; but the only fair judicial test is to apply the rates to the business that has been done in the past, and see whether, upon that basis, such rates will be remunerative, or will compel the transaction of business at a loss."

After all, there can be but one certain method of ascertaining the effect of reduction of rates, and that is the test of experience.

In plaintiff's opening argument, on page 43, appears a table wherein counsel have attempted to apply to a possible increase in business the rates of the 1895 ordinance, as affecting the receipts by the company therefor. Therein is shown a probable reduction in cost per 1,000 feet, as incident to such increased business. Let us take that part of the table, and, instead of placing the cost per 1,000 feet at plaintiff's figures (which are 95 cents), for present consumption, start our table at 90 cents, as above found, and thereafter reducing cost, as consumption increases, the same number of cents per 1,000 as reduced in such table, and we have the following as a result:

Output.	Cost per M.	Selling Price.	Profit, per cent. per M.	Amt.	Per cent. on Cost of Reproduction.	Per cent. af- ter Paying Int. on \$200,- 000 Bonds.
56,000,000.....	\$ .90	\$ 1.21	.31	\$17,546	.043	.018+
65,000,000.....	.85	1.21	.36	23,700	.059+	.034+
75,000,000.....	.81	1.21	.40	30,000	.075	.05
85,000,000.....	.77	1.21	.44	37,400	.093+	.068 -
95,000,000.....	.74	1.21	.47	44,750	.111+	.086+

This is the result most nearly approaching accuracy at which I have been able to arrive, under the proof presented. I realize that, of necessity, any result, attempted as accurate, must largely rest on probabilities, many of which may easily change, and many, if not all, of which, are shifting factors. But, taking the entire proof, I can do no better at this time. It may be here stated that the proof shows that, during the 20 years in which plaintiff has operated its gas plant, there has been paid in dividends, and in interest on bonds, less than \$50,000. Apparently, what profits beyond that amount have been realized from the business have been applied to the building up of plaintiff's plants. Were this the final hearing of this case, and time had proven my computation accurate, and that the increase in consumption had not proportionately and profitably grown in response to decrease in rates, but that substantially the consumption was as now, I should be strongly inclined, with my present view of the law and the facts, to grant a permanent in-

junction, if plaintiff be found entitled to include interest on bonds. There has been invested of cash (so the proof shows), in this gas plant, \$466,522.93. In this amount is included nothing relating to the electric light plant, nor any part of the bonds which were given for the right to use gas patents. If these bonds are included, the investment in the gas plant amounts to \$641,974.73 according to the proof. And considered from any standpoint of business enterprise, with the risks attending the business, the depreciation naturally occurring to the plant, the repairs which must constantly be in progress, the possibility (always imminent in a business enterprise such as this) of some invention or new process being found which would manufacture some satisfactory illuminant so cheaply as to make further operation of the plant financially impracticable, and the many other matters which must occur to a business mind when considering this gas plant as a financial investment,—all these strongly impress my mind that the per cent. of profit shown by the above table (assuming that interest on the \$200,000 bonds should be paid) is not what plaintiff is entitled to under equal protection of the laws with other like business enterprises generally, and that compulsory rates, which only permit charges affording no larger returns, and when the business is carried on with all practicable prudence and economy, are not reasonable rates, and are not compensatory, within the meaning of the term "compensation," as that term is used and construed in the decisions which are binding authority on this court. It will be observed, also, that the figures above tabulated do not provide any opportunity for realizing from the business a sinking fund, or other means with which to provide for payment of the principal of the bonds when these shall mature. The language of Justice Brewer, above quoted, is pertinent in this connection: "The idea of reasonableness is justice, and that which is unjust cannot be reasonable." Had plaintiff, in any manner, apparently sought to conceal any items pertaining to its business, which to defendant seemed material in this hearing, there might be some reason for doubting the correctness of the computations above made. But so far as seemed material to plaintiff, and so far as defendant asked, the entire business and accounts of plaintiff were opened up for investigation and consideration from its commencement of business, in 1876, to the date of the hearing. But we have not yet reached the final hearing in the case. What is now uncertain may, by the time of final hearing, become certain and convincing. Possibly, the result thus obtained may be contrary to present appearances. Opportunity, meanwhile, will probably be offered to definitely determine the working out of the ordinance in practice, in its business application. The test of experience—the most supreme test—may have been applied. As to the propriety of this test, Mr. Justice Woods, in the case of *Tilley v. Railroad Co.*, 5 Fed. 662, when speaking of a hearing before him in an application for injunction against the enforcement of rates fixed by a railroad commission, says:

"The officers of the railroad company declare that the rates fixed by the commission will so reduce its income that it will not suffice to pay the running

expenses of the road and the interest on the bonded debt, leaving nothing for dividends to its stockholders. The railroad commissioners assert that their schedule was framed to produce eight per cent. income on the value of the road, after paying cost of maintenance and running expenses. Which view is the correct one, it is impossible to decide from the evidence submitted. There is, however, a conclusive way—and it seems to me it is the only one—by which this controversy can be settled, and that is by experiment. A reduction of railroad charges is not always followed by a reduction of either gross or net income. It can soon be settled which is right—the railroad company's officers, or the railroad commission—in their view of the effect of the commission's tariff of rates, by allowing the tariff to go into operation."

This language is quoted by Judge Brewer (Railroad Co. v. Dey, 38 Fed. 664) on a hearing before him upon an application for a preliminary injunction in this state against a tariff of rates prescribed by the railroad commissioners of Iowa. Judge Brewer, after making the quotation, adds:

"While quoting this language as applicable hereto, I do not indorse it as of universal application, but only under the circumstances of the present case. Where the effect of the rates is doubtful, with a probability that they will prove compensatory, and the amount of business to be thereby affected is comparatively small, I think the courts may well wait for the test of experience. Influenced by these considerations, I am led to refuse the preliminary injunction, and to set aside the restraining order heretofore entered. It may well be that by the time this case comes to a final hearing the test of experience will have solved some of these matters, and it may be clear—as now seems probable—that the rates imposed by this last schedule are compensatory, within the rule laid down in the prior opinion, in which case an injunction ought not to issue, or clear that they are not compensatory, in which case, beyond any doubt, in my mind, a final and permanent injunction ought to be granted."

Is there, from the proof herein, such danger to plaintiff—such showing of irreparable injury to plaintiff—as to require that the preliminary writ shall issue? Taking the situation of plaintiff and defendant, where are the pressing, the controlling, equities? Plaintiff, at furthest, will receive within 40 cents per 1,000 feet of the prices heretofore received. According to the proof as now presented, plaintiff will pending this suit receive some profit. It is not compelled, as were plaintiffs in the Reagan and Ames Cases, to perform its business at ruinous or destructive rates, and without any compensation. The final hearing herein need not long be delayed, with a decision had on the merits, upon all the evidence that may be presented.

I have not attempted to notice herein all the points argued or pressed by counsel. Were I to attempt such presentation, this opinion, already too lengthy, would be greatly prolonged. I have given to the consideration of this application much time and study, through different methods of computation as to the items involved. About 10 days were occupied with the matter at the oral hearing in last August. The printed briefs of counsel were received after I had entered upon the fall sessions of this court, in September. These sessions continue, without interruption, until in December. I have devoted the past three weeks to the investigation of the proof and law presented, to the exclusion of other pressing official business. The nature of this case not only justified, but required, this exclusive and unremitting attention. The proof consists of

many hundreds of typewritten pages, with numerous tabular exhibits. The presentation by counsel of the facts and principles of law involved has been unusually thorough and complete, and consistent with the important financial and public interests involved, and as would have been confidently expected from the eminent legal standing and recognized ability of counsel representing the parties. If the court has erred in the conclusions reached, certainly such result cannot be charged to failure of counsel in presenting the case. I do not find in the proof presented and conclusions reached herein such showing as, when opposed to the prima facie proof of reasonableness of rates which accompanies and must be given to the ordinance, requires or justifies the issuing of a preliminary injunction. Accordingly the application for a preliminary injunction is denied, to which plaintiff excepts.

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PRESTON v. FINLEY, Comptroller.

(Circuit Court, W. D. Texas. March 9, 1896.)

1. EQUITY PLEADING—DEMURRER AND PLEA—CERTIFICATE AND AFFIDAVIT.  
Demurrers which are unsupported either by certificate of counsel or affidavit of the party, as required by equity rule 31, must be disregarded, but they may be considered as grounds of objection to granting a preliminary injunction prayed for.
2. CONSTITUTIONAL LAW—LIBERTY OF THE PRESS—TAXING SALE OF NEWSPAPERS.  
The act of the Twenty-Fourth legislature of Texas which provides for levying a tax on the occupation of selling the Sunday Sun, the Kansas City Sunday Sun, or other publications of like character, is not in contravention of article 1, § 8, of the state constitution, relating to the liberty of the press, or of article 8, § 2, relating to uniformity of taxation. *Thompson v. State*, 17 Tex. App. 253, and *Baldwin v. State*, 8 S. W. 109, 21 Tex. App. 591, followed.
3. SAME—TITLES OF LAWS.  
The subject of the said act is sufficiently expressed in its title, within the requirement of article 3, § 35, of the state constitution.
4. SAME.  
The provision of article 1, § 10, cl. 2, of the constitution of the United States, that no state shall, without consent of congress, lay any imposts or duties on imports, etc., does not apply to articles brought into the state from a sister state. *Woodruff v. Parham*, 8 Wall. 136, followed.
5. SAME—INTERSTATE COMMERCE—NEWSPAPERS.  
Newspapers are subjects of commerce, within the meaning of the provision in the constitution of the United States relating to commerce between the states.
6. SAME.  
The Texas statute imposing an occupation tax of \$500 upon every person, firm, or association engaged in selling the Sunday Sun, the Kansas City Sunday Sun, or other publications of like character, being applicable to all persons, whether residents of the state or not, engaged in selling "publications of like character" with those specifically mentioned, is not a discrimination either against the person or the property of the owners of the publications named, and is therefore not invalid as a regulation of interstate commerce.

This bill, duly sworn to by H. L. Strohm, Esq., one of the attorneys of complainant, was brought by Henry L. Preston, a citizen of the state of Missouri, against the comptroller of public accounts of this

state, to restrain the collection of an occupation tax. The question now before the court arises upon a motion made by the complainant for a temporary injunction. The allegations of the bill, material to be considered, are the following:

"Your orator, Henry L. Preston, is now, and for more than five years last past has been, engaged in the newspaper business at Kansas City, Missouri, as editor and publisher of the Kansas City Sunday Sun, a weekly newspaper wholly prepared, edited, and published at Kansas City, in the state of Missouri. That the said newspaper, the Kansas City Sunday Sun, has been duly entered by the post-office department for transmission through the United States mails as second-class matter, and is so transported by the United States government from the state of Missouri into and through the various states of the United States, including the state of Texas. That each separate copy of said newspaper, before being mailed from the state of Missouri, is separately folded, and constitutes a separate, original, and complete package in itself, and is so delivered and sold by your orator through his various agents in the state of Texas. That the monthly shipments of your orator's said newspaper from the state of Missouri into the state of Texas exceed fifty thousand copies, of a total value of over two thousand five hundred dollars. That said shipments are made by your said orator to one or more persons in each of the several counties of the state of Texas, who are the duly employed and authorized agents for your said orator, and, as such, distribute and sell your orator's said newspaper to the numerous patrons within the state of Texas. Your orator further says that the defendant R. W. Finley, in his official capacity as comptroller of public accounts of the state of Texas, has notified each tax collector throughout the state of Texas that there is a special occupation tax of five hundred dollars per annum, in each county, to be levied upon every person, firm, or association of persons selling or offering for sale the Kansas City Sunday Sun, and that he is about to transmit to each tax collector of the state of Texas receipts executed by him for the immediate collection of said alleged occupation tax, in accordance with article 4668c, Sayles' Civ. St. Tex., and that he threatens and is about to enforce and compel the collection of said tax against each of the agents of your orator; that said threatened act of said defendant, if performed or attempted to be performed, will occasion a multiplicity of suits throughout the state of Texas, and will do your orator an irreparable injury, for which he has no sufficient or adequate remedy at law. Your orator further says that the threatened act of the defendant herein complained of is founded upon an act of the Twenty-Fourth legislature of the state of Texas, entitled 'An act to provide for levying a tax on the occupation of selling or offering for sale the Sunday Sun, the Kansas City Sunday Sun, or other publications of like character, whether illustrated or not,' and is in the words and figures following, to wit:

"[Section 1. Be it enacted by the legislature of the state of Texas. There shall be levied on and collected from every person, firm or association of persons selling or offering for sale, the "Sunday Sun," the "Kansas City Sunday Sun," or other publications of like character, whether illustrated or not, the sum of five hundred dollars in each county in which sale may be made or offered to be made.

"[Sec. 2. The near approach of the close of the present session of the legislature and the large number of bills now pending on the calendar, and the fact that the occupation herein taxed is not now taxed by law, creates an emergency and a public necessity exists that the constitutional rule requiring bills to be read on three several days be suspended, and that this act take effect and be in force from and after its passage, and it is so enacted."

The bill then alleges that the act of the legislature is unconstitutional and void, and states at length the reasons therefor, which may be summarized as follows:

First. Because it is in violation of section 8, art. 1, of the state constitution, in that it curtails the liberty of the press. Second. The act amounts in fact

to an attempt at an unauthorized police regulation, and creates a prohibitory tax upon complainant's newspaper, and is not a bona fide tax for any purpose. Third. Because the subject of the act is not expressed in its title, and the act is therefore repugnant to section 35, art. 3, of the state constitution. Fourth. Because it is in violation of clause 3, § 8, art. 1, of the constitution of the United States, in that it attempts to regulate commerce among the several states. Fifth. It conflicts with clause 2, § 10, art. 1, of the constitution of the United States, in that it lays an impost or duty on imports without the consent of congress. Sixth. Because the act of the legislature is so indefinitely and unintelligibly framed, and of such doubtful construction, that it cannot be properly understood what character of publication it is intended to tax, or what particular class of persons it is designed to effect, etc. Seventh. Because it is special legislation, and it is calculated to affect only the newspaper of complainant, and deprive him of the legal use of his property without just cause, and without due process of law.

An injunction is prayed to enjoin the comptroller, his clerks, agents, etc., from doing any act tending to collect, or enforce the collection of, the tax. Attached to the motion are the following exhibits:

"Exhibit A.

"State of Missouri, Jackson County—ss.: Henry L. Preston, the complainant herein, being first duly sworn, on his oath says that he has read the complainant's bill herein filed, and that, of his own knowledge, the allegations therein are true, except as to those stated on information and belief, and those affiant believes to be true. Affiant further says that according to his best information and belief, and so alleges the fact to be, there are 226 organized counties in the state of Texas, a list of the names of which, with the names of each county seat, is hereto attached, and marked 'Exhibit B.' That affiant attaches hereto, and marks 'Exhibit C,' a true copy of the entry of the Kansas City Sunday Sun at the post office at Kansas City, Missouri, to which he has added an affidavit of the postmaster at Kansas City, Missouri, establishing the fact that said certificate is in full force and effect. Affiant further says that Exhibit D, hereto, is a true copy of the Kansas City Sunday Sun of a date prior to the passage of chapter 50 of the Acts of the 24th legislature, and that Exhibit E, hereto attached, is a true copy of the Kansas City Sunday Sun of a date subsequent to the passage of said act. Further, affiant saith not.

"Henry L. Preston.

"Subscribed and sworn to before me by said Henry L. Preston this Nov. 20th, 1895. My commission expires April 18th, 1899.

"[Seal.]

Ida E. Snow,

"Notary Public for Jackson County, Missouri."

"Exhibit C.

"State of Missouri, County of Jackson—ss.: Homer Reed, being duly sworn, says that he is the postmaster of Kansas City, Missouri; that the Kansas City Sunday Sun is a newspaper published at Kansas City, Missouri, and is regularly admitted for transmission through the United States mails as second-class mail matter; and that the certificate, a copy of which is hereto attached, is in full force and effect.

Homer Reed,

"Postmaster Kansas City, Missouri.

"Subscribed and sworn to before me by said affiant this 20th day of November, 1895.

Ida E. Snow, Notary Public.

"My commission expires April 13th, '99. [Seal.]

"(3249)

"Certificate of Entry of Publication as Second-Class Matter.

"Post Office of Kansas City, Mo., Sept. 17th, 1894.

"I hereby certify that the Kansas City Sunday Sun, a weekly newspaper published at this place, has been determined by the third assistant postmaster general to be a publication entitled to admission in the mails at the pound rate

of postage, and entry of it as such is accordingly made upon the books of this office. Valid while the character of the publication remains unchanged.

"Homer Reed, Postmaster,  
"By Chas. N. Seidlitz, Asst. P. M."

Attached as exhibits to the bill are also several copies of complainant's newspaper, the Kansas City Sunday Sun.

The attorney general, appearing in behalf of the comptroller, interposes demurrers setting forth the following objections to the bill:

"First. That the complainant hath not in said bill made or stated such a cause as doth or ought to entitle him to any such relief as is thereby sought and prayed for against this defendant. Second. If the statute of the state imposing an occupation tax on the business of selling the Kansas City Sunday Sun is void, the courts of law afford complainant an adequate and complete remedy. Third. That complainant's bill fails to show that the Kansas City Sunday Sun is such a newspaper as, under the laws of this state and of the United States, can be circulated through the mails, or the circulation of which in this state could not be prevented by this state, in a reasonable exercise of its police powers. Fourth. The complainant's bill does not show that this defendant has any authority to prosecute or force the collection of any of the occupation tax alleged to be due; but, on the contrary, said bill doth show that this defendant has no legal duty to perform in connection therewith, except to furnish the tax collectors of the several counties of this state the receipts which they are authorized to issue to those paying said tax, and that upon furnishing said receipts to the tax collectors the legal duty and liability of this defendant are at an end, except in so far as may be necessary to settle with the said tax collectors for such money as they may receive. Fifth. That it appears by said complainant's bill that there are divers other persons, necessary parties to said bill, but who are not made parties thereto; that is to say, it appears that all the tax collectors of the state of Texas, or at least some one or more of them, should be made parties thereto, so that they may be enjoined from attempting to collect said tax, and from prosecuting complainant by reason of his failure to pay the same."

Harry L. Strohm and Boykin & Bashaw, for complainant.  
M. M. Crane, Atty. Gen. of Texas, for defendant.

MAXEY, District Judge, after stating the case, delivered the following opinion:

The objection is made in limine by counsel for complainant, to the demurrers of defendant, that they are not supported by the usual certificate of counsel and affidavit of defendant, as required by equity rule 31, which provides that:

"No demurrer or plea shall be allowed to be filed to any bill, unless upon a certificate of counsel that in his opinion it is well founded in point of law, and supported by the affidavit of the defendant that it is not interposed for delay; and if a plea, that it is true in point of fact."

Neither the certificate nor affidavit required by the rule is appended to the demurrers, and they should therefore be disregarded. Construing the rule above quoted, it is said by the supreme court that:

"Inasmuch as the so-called demurrer was fatally defective, in lacking the affidavit of defendant and certificate of counsel required by rule 31, there was no error in disregarding it and entering a decree pro confesso." *Furnace Co. v. Witherow*, 149 U. S. 576, 13 Sup. Ct. 936; *National Bank v. Insurance Co.*, 104 U. S. 76.



Although the demurrers, as such, cannot be regarded, no reason is perceived why they may not be considered as grounds of objection to granting the preliminary injunction prayed by the bill.

The bill in the present case seeks to enjoin the collection of an occupation tax imposed by the state, upon the two general grounds that the act of the legislature is in violation of the state constitution, and that it is repugnant to the constitution of the United States; and, as a further ground of equitable cognizance, it is insisted that the enforcement of the statute by the collection of the tax would subject complainant to a multiplicity of suits, and result in irreparable injury. That an injunction should issue, in a proper case, to restrain the collection of a tax, is doubtless true. To authorize it, however, the tax must not only be illegal, but the party must, by his bill, bring his case under some acknowledged head of equity jurisdiction, "such as that the enforcement of the tax would lead to a multiplicity of suits or produce irreparable injury, or, where the property is real estate, throw a cloud upon the title of complainant." *Shelton v. Platt*, 139 U. S. 594, 11 Sup. Ct. 646; *Railway Co. v. Cheyenne*, 113 U. S. 516, 5 Sup. Ct. 601; *State Railroad Tax Cases*, 92 U. S. 575; *Hannewinkle v. Georgetown*, 15 Wall. 547; *Dows v. Chicago*, 11 Wall. 109; *Blessing v. Galveston*, 42 Tex. 641. It consequently follows that, if the tax be a legal charge,—if it be lawfully exacted pursuant to a constitutional statute,—an injunction should not issue to stay the hand of the state in the collection of its revenue. Is the statute in question obnoxious to the objections urged by counsel for complainant? It is assailed first on the ground that it is in violation of the constitution of the state. Counsel for complainant, after discussing in their brief several objections to the act of the legislature, make the following admission:

"In answer to this the defendant may cite the court to the case of *Thompson v. State*, 17 Tex. App. 253. It is true that in that case the learned judge who announced the opinion of the court upheld a similar law to the statute in controversy, and later reaffirmed the decision in the case of *Baldwin v. State*, 21 Tex. App. 591, 3 S. W. 109. In neither of these cases was the construction of article 6 of the Penal Code asked, nor was the claim made that section 8 of the bill of rights was violated."

It must be remembered that this is not a tribunal clothed with power to revise and reverse the decisions of the highest courts of the state upon questions which concern the validity of a state law, as affected by the constitution of the state, and the true construction of that law. Generally speaking, such decisions are binding upon the federal courts, and are to be accepted by them as correct expositions of the law in a given case. Thus, it is said by Mr. Justice Miller, speaking for the court, in *State Railroad Tax Cases*, *supra*:

"As the whole matter, then, concerns the validity of a state law, as affected by the constitution of the state, that question, and the other one of the true construction of that statute, belong to the class of questions in regard to which this court still holds, with some few exceptions, that the decisions of the state courts are to be accepted as the rule of decision for the federal courts."

In *Machine Co. v. Gage*, 100 U. S. 677, it is said by Mr. Justice Swayne, as the organ of the court, that:

"The sewing machines here in question were made in Connecticut. The supreme court of the state held in this case 'that the law taxing the peddlers of such machines levied the tax upon all peddlers of sewing machines, without regard to the place of growth or produce of material or of manufacture.' We are bound to regard this construction as correct, and to give it the same effect as if it were a part of the statute."

And in *Pullman's Palace-Car Co. v. Pennsylvania*, 141 U. S. 21, 11 Sup. Ct. 876, this emphatic language is employed by Mr. Justice Gray, who rendered the opinion of the court:

"Upon this writ of error, whether this tax was in accordance with the law of Pennsylvania is a question in which the decision of the highest court of the state is conclusive."

In the case at bar the argument of counsel seems to proceed upon the assumptions: (1) That this case involves distinct questions, concerning which no ruling was requested, nor made by the court of appeals, in the Cases of Thompson and Baldwin; and (2) that those cases have been overruled by the same court in *Ex parte Neill*, 32 Tex. Cr. R. 275, 22 S. W. 923. By reference to the Thompson Case, it will be seen that he was indicted for the offense "of pursuing the occupation or business of selling and offering for sale the Illustrated Police News and Police Gazette without obtaining license and paying occupation tax therefor." The trial resulted in his conviction, and the assessment of a fine of \$750.

"The motion in arrest of judgment alleged that the indictment charged no offense; that the act of May 4, 1882, so far as it attempts to levy the tax for the failure to pay which the defendant was indicted, is oppressive, indefinite, and uncertain, and beyond the power of the legislature; the said act is repugnant to section 2, art. 8, of the constitution; that the indictment did not sufficiently and with certainty describe the occupation for the pursuing of which the defendant was sought to be charged; that the prosecution was such as is expressly prohibited by section 8 of article 1 of the constitution."

By the act of May 4, 1882, it is provided that there shall be levied on and collected "from every person, firm or association of persons selling or offering for sale, the Illustrated Police News, Police Gazette, and other illustrated publications of like character, the sum of \$500 in each county in which such sale may be made or offered to be made." Judge Willson, in delivering the opinion of the court, says:

"There is but a single question presented by the record for our determination, and that is the constitutionality of the above-quoted statutory provision. Counsel for appellant contends that said law is unconstitutional for two reasons: (1) That the tax levied by it is not 'equal and uniform upon the same class of subjects.' Const. art. 8, §§ 1, 2. (2) That it is oppressive, vague, uncertain, indefinite, and beyond the power of the legislature."

At page 258, 17 Tex. App., Judge Willson further says:

"In support of our view that the law in question is valid, that it was fully within the power of the legislature to enact it, and that it is not obnoxious to any of the objections made to it, we cite the following additional authorities: *Cooley, Tax'n*, 396, 403, 404; *Cooley, Const. Lim.* 713, 725, 748, 749; *Burroughs, Tax'n*, § 77; *Languille v. State*, 4 Tex. App. 812; *Higgins v. Rinker*, 47 Tex. 393."

From the record in Thompson's Case, it appears that his counsel, in their motion in arrest of judgment, relied upon the same article of the bill of rights (Const. art. 1, § 8) as do counsel for complainant here; and, while the construction of article 6 of the Penal Code was not directly requested, it may be answered that it was necessarily involved, for if the statute was so vague and indefinitely framed, or of such doubtful construction, that it could not be understood, its invalidity would have been declared by the court if article 6 had no place in the Penal Code.

Counsel for complainant urgently insist that a tax levied upon the occupation of selling a newspaper contravenes section 8, art. 1, of the constitution, because it restricts the liberty of the press. That article is as follows:

"Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press."

It has already been shown that this provision of the constitution was relied upon by counsel in Thompson's Case to defeat a similar statute, which was declared by the court to be in all respects constitutional. And, as the decision of the court of appeals is binding upon this court, it is deemed useless to pursue the argument further, except to add, in the language of Judge Simkins:

"It is obvious, from the express terms of the constitution, that the only exemptions from the all-pervading power of taxation are the agricultural and mechanical pursuits." *Ex parte Williams*, 31 Tex. Cr. R. 272, 20 S. W. 580; *Albrecht v. State*, 8 Tex. App. 221; *Languille v. State*, supra.

The position assumed by counsel for complainant, that article 6 of the Penal Code, and section 8 of the bill of rights, were not substantially given effect by the court in Thompson's Case, does not seem to be well taken. But it is further contended that the Cases of Thompson and Baldwin are overruled by the subsequent case of *Ex parte Neill*, supra. A brief reference to *Ex parte Neill* will demonstrate the fallacy of this contention. Neill, a news-dealer in the city of Seguin, was arrested and fined in the mayor's court for violating the following ordinance: The city council of the city of Seguin ordained—"That the Sunday Sun, a paper said to be published at Chicago, Illinois, is hereby declared a public nuisance, and its circulation prohibited within the corporate limits of the city of Seguin. Any person or persons offering to sell, barter, give away, or in any manner dispose of the Sunday Sun in violation of above ordinance, shall be punished in a fine not to exceed one hundred dollars." Resorting to a writ of habeas corpus, Neill was remanded to custody by the county judge, and appealed his case to the court of criminal appeals. The court properly held the ordinance void, and observed: "We are not informed of any authority which sustains the doctrine that a municipal corporation is invested with the power to declare the sale of newspapers a nuisance." The court makes no reference, direct or remote, to the Thompson and Baldwin Cases. Why? Because there is such striking dissimilarity between them and Neill's Case that it was evidently deemed altogether unnecessary to allude to the distinc-

tion. "We take it to be a sound principle," says the supreme court, "that no proposition of law can be said to be overruled by a court, which was not in the mind of the court when the decision was made." *Woodruff v. Parham*, 8 Wall. 138.

The decisions of the court in *Thompson v. State* and *Baldwin v. State* are therefore binding upon this court, in so far as they affect questions already discussed. This further objection is, however, urged by complainant's counsel to the validity of the act in question:

"Because the act is in violation of section 35, art. 3, of the constitution of the state of Texas, in this: that the subject of said act is not expressed in the title. The title expresses only the taxing of a certain occupation, while the act itself taxes each individual, and single sale or offer of sale, whether selling said newspaper be followed as an occupation or not."

As the question involved in this objection did not arise, and could not have arisen, in the *Thompson Case*, it becomes the duty of the court to consider it. The act complained of, including its title, is set out in the foregoing statement of the case, and need not be repeated. Having under consideration section 35, art. 3, of the constitution, it is said by Judge Clark, in *Albrecht v. State*, 8 Tex. App. 221, that:

"In construing the provision, therefore, courts have almost uniformly refused to adopt a strict and literal construction, which would inevitably tend to the serious embarrassment of legislation, and have uniformly sustained legislation when the several provisions of the act are fairly indicated in the general object as stated in the title, under a rule adopted by themselves, giving to the sections a broad and liberal construction. The general purpose of the provision is fully accomplished when a law has but one general object, which is fairly indicated by its title; and the generality of the title is not objectionable so long as it is not made a cover to legislation incongruous in itself, and which by no fair intendment can be considered as having a necessary or proper connection."

In support of the principle, Judge Clark cites *Breen v. Railway Co.*, 44 Tex. 302; *Giddings v. City of San Antonio*, 47 Tex. 548; *Ex parte Mabry*, 5 Tex. App. 93; *Railroad Co. v. Potts*, 7 Ind. 681; *People v. Briggs*, 50 N. Y. 553; *Cooley*, Const. Lim. 141-145.

In *Day Land & Cattle Co. v. State*, 68 Tex. 542, 4 S. W. 865, Mr. Justice Stayton, delivering the opinion of the court, states the purpose of the constitutional provision in the following language:

"As said in *Tadlock v. Eccles*, 20 Tex. 793, 'the intention, doubtless, was to prevent embracing in an act having one ostensible object provisions having no relevancy to that object, but really designed to effectuate other and wholly different objects, and thus to conceal and disguise the real object proposed by the provisions of an act under a false and deceptive title.' A title or act essentially single in subject, which does not conceal or disguise the real purpose, is not subject to constitutional objection, although the ends intended to be reached through the one subject may be many."

There is no ambiguity in the act in question, nor real inconsistency between it and the title. The act, considered in connection with its title, makes manifest the legislative intent to tax every person who sells or offers for sale the publications named. Tested by the authorities referred to, the law is not obnoxious to the objection urged against it; and, following the decisions of the highest courts of the state, it must be held valid in its entirety,

as a legislative enactment in harmony with the provisions of the state constitution.

Counsel for complainant further challenge the validity of the statute upon the grounds (1) that "it is in violation of clause 3 of section 8 of article 1 of the constitution of the United States, in that it attempts to regulate commerce among the several states"; and (2) "because it is in conflict with clause 2, § 10, art. 1, of the constitution of the United States, in that it lays an impost or duty on imports without the consent of congress,—said Kansas City Sunday Sun being an article of import from the state of Missouri into the state of Texas, by your orator herein." The intricate, difficult, and serious questions which these objections involve have received at the hands of the court the careful attention and thoughtful consideration which their importance demands. A large number of cases have been examined, beginning with *Gibbons v. Ogden* (decided in 1824) 9 Wheat. 1, and extending to *Emert v. Missouri* (decided in 1895) 156 U. S. 296, 15 Sup. Ct. 367. And the embarrassment attending the effort of the trial court to reach correct conclusions in cases involving "the questions of the nature of the power to regulate commerce, and how far that power is exclusively vested in congress," is greatly enhanced when it is reflected that, employing almost the exact language of Mr. Justice Miller, the question has seldom been decided in the supreme court with unanimity. *Hinson v. Lott*, 8 Wall. 152. Although 28 years have elapsed since the statement made by that eminent jurist, a continuing "want of unanimity" is clearly made manifest by later decisions; notably, those rendered in *Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. 681, and the recent case of *Plumley v. Massachusetts*, 155 U. S. 461, 15 Sup. Ct. 154. With these observations, the court will proceed to inquire whether the objections of counsel are tenable. The two clauses of the federal constitution invoked to defeat the statute read as follows:

Clause 3, § 8, art. 1: "The congress shall have power \* \* \* to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

Clause 2, § 10, art. 1: "No state shall, without the consent of the congress, lay any imposts, or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws."

By the Texas statute, "every person, firm or association of persons selling or offering for sale the 'Sunday Sun' the 'Kansas City Sunday Sun,' or other publications of like character, whether illustrated or not," is required to pay "the sum of five hundred dollars in each county in which sale may be made or offered to be made." Article 112 of the Penal Code of 1895 provides:

"Any person who shall pursue or follow any occupation, calling or profession, or do any act taxed by law, without first obtaining a license therefor, shall be fined in any sum not less than the amount of the taxes due, and not more than double that sum."

The case made by the bill is that the complainant is a citizen of Missouri; that he is the editor and publisher of the Kansas City Sunday Sun; that his newspaper has been entered by the post-

office department for transmission through the mails as second-class matter, and is so transported by the United States government from the state of Missouri into the state of Texas; that each separate copy of his paper, before being mailed from the state of Missouri, is separately folded, and constitutes a separate, original, and complete package in itself, and is so delivered and sold by him through his various agents in the state of Texas; that the monthly shipments of his paper to the state of Texas exceed 50,000 copies; that said shipments are made by him to one or more persons in each of the several counties of the state, who are his duly-employed and authorized agents, and as such distribute and sell his papers to the numerous patrons thereof within the state. Upon the case thus made the complainant relies to defeat the state statute, as being repugnant to the provisions of the two clauses of the constitution above quoted, "in that it, in effect, regulates commerce among the several states, and, without the consent of congress, lays an impost duty upon the complainant's newspaper." "Commerce," says the supreme court, "is a term of the largest import. It comprehends intercourse for the purposes of trade, in any and all its forms, including the transportation, purchase, sale, and exchange of commodities between the citizens of our country and the citizens or subjects of foreign countries, and between the citizens of different states." *Welton v. Missouri*, 91 U. S. 280. In *County of Mobile v. Kimball*, it is said by the supreme court that "commerce with foreign countries and among the states, strictly considered, consists in intercourse and traffic, including in those terms navigation, and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities." 102 U. S. 702; *McCall v. California*, 136 U. S. 108, 10 Sup. Ct. 881. "Commerce, undoubtedly, is traffic," said Chief Justice Marshall, "but it is something more. It is intercourse. It describes the commercial intercourse between nations and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse." *Gibbons v. Ogden*, 9 Wheat. 189. Within the comprehensive definition given the term "commerce" by the supreme court, a newspaper is a subject of commercial intercourse and sale between state and state, like any other article in which a right of traffic exists. But is the conclusion warranted that a statute infringes the constitution when it imposes a tax upon every person alike, whether resident or non-resident, who sells within the limits of a state a newspaper published in another state, and other publications of like character? Clause 2, § 10, art. 1, of the constitution is inapplicable to the question now under consideration, as it has been expressly held by the supreme court that the constitutional provision against taxing imports by the state does not extend to articles brought from a sister state. Discussing this clause, Mr. Justice Miller, in *Woodruff v. Parham*, 8 Wall. 136, 137, says:

"Whether we look, then, to the terms of the clause of the constitution in question, or to its relation to the other parts of that instrument, or to the history of its formation and adoption, or to the comments of the eminent men who took

part in those transactions, we are forced to the conclusion that no intention existed to prohibit, by this clause, the right of one state to tax articles brought into it from another." *Hinson v. Lott*, supra; *Brown v. Houston*, 114 U. S. 622, 5 Sup. Ct. 1091.

Is the position of counsel maintainable,—that the statute is in derogation of clause 3, § 8, art. 1, in that it attempts to regulate commerce among the states? In support of this contention, reliance is placed upon *Leisy v. Hardin*, supra; *Bowman v. Railroad Co.*, 125 U. S. 465, 8 Sup. Ct. 689, 1062; *Robbins v. Taxing Dist.*, 120 U. S. 489, 7 Sup. Ct. 592,—and other authorities cited in the brief. It would prove a fruitless undertaking for the court to attempt a review of the cases, for the purpose of distinguishing between them. That duty has been performed by the supreme court in numerous cases, and particularly in the exhaustive prevailing and dissenting opinions in *Leisy v. Hardin*, in *Plumley v. Massachusetts*, and *Emert v. Missouri*. And it may be remarked that, in *Plumley v. Massachusetts*, *Leisy v. Hardin* is expressly limited. 155 U. S. 474, 15 Sup. Ct. 154. Without entering, therefore, upon a more extended reference to the cases, it is thought that the disposition of this case should be controlled by the principles laid down by the court in *Woodruff v. Parham*, *Hinson v. Lott*, *Machine Co. v. Gage*, *Brown v. Houston*, and *Emert v. Missouri*. In essential respects, the facts of *Woodruff v. Parham* are quite similar to those upon which complainant here relies, and may be stated as follows:

"The city of Mobile, Alabama, in accordance with a provision of its charter, authorized the collection of a tax for municipal purposes on real and personal estate, sales at auction, and sales of merchandise, capital employed in business, and income within the city. This ordinance being on the city statute book, *Woodruff* and others, auctioneers, received in the course of their business, for themselves, or as consignees and agents for others, large amounts of goods and merchandise, the product of states other than Alabama, and sold the same in Mobile, to purchasers, in the original and unbroken packages. Thereupon the tax collector for the city demanded the tax levied by the ordinance."

*Woodruff* refused to pay, asserting that it was repugnant to the following clauses of the constitution: Clause 3, § 8, art. 1; clause 2, § 10, art. 1; and clause 1, § 2, art. 4. The supreme court of Alabama decided in favor of the tax, and its judgment was affirmed by the supreme court of the United States. In discussing the case the following questions and answers are suggested by the court:

"But we may be asked, is there no limit to the power of the states to tax the produce of their sister states, brought within their borders? And can they so tax them as to drive them out, or altogether prevent their introduction, or their transit over their territory? The case before us is a simple tax on sales of merchandise, imposed alike upon all sales made in Mobile, whether the sales be made by a citizen of Alabama or of another state, and whether the goods sold are the produce of that state, or some other. There is no attempt to discriminate injuriously against the products of other states, or the rights of their citizens; and the case is not, therefore, an attempt to fetter commerce among the states, or to deprive the citizens of other states of any privilege or immunity possessed by citizens of Alabama. But a law having such operation would, in our opinion, be an infringement of the provisions of the constitution which relate to those subjects, and therefore void." 8 Wall. 140.

The question in *Hinson v. Lott* arose upon the thirteenth section of the Alabama statute, which is in these words:

"Before it shall be lawful for any dealer or dealers in spirituous liquors to offer any such liquors for sale within the limits of this state, such dealer or dealers introducing any such liquors into the state for sale shall first pay the tax-collector of the county into which such liquors are introduced, a tax of fifty cents per gallon upon each and every gallon thereof."

Other sections of the same statute laid a tax of 50 cents per gallon on all whisky and all brandy from fruits manufactured in the state. With this statute in force, *Hinson*, a Mobile merchant, filed a bill against the tax collector for the city of Mobile and state of Alabama, "in which he set forth that he had on hand five barrels of whisky consigned to him by one Dexter, of the state of Ohio, to be sold on account of the latter in the state of Alabama, and that he had five other barrels purchased by himself in the state of Louisiana, and that he had brandy and wine imported from abroad (upon which he had paid the import duties laid by the United States, at the customhouse at Mobile), all of which liquors he now held, and was offering for sale, in the same packages in which they were imported, and not otherwise." *Hinson* insisted that the statute was void as being in conflict with the United States constitution, and prayed an injunction. The case went to the supreme court of the state, and "the state tax of fifty cents per gallon on the whisky of Dexter, of Ohio, and that purchased by plaintiff in Louisiana, was held to be valid." Upon writ of error to the United States supreme court the judgment was affirmed, and, after discussing the constitutional question, it is said by the court:

"As the effect of the act is such as we have described, and it institutes no legislation which discriminates against the products of sister states, but merely subjects them to the same rate of taxation which similar articles pay that are manufactured within the state, we do not see in it an attempt to regulate commerce, but an appropriate and legitimate exercise of the taxing power of the states."

In *Machine Co. v. Gage* the following are the material facts: The *Howe Machine Company* was a corporation of Connecticut. It manufactured sewing machines at Bridgeport, in that state, and had an agency at Nashville, in the state of Tennessee. From the latter place an agent was sent into Sumner county to sell machines there. A tax was demanded from him for a peddler's license to make such sales. He denied the validity of the law under which the tax was claimed, but, according to a law of the state, paid the amount demanded by *Gage* as clerk of the county court. The company, who brought the suit to recover it back, was defeated in the lower court. The judgment was sustained by the supreme court of the state, and subsequently affirmed by the supreme court of the United States, in an opinion delivered by Mr. Justice *Swayne*. After reviewing the cases the justice adds:

"In all cases of this class to which the one before us belongs, it is a test question whether there is any discrimination in favor of the state, or of the citizens of the state, which enacted the law. Wherever there is, such discrimination is fatal." 100 U. S. 679.



In *Brown v. Houston* a bill in equity was filed to restrain the defendant, Houston, from selling a lot of coal belonging to the plaintiffs for the purpose of collecting a tax imposed upon personal property by the authorities of the state of Louisiana. In addition to the usual averments to be found in similar bills, it was alleged by the plaintiffs—

“That said coal was mined in Pennsylvania, and was exported from said state and imported into the state of Louisiana as their property, and was then [at the time of the petition], and had always remained, in its original condition, and never had been or become mixed or incorporated with other property of the state of Louisiana; that when said assessment was made the said coal was afloat in the Mississippi river, in the parish of Orleans, in the original condition in which it was exported from Pennsylvania, and the agents, Brown & Jones, notified the board of assessors of the parish that the coal did not belong to them, but to the plaintiffs, and was held as before stated, and was not subject to taxation, and protested against the assessment for that purpose.”

The plaintiffs prayed an injunction, which was granted. On final hearing the injunction was dissolved and the bill dismissed. The supreme court of Louisiana affirmed the judgment (33 La. Ann. 843), and the ruling was sustained by the supreme court of the United States. It was said by Mr. Justice Bradley, who delivered the opinion of the court, that:

“As to the character and mode of the assessment, little need be added to what has already been said. It was not a tax imposed upon the coal as a foreign product, or as the product of another state than Louisiana, nor a tax imposed by reason of the coal being imported or brought into Louisiana, nor a tax imposed whilst it was in a state of transit through that state to some other place of destination. It was imposed after the coal had arrived at its destination and was put up for sale. The coal had come to its place of rest, for final disposal or use, and was a commodity in the market of New Orleans. It might continue in that condition for a year or two years, or only for a day. It had become a part of the general mass of property in the state, and as such it was taxed for the current year [1880] as all other property in the city of New Orleans was taxed. Under the law it could not be taxed again until the following year. It was subjected to no discrimination in favor of goods which were the product of Louisiana, or goods which were the property of citizens of Louisiana. It was treated in exactly the same manner as such goods were treated. It cannot be seriously contended—at least, in the absence of any congressional legislation to the contrary—that all goods which are the product of other states are to be free from taxation in the state to which they may be carried for use or sale. Take the city of New York, for example. When the assessor of taxes goes his round, must he omit from his list of taxables all goods which have come into the city from the factories of New England and New Jersey, or from the pastures and grain fields of the West? If he must, what will be left for taxation? And how is he to distinguish between those goods which are taxable and those which are not? With the exception of goods imported from foreign countries, still in the original packages, and goods in transit to some other place, why may he not assess all property alike that may be found in the city, being there for the purpose of remaining there till used or sold, and constituting part of the great mass of its commercial capital, provided, always, that the assessment be a general one, and made without discrimination between goods the product of New York, and goods the product of other states? Of course, the assessment should be a general one, and not discriminative between goods of different states.” 114 U. S. 632, 633, 5 Sup. Ct. 1091.

*Emert v. Missouri* involved the construction of a statute of Missouri which required peddlers to obtain a license before selling their

wares, and imposed a penalty for noncompliance with its provisions. An information was filed against Emert for failing to comply with the law. He was adjudged guilty, and sentenced to pay a fine of \$50 and costs. The judgment was sustained by the supreme court of Missouri (15 S. W. 81), and the case went by writ of error to the United States supreme court.

"The facts were agreed,—that the Singer Manufacturing Company, for more than five years last past, and on the day in question, was a corporation of New Jersey; that the defendant, on and prior to that day, was in the employment of that company, and on that day, in pursuance of that employment, and having no peddler's license, was engaged in going from place to place in Montgomery county, in the state of Missouri, with a horse and wagon, soliciting orders for the sale of the company's sewing machines, and having with him in the wagon one of those machines, the property of the company, and manufactured by it at its works in New Jersey, and which it had forwarded and delivered to him for sale on its account, and that he offered this machine for sale to various persons at different places, and found a purchaser, and sold and delivered it to him."

After an elaborate review of adjudged cases, embracing those above cited, the court held that:

"The necessary conclusion, upon authority, as well as upon principle, is that the statute of Missouri, now in question, is nowise repugnant to the power of congress to regulate commerce among the several states, but is a valid exercise of the power of the state over persons and business within its borders."

So, also, it must be held in this case that the statute of Texas is not in conflict with the commerce clause of the constitution, but is a valid exercise of the power of the state over persons and business within its territorial limits, unless it discriminates against the person or property of complainant. If the discrimination exists, as in *Welton v. Missouri*, supra; *Walling v. Michigan*, 116 U. S. 446, 6 Sup. Ct. 454; *Robbins v. Taxing Dist.*, supra; *Asher v. Texas*, 128 U. S. 129, 9 Sup. Ct. 1; *Brimmer v. Rebman*, 138 U. S. 78, 11 Sup. Ct. 213; and others of that class,—then the statute, according to all the decisions, would be repugnant to the constitution and void. It must be borne in mind that the court of appeals of this state held a similar statute as not being in conflict with the state constitution, and that the tax levied thereunder was not discriminative, but equal and uniform in its operation. Employing the precise language of the court:

"This law exempts no publication belonging to the class represented by the two named publications from the tax levied. We conclude, therefore, that the tax levied is equal and uniform; applicable to all publications coming within the class designated." *Thompson v. State*, 17 Tex. App. 256.

If, then, as said by the supreme court of the United States in reference to the decision of the supreme court of Tennessee, "We are bound to regard this construction as correct, and to give it the same effect as if it were a part of the statute," the conclusion is inevitable that the act in question should be construed as not discriminating either against the person or the property of complainant. The law, indeed, requires the person who sells the complainant's newspaper to pay the tax, but it is equally obligatory on all persons who sell "other publications of like character" to

pay the same amount. Whether, therefore, the seller of the paper be a resident or nonresident of the state; whether the "Kansas City Sunday Sun, or other publication of like character," be edited and published in Missouri, Texas, or elsewhere,—each and all, without distinction or discrimination, must submit to the requirements of the law before selling, within the limits of the state, the designated publications. As thus construed, the act is not obnoxious to the criticisms of counsel, and should be held to be a valid exercise of legislative power, and not an encroachment on the commerce clause of the constitution. The motion for injunction should be denied, and it is so ordered.

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BURDICK v. PETERSON et al.

(Circuit Court, S. D. Iowa, C. D. February 4, 1896.)

No. 1,952.

DEEDS—LOST INSTRUMENTS—ORAL PROOF.

In a suit to establish a lost unrecorded deed of certain real estate, alleged to have been given by one S. to one M. in exchange for other property conveyed by M. to S., both S. and M. being dead at the time of the trial, M.'s widow testified to the negotiations preliminary to the exchange; that she was present when M. executed his deed to S.; that M. left with S., who said he would now have his deed executed; that M. returned with a deed from S. to him, which she read and preserved, and which she described in all essential particulars, except the description of the land, as to which she remembered only that it was in the county where the land in question lay. Another witness testified that a few years later, M. having died in the meantime, his widow gave the deed to the witness to take to the place where the land lay, and make inquiries about taxes, etc., and he corroborated M.'s widow as to the contents of the deed, and testified that he gave it to one J., to have it recorded. J. testified that he did not have the deed recorded, because he was not provided with the money for the purpose, and that he left the deed with one P., and he produced a memorandum of the land conveyed by the deed, made by him at the time, and which corresponded with the land in question. These witnesses and J. testified to diligent, but unsuccessful, search for the deed. *Held*, that the making and delivery of the deed from S. to M. of the land in question was proved, and that the complainants were entitled to a decree establishing it.

Gatch, Connor & Weaver, for plaintiffs.  
Charles A. Clark, for Tallman heirs.

WOOLSON, District Judge. The history of this case extends over many years. The real estate to which the controversy relates is the N. W.  $\frac{1}{4}$  of section 3, in township 96 N., of range 8 W., in Winneshiek county, Iowa. Plaintiff claims title thereto under deed dated November 3, 1871, from the heirs of John Mosher. The bill herein alleges that Mosher became the owner thereof by deed in fee simple from one Andrew Sharp, said deed having been executed and delivered to said Mosher about July 15, 1852, and that said deed has been lost or destroyed, and was never recorded; that said Sharp has since died, and his heirs are made parties de-

fendant herein; that plaintiff having duly instituted, in the district court of Iowa in and for Winneshiek county, proceedings for the recovery of said real estate, against defendant Peterson, who was in the actual possession thereof, George C. Tallman intervened, claiming to be the owner in fee simple of said real estate, and, on application of said Tallman, the cause was removed to this court, and is now pending on the law docket of this court. Said Tallman having died, his heirs are made defendants herein. On the trial of said law action, plaintiff was unsuccessful, because of his inability therein to produce or to prove the said deed from said Sharp to said Mosher, and a motion for new trial was continued, to permit plaintiff to file this bill to establish, etc., said lost deed. The chain of title, as claimed by defendants through said Tallman, includes a deed of said real estate from said Sharp to said Tallman's grantors, of date June 25, 1870. The question of fact to be herein determined is whether Andrew Sharp did, about July, 1852, execute and deliver to John Mosher a deed in fee simple for the real estate above mentioned. If such is found to be proven, then decree must follow as prayed, leaving the effect of said deed or decree, as against the Tallman heirs, to be determined in the said action at law, now pending in this court.

It would serve no useful purpose to minutely review the testimony herein. The widow of said John Mosher (since remarried, whose present name is Mary Hancock), in substance, states that Sharp and her late husband exchanged real properties, Mosher and his wife conveying to Sharp real estate in Princeton, Wis. She was not present at the execution of the deed from Sharp and wife to Mosher. She testifies to the negotiations preliminary to the transfer of property, to the circumstances attending the execution, at her residence, of deed from herself and husband to Sharp, in 1852, and that thereupon Sharp and her said husband and the notary left, Sharp saying that they would now go and have the notary take the acknowledgment of himself (Sharp) and wife to the deed to Mosher; that presently her husband returned, bringing with him a deed from Sharp and wife to said Mosher; that she read the deed, and remembers that it conveyed 160 acres of land in Winneshiek county, Iowa, to her said husband, and was signed by Mosher and his wife, Esther; that it was witnessed by two witnesses, whose names she cannot recall; that it was acknowledged before an officer, who signed his name and office thereto, but she is not able to state the description of the land as it was contained in the deed; that her said husband had gone to Iowa to examine the land before the trade was closed; that she and her said husband intended to move on the land, and occupy it as their homestead; that her husband was a blacksmith by trade, and they agreed between themselves that he should work at his trade another year, so as to get money with which to purchase farming tools, etc.; that, when she had read the deed over, she placed it among their other valuable papers in their residence; that, after she had put the deed away, she had a number of con-

versations with said Sharp as to the Iowa land which Sharp had deeded to her husband, and about their removal, as intended, to it; that her husband died within a year from the date of his transfer of deeds; and she produces a certified copy of the record of deed, dated July 15, 1852, from herself and husband to said Sharp.

Thus far the testimony fails to connect this deed from Sharp and wife to Mosher with the real estate in controversy. In 1856, Mrs. Hancock (formerly Mosher) gave the deed, from Sharp and wife to Mosher, to one Collar, for the purpose of having him write to Iowa and ascertain what taxes, etc., were against the land, and its condition. Collar's testimony corroborates the general testimony of Mrs. Hancock as to the contents of the deed, although not giving said contents so fully. He states that, some time after he received the deed from her, he gave the deed to Jesse B. Shaw, who was going to Iowa, to have him put it on record there. Shaw testifies that Collar gave him the deed about the year 1857, for the purpose of having it recorded. He says: "About the year 1857, in that year, I believe, I had placed in my hands by one Daniel Collar, of Racine county, Wis., a deed of conveyance,—a warranty deed, I believe,—given by one Andrew Sharp to one John Mosher. It conveyed the northwest fr. quarter Sec. three, town. ninety-six, range eight, in Winneshiek county. It was placed in my hands, to be recorded in Decorah, Ia." Again he says: "I had the deed in my hands for about two weeks. On the 22d day of May, 1857, as I verily believe, I placed said deed in the hands of one Wm. Tabor of Racine county, Wis., since which time I have not seen said deed. I looked over the deed,—the description, the grantor and grantee,—and minuted the description of the land in my memorandum book." He produces this book, with the entry therein to which he refers, which is: "Left home May 22nd, 1857. Cash, \$17. N. W. f. S. 3, T. 96, R. 8." He also states that the reason why he gave the deed to Tabor (with whom the Mosher children were at that time living), and did not take it to Iowa, was because they would not give him the money to pay the record fee of the deed. The testimony of Mrs. Hancock, Collar, Tabor, and Shaw shows that they have made diligent, but unsuccessful, search for the deed, and that they do not know where it is. The testimony is not clear and positive as to who last had possession of the deed; but it shows that, when the deed was last known to be in existence, it was in the possession of one of these parties. That there was a deed executed by Sharp and wife to Mosher, and delivered to Mosher, is proven. Defendants object there is no proof of the actual execution of the deed. The proof shows that Sharp and Mosher are both dead, and that diligent, but unsuccessful, search has been made for the whereabouts of the witnesses to the deed, and of the officer who took the acknowledgment of the Mosher-Sharp deed, and is supposed to have taken that of the Sharp-Mosher deed, and who left the Mosher residence with the expressed intention of taking the Sharp acknowledgment. The testimony of Mrs. Hancock

as to her repeated conversations with Sharp, after she had had the Sharp deed, and had placed it away with other papers at her residence, is convincing as to Sharp having executed the deed. But did the deed convey the real estate in question? The witnesses Mrs. Hancock, Shaw, Tabor, and Collar all testify to the deed describing Iowa land, and most of them as to the land being in Winneshiek county, Iowa. No suggestion appears in the proof that Sharp then owned more than one tract of land in that county. The abstracts of title in proof show that, at date of the Mosher-Sharp transfers, Sharp did own the real estate in controversy; and Shaw produces the memorandum book with the entry therein which he says he made of the description of the land, taking this description from the deed from Sharp to Mosher, at the time he had this deed in his possession, in 1857. Without the testimony of Shaw and the memorandum he produces, made by him at the time, plaintiff could not recover herein. But, in my judgment, with these, uncontradicted and supported by other proof, the requirements are fully met which were laid down by Chief Justice Marshall (Taylor v. Riggs, 1 Pet. 600), when speaking of a lost written agreement: "When a written contract is to be proved, not by itself, but by parol testimony, no vague, uncertain recollection concerning its stipulations ought to supply the place of the written instrument itself. The substance of the agreement ought to be proved satisfactorily."

I find, therefore, that about July 15, 1852, said Andrew Sharp and wife executed and delivered to said John Mosher a deed conveying to said Mosher the N. W. fractional  $\frac{1}{4}$  of section 3, in township 96 N., of range 8 W., in Winneshiek county, Iowa; and that plaintiff is entitled herein to decree accordingly, and for costs. Counsel for plaintiff will prepare decree accordingly, and submit the same to counsel for defendants. To all of which defendants except, and are given 60 days from entry of judgment within which to have signed and filed bill of exceptions.

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BANK OF ARAPAHOE v. DAVID BRADLEY & CO.

(Circuit Court of Appeals, Eighth Circuit. January 7, 1896.)

No. 668.

CIRCUIT COURTS—JURISDICTION—AMOUNT IN CONTROVERSY.

In determining whether a claim is made in good faith, or is fictitious, and made only for imposing upon the court a case not within its jurisdiction, the plaintiff will be held to a knowledge of the well-settled rules of law; and when the actual matter in controversy is inadequate in value to confer the jurisdiction, and the additional amount required for that purpose is attempted to be supplied by setting up a claim for something easily susceptible of proof, if made in good faith, but in support of which no proof is offered and no satisfactory explanation given, or by adding a claim for which the law gives no right of action, and for which there can be no recovery, such a claim must be held to be fictitious, and to have been made for the purpose of perpetrating a fraud upon the jurisdiction of the court.

**In Error to the Circuit Court of the United States for the District of Nebraska.**

The defendant in error, David Bradley & Company, a corporation of Iowa, brought this action against the plaintiff in error, the Bank of Arapahoe, setting up, as its cause of action: That, in February, 1891, James B. Murray was carrying on an agricultural implement business at Arapahoe, Neb. That, for the purpose of ascertaining his business standing and solvency, the plaintiff corporation, which was a manufacturer and dealer in agricultural and farming implements at Council Bluffs, Iowa, addressed to the defendant the following letter:

"David Bradley & Company, Incorporated, Manufacturers and Jobbers of Agricultural Implements, Farm and Spring Wagons, Buggies, etc.

"Council Bluffs, Iowa, Feb. 11, 1891.

"Bank of Arapahoe, Arapahoe, Neb.—Gentlemen: Please give us what information you can regarding the financial position, character, credit, etc., of J. B. Murray, your town. Can you give us an estimate of his net worth, and is he prompt pay? An early reply will greatly oblige.

"Yours, truly,

David Bradley & Co."

That the defendant replied to this letter as follows:

"The Bank of Arapahoe, Incorporated. Capital, \$50,000.

"Arapahoe, Neb., Feb. 12, 1891.

"Mess. D. Bradley & Co., Council Bluffs, Iowa—Gentlemen: We are in receipt of your favor of the 11th inst. requesting information regarding Mr. Jas. B. Murray. Have always considered him good for his contracts, and in his dealings with us he has been prompt and straight. His net worth has been placed at about \$10,000. Should consider this a fair estimate.

"Yours, very truly,

Perry L. Hole, Cashier."

That the bank knew that the statements contained in its letter as to Murray's financial condition and standing were false, and that it made them for the fraudulent purpose of inducing the plaintiff to sell goods to Murray on credit, intending, as soon as the goods came into his possession, to have them appropriated to the payment of a debt then due from Murray to the bank. That, relying on the truth of the statements contained in the bank's letter, the plaintiff sold Murray, on credit, a bill of goods, of the value of \$1,643.68, which were secured and appropriated by the bank, as soon as they came into the possession of Murray, to pay a debt due from him to the bank; and that Murray was insolvent. The complaint further alleged that the plaintiff had incurred an expense of \$475 in an unavailing effort to collect the debt from Murray. The defendant demurred to the complaint, upon the ground that it did not appear therefrom that the amount in controversy exceeded \$2,000, exclusive of interest and costs. The court sustained the demurrer, and thereupon the plaintiff filed an amended complaint, in which it is alleged that the action against Murray resulted in a judgment in favor of the plaintiff for \$1,678.32 and \$11.63 costs, and "that this plaintiff expended, in money, the sum of \$475, over and above the taxable costs in said suit in the district court of Furnas county; that such sum was necessarily expended for transportation, hotel bills, and in payment for the time and labor of persons representing this plaintiff in the preparation for and trial of" the suit against Murray,—and further claiming that, "on account of the false and fraudulent representations of the defendant, and the fraudulent acts of the defendant hereinafter recited, the plaintiff claims the sum of \$2,500 from the defendant as punitive damages therefor." A demurrer to the amended complaint was overruled. There was a trial to a jury, and a verdict and judgment for the plaintiff for the value of the goods, viz. \$1,643.68, and interest on that sum, and the defendant sued out this writ of error.

John L. Kennedy (Myron L. Learned was with him on the brief), for plaintiff in error.

Edward P. Smith (James B. Sheean was with him on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge, after stating the case as above, delivered the opinion of the court.

Numerous errors are assigned to the ruling of the court in admitting and rejecting evidence, and to instructions given and refused, and it is also assigned for error that the amount in controversy was not sufficient to give the circuit court jurisdiction. This last assignment is the only one we find it necessary to consider. It is averred in the complaint that the goods sold by the plaintiff to Murray on the faith of the alleged false representations of the defendant were of the value of \$1,643.68. In order to give the circuit court jurisdiction, the goods must have exceeded in value the sum of \$2,000, exclusive of interest and costs, and they fall short of that value by more than \$350. This deficiency in the amount of the demand sued upon, to give the circuit court jurisdiction, is attempted to be supplied in two ways: The first allegation intended to supply this deficiency is to the effect that the plaintiff, in the prosecution of its suit against Murray, expended for transportation, hotel bills, and in payment for the time and labor of persons representing the plaintiff, the sum of \$475. But, in determining whether the complaint states a cause of action for an amount within the jurisdiction of the circuit court, the amount expended by the plaintiff for these purposes cannot be considered as any part of the plaintiff's claim against the defendant, for the reason that the law gives the plaintiff no right of action against the defendant for these things. The plaintiff must be held to a knowledge of so plain a principle of law. Indeed, we do not understand the learned counsel for the defendant in error to contend, in this court, that the defendant is liable for the items going to make up the claim for \$475. No case is cited, and it is believed none can be found, tending to support such a claim. No testimony was offered to prove a single item going to make up this alleged claim for \$475. It was a matter within the knowledge of the plaintiff, and easily proved if it had any foundation in law or fact. It is reasonable to suppose that, if the claim for this sum had been made in good faith, some evidence would have been offered to support it. No such offer or evidence is in the record, and the bill of exceptions states that it contains "all the testimony offered or given by either party upon the trial." It is perfectly obvious, therefore, that this claim for \$475 was set up, not because it had any foundation in fact, or in the hope or expectation that any recovery could be had thereon, but for the sole purpose of making a claim, on the face of the complaint, sufficient in amount to confer jurisdiction on the circuit court. But jurisdiction is not acquired by a groundless and fictitious claim, made for the sole purpose of conferring it. The jurisdiction is determined by the amount demanded by the plaintiff in good faith, and not by the damages claimed, either in the body of the com-



plaint or in the prayer for judgment. In *Bowman v. Railway Co.*, 115 U. S. 611, 613, 6 Sup. Ct. 192, Chief Justice Waite, speaking for the court, said:

"Upon the face of this record, it is apparent that the actual value of the matter in dispute is not sufficient to give us jurisdiction. It is now well settled that our jurisdiction in an action upon a money demand is governed by the value of the actual matter in dispute in this court, as shown by the whole record, and not by the damages claimed, or the prayer for judgment. \* \* \* As was said in *Hilton v. Dickinson* [2 Sup. Ct. 424], 'It is undoubtedly true that, until it is in some way shown by the record that the sum demanded is not the matter in dispute, that sum will govern in all questions of jurisdiction; but it is equally true that, when it is shown that the sum demanded is not the real matter in dispute, the sum shown, and not the sum demanded, will prevail.'"

In *Peeler's Adm'x v. Lathrop*, 2 U. S. App. 40, 51, 1 C. C. A. 93, 48 Fed. 780, the court said:

"The amount in dispute, or the matter in controversy, which determines the jurisdiction of the circuit court in suits for the recovery of money only, is the amount demanded by the plaintiff in good faith. *Hilton v. Dickinson*, 108 U. S. 163, 2 Sup. Ct. 424; *Barry v. Edmunds*, 116 U. S. 550, 561, 6 Sup. Ct. 501."

The effort to support the jurisdiction by setting up a claim for \$2,500 for punitive damages is equally unavailing. Since the case of *Day v. Woodworth*, 13 How. 363, which was an action of trespass for tearing down and destroying a milldam, the rule has been well settled, in the federal courts, "that in actions of trespass, and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offense, rather than the measure of compensation to the plaintiff." The rule is applied in actions of trespass for personal injuries, and for willful injury to property, and in actions for slander, libel, seduction, false imprisonment, and malicious prosecution; but the rule has never been applied to actions for the loss of personal property by fraud, instead of by force. It has, therefore, never been applied to cases of the loss of personal property by fraudulent representations. In such cases, the recovery is limited to the value of the property lost through the false representations, and interest thereon. The rule is thus stated in *Sedg. Dam.* § 439.

"False Representations. Where the plaintiff suffers pecuniary injury through the loss of personal property by the fraud of the defendant, instead of by force, the general principles are the same. The damages recoverable are those which naturally flow from the fraud. \* \* \* Where the defendant falsely represented a third party to be of good credit, whereupon the plaintiff sold him goods on credit, and was unable to recover the price, the measure of damages is the value of the goods supplied."

In *Lane v. Wilcox*, 55 Barb. 615, the court said:

"If one knowingly or fraudulently misrepresents the pecuniary standing of a third person to one from whom such third person is desirous of obtaining property on credit, whereby the person to whom such representations are made is induced to give such credit, and is injured thereby, the well-settled rule of damages is one of compensation merely, and not punitive."

Under the judiciary act of 1789, which fixed the amount in controversy requisite to give the circuit court jurisdiction at a sum exceeding \$500, exclusive of interest and costs, it was commonly

held by the circuit courts that the amount claimed in the body of the declaration and in the writ was conclusive on the question of jurisdiction, so far as related to the amount in controversy, and that the jurisdiction, having once attached in an action on a declaration and writ which claimed a sum sufficient to confer the jurisdiction, would be retained, although, upon the trial of the cause, it clearly appeared that the actual matter in controversy was less than \$500, and that the plaintiff knew that fact, and claimed a larger sum for the sole purpose of suing in the federal court. This ruling was not without apparent sanction in some of the early judgments of the supreme court. In *Gordon v. Longest*, 16 Pet. 97, the court said:

"The damages claimed in the writ and declaration were unquestionably the sum in controversy. This is not an open question. It has been often decided that, if the plaintiff shall recover less than \$500, it cannot affect the jurisdiction of the court; a greater sum being claimed in the writ. But in such cases the plaintiff does not recover his costs, and at the discretion of the court he may be adjudged to pay costs."

In *Kanouse v. Martin*, 15 How. 198, Mr. Justice Curtis, speaking for the court, said:

"The words 'matter in dispute,' in the twelfth section of the judiciary act, do not refer to the disputes in the country, or the intention or expectation of the parties concerning them, but to the claim presented, on the record, to the legal consideration of the court. What the plaintiff thus claims is the matter in dispute, though that claim may be incapable of proof, or only in part well founded."

We have seen that more recent decisions of the supreme court (*Bowman v. Railway Co.*, *supra*; *Hilton v. Dickinson*, *supra*; *Barry v. Edmunds*, *supra*) declare that the jurisdiction of the court upon a money demand is governed by the value of the actual matter in controversy, and not by the damages laid in the writ and declaration, and that, when it is shown that the sum demanded is not the real matter in dispute, the sum shown, and not the sum demanded, will prevail. The circuit courts construed the language of the supreme court in *Gordon v. Longest*, *supra*, and *Kanouse v. Martin*, *supra*, as furnishing the rule to determine their jurisdiction, and, prior to the passage of the act of 1875, very generally held that the jurisdiction of the circuit court was conclusively established, so far as related to the amount in controversy, when the declaration and the writ claimed damages to an amount sufficient to confer the jurisdiction, and that the court was powerless to dismiss the suit, although it plainly appeared that the real matter in controversy was less than the sum required to give the circuit court jurisdiction, and that the claim for the amount in excess of the real matter in dispute was not made in good faith, but for the sole purpose of making a case apparently within the jurisdiction of the court. Under this rule, the only penalty that could be visited upon the plaintiff for perpetrating a fraud on the jurisdiction of the circuit court, in respect of the amount required to give the court jurisdiction, was the denial or the imposition of costs. In practice, this proved to be a totally inadequate penalty to prevent frauds on the jurisdiction of

the courts, and oppression on defendants, who were sometimes required to travel hundreds of miles to answer to suits in the federal court for trifling sums. The fifth section of the judiciary act of March 3, 1875 (18 Stat. 470), was leveled specially at this abuse, and put an end to all such frauds on the jurisdiction of the circuit court by providing:

"That if, in any suit commenced in a circuit court, \* \* \* it shall appear to the satisfaction of said circuit court, at any time after such suit has been brought, \* \* \* that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, \* \* \* the said circuit court shall proceed no further therein, but shall dismiss the suit. \* \* \*"

It will be observed that this act is mandatory in its terms, and makes it the absolute duty of the circuit court to dismiss a suit whenever, in the progress of the case, it appears that it does not really and substantially involve a dispute or controversy within the jurisdiction of the circuit court. In *Williams v. Nottowa Tp.*, 104 U. S. 209, Chief Justice Waite, speaking for the court, says:

"This provision of the act of 1875 is a salutary one, and it is the duty of the circuit courts to exercise their power under it in proper cases."

See, to same effect, *Maxwell v. Railroad Co.*, 34 Fed. 286; *Froelich v. Express Co.*, 67 N. C. 1.

Groundless and fictitious claims, obviously set up for the purpose of swelling the plaintiff's claim, on the face of the complaint, to an amount, within the jurisdiction of the circuit court, under the act of 1875, utterly fail of their purpose. The plaintiff's claim, so far as relates to the amount required to give jurisdiction to the circuit court, under this act, must be made in good faith. When so made for the requisite jurisdictional amount, the jurisdiction will be maintained, although the plaintiff may fail to make good his contention for that amount. In actions of trespass and for false imprisonment, and other actions of like character, where the jury have it in their power to assess exemplary damages, the court cannot, ordinarily, assume that the plaintiff's claim to recover the requisite jurisdictional amount is merely colorable, and not made in good faith. *Hynes v. Briggs*, 41 Fed. 468; *Smith v. Greenhow*, 109 U. S. 669, 3 Sup. Ct. 421; *Barry v. Edmunds*, 116 U. S. 550, 6 Sup. Ct. 501.

In determining whether a claim is made in good faith, or is fictitious, and made only for imposing on the court a case not properly within its jurisdiction, the plaintiff will be held to a knowledge of the well-settled rules of law; and when the actual matter in controversy is inadequate in value to confer the jurisdiction, and the additional amount required for that purpose is attempted to be supplied by setting up a claim for something easily susceptible of proof, if made in good faith, but in support of which no proof is offered, and no satisfactory explanation given, or by adding a claim for which the law gives no right of action, and for which there can be no recovery, such a claim must be held to be fictitious, and to have been made for the purpose of perpetrating a fraud on the jurisdiction of the court.

The court below should have sustained the demurrer to the amended complaint for want of jurisdiction, and, if no demurrer had been interposed, it should, under the fifth section of the act of 1875, have dismissed the suit, upon the trial, when the fact was disclosed that the plaintiff's claim to recover more than the value of the goods and interest was not made in good faith, and that the amount really in controversy was not within the jurisdiction of the court. The judgment of the circuit court is reversed, and the cause remanded, with instructions to dismiss the case, at the plaintiff's costs, for want of jurisdiction.

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CITY OF FERGUS FALLS v. FERGUS FALLS WATER CO.

(Circuit Court of Appeals, Eighth Circuit. January 2, 1896.)

No. 688.

1. FEDERAL COURTS—JURISDICTION—SUITS ARISING UNDER CONSTITUTION.

The F. F. Water Company brought an action against the city of F. F. upon a contract. It alleged in its complaint that the city made a contract to pay to it certain water rents for supplying the city with water; that it had complied with the contract and furnished the water; that the city had paid the rents until its city council passed a resolution that the contract was annulled and canceled, and that it would pay no more rents thereunder; that from the date of the passage of that resolution the city had refused to pay the rents; and that the resolution was a law impairing the obligation of the contract. *Held*, that the latter allegation was mere surplusage, and did not make the action one arising under the constitution of the United States, within the jurisdiction of the federal courts. Sanborn, Circuit Judge, dissenting.

2. SAME.

*Held*, second, that even if the averments of the complaint had brought the case within the jurisdiction of the court, the suit should have been dismissed when it appeared upon the trial, as it clearly did, that the suit did not arise under the constitution, and that no federal question was involved, but only the question whether the city had authority, under the laws of Minnesota, to enter into the contract in suit.

In Error to the Circuit Court of the United States for the District of Minnesota.

This action was commenced in the United States circuit court for the Sixth division of the district of Minnesota by the defendant in error, the Fergus Falls Water Company, a corporation chartered under the laws of the state of Minnesota, against the city of Fergus Falls, a municipal corporation of that state, to recover moneys alleged to be due upon a contract entered into between the city and the water company on the 19th day of April, 1883, whereby the water company agreed to supply the city with water for fire and other purposes for the term of 30 years, and the city, by an ordinance of its common council, agreed to pay therefor, for that term, the rates specified in the contract. The complaint sets out the contract which is the foundation of the action, and alleges, in the mode required by the rules of pleading, that the plaintiff has at all times furnished water to the city, and fully complied with the covenants of the contract on its part, and that the defendant refuses to pay the water rents due the plaintiff by the terms of the contract, and prays judgment for the amount claimed to be due. In addition to the statement of the plaintiff's cause of action, the complaint contains averments by which it is sought to make it appear that the action is one arising under the constitution of the United States, and therefore cognizable in the circuit court.

These allegations of the complaint are as follows: "That on or about the 30th day of August, 1893, said defendant, by its council, duly passed a resolution wherein and whereby said defendant resolved and determined that 'the contract for water supply through fire hydrants, for fire protection, heretofore recognized as existing between' said plaintiff and defendant 'under the provisions of Ordinance No. 18 of said city, be and the same is hereby declared to be null and void and is hereby canceled.' And said defendant further determined in said resolution that said city would no longer take water from said plaintiff under the provisions of said ordinance; that since said time said defendant has refused to pay rent on said hydrants under said contract, or to recognize said contract as binding; that said resolution is a law impairing the obligation of said contract." The resolution of the council of the 30th of August, 1893, referred to in the foregoing extracts from the complaint, reads as follows: "It is hereby resolved and determined that the contract for water supply through fire hydrants, for fire protection, heretofore recognized as existing between the city of Fergus Falls and the Fergus Falls Water Company, under the provisions of Ordinance No. 18 of said city, be and the same is hereby declared to be null and void and is hereby canceled. And it is hereby determined that the city will no longer take water from the said water company under the provisions of said Ordinance No. 18. Adopted August 30, 1893." The defendant demurred to the complaint upon the ground that it did not appear from the allegations thereof that the circuit court had jurisdiction of the suit. The court overruled the demurrer, whereupon the defendant filed an answer, in which it "denies that said defendant, by its charter (chapter 1, Sp. Laws Minn. 1883), or otherwise, was ever authorized to contract for a water supply for said city, and specially denies that said defendant, under said charter or otherwise, ever had the right, power, or authority to make or enter into the contract set out in said complaint, and under which plaintiff claims in this action, and denies that defendant ever entered into any contract with the plaintiff Carroll E. Gray, or any other person, for a water supply for said city. Defendant, further answering, admits that Ordinance 18, attached to said complaint, is a true copy of a pretended ordinance passed by the council of said city April 19, 1883, but denies that said council had any authority, right, or power whatever to pass or enact said ordinance, or to enter into the contract, or to grant the rights, powers, privileges, or franchises, set out in said pretended ordinance, and denies that said city council so passing said pretended ordinance had any authority to create against said city the debt or liability attempted to be created in and by said pretended ordinance." There was a trial to a jury, and a verdict and judgment for the plaintiff, and the defendant sued out this writ of error.

J. W. Mason (C. L. Hilton, M. D. Grover, and C. Wellington were with him on the brief), for plaintiff in error.

Frank W. Booth and Charles A. Willard, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge (after stating the case as above), delivered the opinion of the court.

The defendant challenged the jurisdiction of the circuit court at every stage of the case, and that is the only question we find it necessary to consider. The jurisdiction is attempted to be maintained upon the ground that the case is one arising under the constitution of the United States. But clearly this is not so. The complaint shows the suit to be one to recover for water furnished by the plaintiff to the city under the contract set out in the complaint. In a word, it is a suit to recover for the breach of an alleged contract to pay for water. It does not differ in any respect from a suit to recover for water supplied to a private consumer. It is in no wise different from a suit brought by one individual or private corporation against another indi-

vidual or private corporation to recover for fuel, merchandise, or other property alleged to have been sold and delivered by the one to the other under a contract to pay a stipulated price therefor. In all such cases the cause of action is not grounded on any right derived from the constitution of the United States, but arises out of the contract between the parties. The right to contract and the obligation of contracts antedate the constitution, and were not derived from it. An action, therefore, to recover upon the contract in suit, or to enforce its obligation, is not a suit arising under the constitution. But it is said that the complaint sets up that the defendant, by resolution of its council, declared the contract null and void, and that this resolution impairs the obligation of the contract, and is in contravention of the constitution of the United States. Conceding all this to be so, it does not serve to make the plaintiff's cause of action one arising under the constitution. Notwithstanding this averment, it is indisputable that the complaint shows the plaintiff's suit is based upon, and arises out of, the contract in suit, and not under the constitution. The plaintiff seeks, in its complaint, to inject a federal question into the case by suggesting that the defendant will interpose as a defense to the suit a resolution of its council which impaired the obligation of the contract, in contravention of the constitution. It is apparent that the only use the plaintiff proposes to make of the constitution is as a barrier to a defense which the plaintiff suggests the defendant may set up. The appeal to the constitution is made, not to support the plaintiff's cause of action, but by way of replication to an anticipated defense. The jurisdiction of the circuit court cannot be invoked by any such form of pleading in an action like this. In equity pleadings the complainant is allowed to anticipate and avoid a defense, and this is called the "charging part of the bill." Story, Eq. Pl. § 31. But at law the plaintiff is never expected to state matters which should come more properly from the other side. It is sufficient for each party to make out his own case. 1 Chit. Pl. (Ed. 1867) 222. It is sufficient for the plaintiff to state his own cause of action, and he should not anticipate his adversary's defense, for the reason that the latter may never make the defense sought to be guarded against. Bliss, Code Pl. § 200. In this case the defendant set up no such defense as the plaintiff pretended to anticipate and avoid. In *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 14 Sup. Ct. 654, the supreme court say that:

"By the settled law of this court, as appears from the decisions above cited, a suggestion of one party that the other will or may set up a claim under the constitution or laws of the United States does not make the suit one arising under that constitution or those laws."

And it is equally well settled that the suggestion in a complaint in an action at law that the defendant may or will set up a defense based on a state statute repugnant to the constitution does not make the suit one arising under the constitution.

The averments of the complaint, beyond those which state a cause of action upon the contract in suit, are mere surplusage. When the statement of the plaintiff's cause of action, in legal and logical form, such as is required by the rules of good pleading, does not disclose

that the suit is one arising under the constitution or laws of the United States, then the suit is not one arising under that constitution or those laws, and the circuit court has no jurisdiction. In *New Orleans v. Benjamin*, 153 U. S. 411, 14 Sup. Ct. 905, Chief Justice Fuller, speaking for the court, said:

"When a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the constitution upon the determination of which the result depends, then it is not a suit arising under the constitution. *Shreveport v. Cole*, 129 U. S. 36, 9 Sup. Ct. 210; *Starin v. City of New York*, 115 U. S. 248, 257, 6 Sup. Ct. 28; *Water Co. v. Keyes*, 96 U. S. 199. The judicial power extends to all cases in law and equity arising under the constitution, but these are cases actually, and not potentially, arising, and jurisdiction cannot be assumed on mere hypothesis. In this class of cases it is necessary to the exercise of original jurisdiction by the circuit court that the cause of action should depend upon the construction and application of the constitution, and it is readily seen that cases in that predicament must be rare. Ordinarily the question of the repugnancy of a state statute to the impairment clause of the constitution is to be passed upon by the state courts in the first instance, the presumption being in all cases that they will do what the constitution and laws of the United States require. *Chicago & A. R. Co. v. Wiggins Ferry Co.*, 108 U. S. 18, 1 Sup. Ct. 614, 617. And if there be ground for complaint of their decision, the remedy is by writ of error under section 709 of the Revised Statutes. Congress gave its construction to that part of the constitution by the twenty-fifth section of the judiciary act of 1789, and has adhered to it in subsequent legislation."

This case, with its citations, demonstrates that the views we have expressed upon this question have the sanction of that court.

The demurrer to the complaint for want of jurisdiction should have been sustained. If no demurrer had been interposed, the court, on its own motion, should have dismissed the cause for want of jurisdiction appearing on the face of the complaint. Even if the averments of the complaint had brought the case within the jurisdiction of the court, the suit should have been dismissed when it appeared upon the trial, as it clearly did, that the suit did not arise under the constitution, and that no federal question was involved, but only the question whether the city had authority, under the laws of Minnesota, to enter into the contract in suit. *Bank of Arapahoe v. David Bradley & Co.* (decided at present term) 72 Fed. 867. If the city had power under those laws to enter into the contract, its liability was not disputed. If there was no contract, there was no obligation to be impaired. If there was a valid contract, its obligation was not questioned. The judgment of the circuit court is reversed, and the cause remanded, with instructions to dismiss the suit, for want of jurisdiction, at the costs of the plaintiff.

SANBORN, Circuit Judge (dissenting). The decision and opinion of the majority of the court in this case rests upon this proposition:

"When the statement of the plaintiff's cause of action, in legal and logical form, such as is required by the rules of good pleading, does not disclose that the suit is one arising under the constitution or laws of the United States, then the suit is not one arising under that constitution or those laws, and the circuit court has no jurisdiction."

In other words, the majority hold that no one can invoke the jurisdiction of the circuit court of the United States, in a case arising under

that provision of the constitution that prohibits the states from enacting laws which impair the obligation of contracts, unless a pleading of the law which impairs the obligation of the contract and of the constitution is indispensable to the statement of a good cause of action upon the contract. I am unable to agree to this proposition. Its effect is to deprive the circuit courts of jurisdiction of every case which arises under this provision of the constitution, notwithstanding the fact that the supreme court and the circuit courts have repeatedly held that the latter have jurisdiction of such cases. *White v. Greenhow*, 114 U. S. 307, 5 Sup. Ct. 923, 962; *Barry v. Edmunds*, 116 U. S. 550, 6 Sup. Ct. 501; *Waterworks Co. v. Rivers*, 115 U. S. 674, 6 Sup. Ct. 273; *St. Tammany Waterworks Co. v. New Orleans Waterworks*, 120 U. S. 64, 7 Sup. Ct. 405; *Saginaw Gaslight Co. v. City of Saginaw*, 28 Fed. 529; *Citizens' St. R. Co. v. City of Memphis*, 53 Fed. 715; *Smith v. Bivens*, 56 Fed. 352; *Citizens' St. R. Co. v. City Ry. Co.*, 56 Fed. 746; *Walla Walla Water Co. v. City of Walla Walla*, 60 Fed. 957. The supreme court has repeatedly held that a circuit court of the United States has no jurisdiction of such a suit, as one arising under the constitution, unless that fact appears by the plaintiff's statement of his own claim. It follows that this fact cannot be made to appear in the case unless it is shown by the complaint. *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 14 Sup. Ct. 654; *Chappell v. Waterworth*, 155 U. S. 102, 15 Sup. Ct. 34; *Postal Tel. Cable Co. v. Alabama*, 155 U. S. 482, 15 Sup. Ct. 192. Now, the provision of the constitution under consideration is a shield, and not a sword. It does not lay the foundation for, or create, a cause of action or a contract. It simply preserves and protects contracts already made, and causes of action which are founded upon them, from the unlawful assaults of state legislation. Every cause of action that rests under the protection of this clause of the constitution may be legally and logically stated without referring to the law which by its terms impairs the contract, or to the constitution which protects it from that law, because the contract and its breach themselves constitute a good cause of action. If, therefore, the plaintiff may not invoke the jurisdiction of the circuit court by adding to the statement of his contract and its breach the jurisdictional allegations that the state has passed a law which by its terms impairs or destroys the obligation of the contract, and under which the defendant refuses to perform it, but which the plaintiff insists is void under this provision of the constitution, then no case can ever arise or be presented, under this clause of the constitution, of which the circuit courts of the United States can take jurisdiction. I cannot persuade myself that congress ever intended that its acts giving jurisdiction to the circuit courts of cases arising under the constitution of the United States should thus entirely exclude this important class of cases from those courts. The act of March 3, 1887, as corrected by the act of August 13, 1888, provides:

"That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under



the constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which controversy the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different states, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid, or a controversy between citizens of the same state claiming lands under grants of different states, or a controversy between citizens of a state and foreign states, citizens, or subjects, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid." 1 Supp. Rev. St. 611.

It goes without saying that, in many of the cases of which the circuit court is given jurisdiction by these acts of congress, the allegations which invoke and sustain the jurisdiction of the circuit court are not indispensable to the statement in legal and logical form of a good cause of action. To that end they are generally mere surplusage. Their sole purpose and only effect are to give the circuit court jurisdiction of the suit. Take the case of a controversy between citizens of different states. The plaintiff can state a good cause of action, if he has one, without alleging the citizenship of the parties. That allegation is unnecessary to the statement of a cause of action, and yet the plaintiff may make it, and, if the amount in controversy is sufficient, he may thereby invoke and maintain the jurisdiction of the circuit court. Take the case of ejectment, in which the plaintiff and defendant claim lands under grants of different states. Allegations of the sources of their titles are mere surplusage to the statement of a good cause of action in ejectment, but the plaintiff may undoubtedly plead the grants under which the parties to the action claim, and may, by the force of those allegations, maintain his action in the circuit court. Take the case of a controversy between a citizen of a state and a foreign citizen or subject. An allegation of the diverse citizenship of the parties is rarely, if ever, indispensable to the statement in legal and logical form of a good cause of action; but the plaintiff may allege the citizenship of the parties, and, if the amount in dispute is sufficient, may thereby invoke and sustain the jurisdiction of the circuit court. I can conceive of no good reason why the same rule should not apply to a suit arising under the constitution of the United States; why a plaintiff, in such a case, should not be permitted to set forth his cause of action, and then to invoke and sustain the jurisdiction of the circuit court by allegations not indispensable to the statement of his cause of action, but which show that the suit has arisen under the constitution of the United States. This view is not novel. It is not without support in the adjudicated cases. In *White v. Greenhow*, 114 U. S. 307, 5 Sup. Ct. 923, 962, the facts were that the state of Virginia had in 1871 made a contract with the plaintiff that the coupons cut from bonds issued under "An act to provide for the funding and payment of the public debt," passed by its legislature on March 30, 1871, should be receivable in payment of taxes thereafter levied upon property in that state. In 1882 certain taxes were levied upon the property of the plaintiff. He tendered the coupons cut from these bonds in payment of these taxes, but the defendant refused to accept them, and levied upon and carried away personal property of his of the value of \$3,000, in order to sell it to satisfy these taxes. The plaintiff sued the defendant for \$6,000 dam-

ages for this taking. In his complaint he alleged the facts above recited, and he also averred that the general assembly of the state of Virginia on January 26, 1882, passed an act which forbade the defendant to receive the coupons in payment of the taxes; that the defendant relied on that act, but that it was void under section 10, art. 1, of the constitution of the United States, which prohibits any state from passing any law which impairs the obligation of contracts. It is plain that the jurisdictional allegations in this complaint, the averments of the act of the assembly of January 26, 1882, and of the invalidity of that act under the constitution, were unnecessary to the statement of the cause of action for damages for the taking of the property. The allegations of the contract to take the coupons for taxes, the tender of them in payment of the taxes, the refusal of the treasurer to accept them, and his levy upon and taking of the property to satisfy the taxes, would have stated in legal and logical form a perfect cause of action for the damages the plaintiff sought. The sole purpose and only effect of the averments of the act of 1882, and its invalidity under the constitution, were to invoke and sustain the jurisdiction of the circuit court. A demurrer was interposed to this complaint, and the supreme court overruled it, and said:

"The present action, as shown on the face of the declaration, was a case arising under the constitution of the United States, and was one, therefore, of which the circuit court of the United States had rightful jurisdiction, by virtue of the act of March 3, 1875, without regard to the citizenship of the parties, the sum or value in controversy being in excess of \$500."

In *Barry v. Edmunds*, 116 U. S. 550, 6 Sup. Ct. 501, the facts and the complaint, so far as the question here under consideration is concerned, were the same as in *White v. Greenhow*, *supra*. The action was for damages for the unlawful seizure of property to satisfy taxes after they had been paid by the tender of coupons under the act recited above. The jurisdictional allegations were unnecessary to the statement of a cause of action for damages, and their only effect was to give the circuit court jurisdiction. The defendant interposed a plea to the jurisdiction of the circuit court, "that, as the plaintiff and defendant were both citizens of the state of Virginia, the courts of that state had exclusive jurisdiction of the alleged cause of action"; but the supreme court overruled the plea, reversed the judgment dismissing the action, and remanded the case to the circuit court, with directions to try it. In *Waterworks Co. v. Rivers*, 115 U. S. 674, 6 Sup. Ct. 273, the facts were that the New Orleans Waterworks Company had prior to 1879 a contract with the city of New Orleans for the exclusive privilege of laying conduits, mains, and pipes in the streets of that city, to supply the city and its inhabitants with water, and under that contract it had laid its mains and pipes, and was proceeding in its performance. In 1882, and during the term of this contract, the city council of New Orleans granted to one Rivers the privilege of laying pipes in its streets to supply the St. Charles Hotel, in that city, with water, and he was about to do so. The waterworks company exhibited its bill in the circuit court of the United States to perpetually enjoin Rivers from laying these pipes, or supplying that

hotel with water. In its bill it pleaded the facts above recited, and also averred that a new state constitution had been adopted by the state of Louisiana in 1879, which provided that the monopoly features in the charter of any corporation then existing in that state, save such as might be contained in the charters of railroad companies, were thereby repealed, and that the action of the city council and of Rivers was based on that provision. Now, a perfect cause of action for an injunction against Rivers would have been stated in this bill if the complainant had set forth its original contract for the exclusive right to lay the pipes in the streets, and to supply the city and its inhabitants with water, and had alleged that it had expended large amounts in making the necessary improvements to comply with this contract, and was performing it, and that Rivers was about to lay pipes in the streets of the city, and to supply the St. Charles Hotel with water through them. The allegations of the provisions of the constitution of 1879, and of the claim of Rivers thereunder, were entirely unnecessary to the statement of the complainant's cause of action for the injunction. Their only purpose and effect were to give the circuit court of the United States jurisdiction of the case. To this bill a demurrer was interposed, but it was overruled by the supreme court with the statement that under the bill the complainant was entitled, at the hands of the circuit court, to the perpetual injunction for which it prayed. In *St. Tammany Waterworks Co. v. New Orleans Waterworks*, 120 U. S. 64, 7 Sup. Ct. 405, the facts and the pleading, so far as the question now under consideration is concerned, were substantially the same as in the case last cited. The jurisdictional allegations were unnecessary to the statement of the cause of action, but the jurisdiction of the circuit court was sustained, and a decree for a perpetual injunction was affirmed. The circuit courts have adopted the same rule. They have repeatedly maintained their jurisdiction of cases under this provision of the constitution when the jurisdictional allegations were not indispensable to the statement of the cause of action upon the contract, and when their only purpose and effect were to invoke and sustain the jurisdiction of the circuit courts. *Saginaw Gaslight Company v. City of Saginaw*, 28 Fed. 529; *Citizens' St. Ry. Co. v. City of Memphis*, 53 Fed. 715; *Smith v. Bivens*, 56 Fed. 352; *Citizens' St. R. Co. v. City Ry. Co.*, 56 Fed. 746; *Walla Walla Water Co. v. City of Walla Walla*, 60 Fed. 957. The effect of these decisions of the national courts, as I read them, is that one who has a cause of action founded in contract, which is protected from state legislation which has been enacted to impair or destroy it, by the provision of the constitution which forbids any state to pass a law impairing the obligation of contracts, may invoke and sustain the jurisdiction of the circuit court of the United States by allegations in his complaint which show that the defendant has passed, procured, or relies on the hostile state legislation, and that the plaintiff rests under the aegis of this clause of the constitution, although these allegations are not indispensable to the statement of a good cause of action upon the contract, and although their only purpose

and effect are to invoke and sustain the jurisdiction of the circuit court.

I have carefully read the authorities cited in the opinion of the majority, and I am unable to find anything in them in conflict with this proposition. In *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 14 Sup. Ct. 654, the plaintiff did not aver that it was protected by, or claim for its cause of action the protection of, the constitution of the United States. That was a suit by the state of Tennessee to collect its taxes. The allegation relied upon to give the circuit court jurisdiction was that the defendant claimed that the law under which the tax was levied violated the constitution. It is well settled that the plaintiff cannot make a case arising under the constitution of the United States by pleading that the defendant will shelter himself under its protection. The defendant may not do so. The option to interpose or refuse to interpose the shield of the constitution is his. It is only when the plaintiff himself claims immunity from state legislation under this clause of the constitution that he presents a case arising under it. Such is the case at bar, and such are the cases to which I have referred. In *New Orleans v. Benjamin*, 153 U. S. 411, 414, 14 Sup. Ct. 905, the complainant, Benjamin, brought a bill against the city of New Orleans and others for an accounting of the liabilities of the board of Metropolitan police, and of the amounts due to that board from the various defendants in the suit, for the appointment of a receiver to collect the amounts due, and for the application of the amounts so collected to the payment of the debts of the board, including certain warrants held by the complainant. The complainant alleged in the bill that a certain act of the legislature of Louisiana, which repealed prior acts of that legislature, and which abolished the board of metropolitan police, was in violation of section 10, art. 1, of the constitution. This allegation of the claimed immunity from the effect of this act was unnecessary to the statement of the cause of action. Nevertheless, the supreme court, after some general remarks, assumed that the repugnancy of the act of the legislature to the constitution might be so set up as to form an independent ground of jurisdiction in the circuit court, and proceeded to decide that the act pleaded did not impair the obligation of any contract, and that, therefore, the suit did not really and substantially involve a dispute or controversy as to the effect or construction of the constitution of the United States, upon the determination of which the result depended. 153 U. S. 414, 431, 14 Sup. Ct. 905. *Shreveport v. Cole*, 129 U. S. 36, 39, 9 Sup. Ct. 210, was disposed of in the same way. It was an action to recover a balance due on a contract for grading and improving streets. The plaintiff alleged in his complaint that an act of the legislature which limited the amount of the municipal taxes impaired the obligation of his contract. The supreme court considered at length the question whether or not that act did impair the obligation of the contract; decided that it did not, because it was prospective, and could not have any effect upon the claims of antecedent contract creditors, and that for that reason the case did not arise un-

der the constitution. 129 U. S. 42, 9 Sup. Ct. 210. *Starin v. New York*, 115 U. S. 248, 258, 6 Sup. Ct. 28; *Water Co. v. Keyes*, 96 U. S. 199; and *Chicago & A. R. Co. v. Wiggins Ferry Co.*, 108 U. S. 18, 22, 1 Sup. Ct. 614, 617,—were cases which arose upon appeals from orders remanding them to state courts, in which the supreme court held, upon a consideration of the pleadings and petitions for removal, that they presented no federal question. Neither of these cases presents or determines any phase of the question now under consideration. These are all the authorities cited in the opinion of the majority, and they do not seem to me to sustain the proposition that a plaintiff may not invoke and sustain the jurisdiction of the circuit court by proper jurisdictional allegations, which show that the contract and cause of action on which he sues are protected from hostile state legislation, that would otherwise impair or destroy them, by section 10, art. 1, of the constitution, although these allegations are not indispensable to the statement of the cause of action upon the contract, and their only purpose and effect are to invoke and sustain the jurisdiction of the circuit court. I have been forced to the conclusion that the true rule here is the converse of that proposition (1) because the proposition of the majority would exclude from the jurisdiction of the circuit court all cases which arise under section 10, art. 1, of the constitution, and I do not think such was the intention of congress; (2) because the converse of that proposition governs the practice in other classes of cases in which jurisdiction is conferred on the circuit courts, and no good reason occurs to me why it should not govern in this class; and (3) because the supreme court and the circuit courts have adopted the converse of that proposition in this class of cases. See authorities *supra*.

But it is said that although the complaint averred that the city of Fergus Falls made this contract, that it complied with its terms and paid the water rent under it for years, that it then passed an ordinance that the contract was null and void and was thereby canceled, and that from that date it refused to pay any rent under the contract, and that this ordinance was a law impairing the obligation of the contract, yet that, inasmuch as the only defense to the action pleaded by the answer and relied upon at the trial was that there never was any contract, because the city was without power to make it, the circuit court had no jurisdiction, and should have dismissed the action, because the answer presented no controversy as to the validity of the ordinance by which the attempt was made to rescind and cancel the contract. When a defendant that has made, recognized, and performed a contract for years, passes or procures the passage of a law which by its terms annuls and cancels it, and from that time refuses to perform the contract, the natural, reasonable, and logical inference is that the defendant relies on the law it has passed, or procured the passage of, to relieve it from its contract, and the plaintiff is well warranted by these facts in invoking the jurisdiction of the federal court on the ground that it is protected from the effect of that law by the constitution of the United States. Upon this subject this

court has held the rule to be that if it appears from the complaint, in any aspect which the case may assume, that the right of recovery may depend upon the construction of the constitution, and if the right to recover, so far as it turns on the construction of the constitution, is not merely a colorable claim, but rests on a reasonable foundation, then a federal question is involved which is adequate to confer jurisdiction. *St. Paul, M. & M. Ry. Co. v. St. Paul & N. P. R. Co.*, 15 C. C. A. 167, 68 Fed. 2, 13. Moreover, the right to sue in the federal court, as we held in that case, must be judged exclusively as of the date of filing the complaint, on the state of facts therein disclosed:

"If, on the face of the complaint or declaration, the case is one which the court has the power to hear and determine, because of the existence of a federal question, it has the right to decide every issue that may subsequently be raised; and whether the decision of the case ultimately turns on a question of federal, local, or general law is a matter that in no wise affects the jurisdiction of the court. *Mayor v. Cooper*, 6 Wall. 247; *Railroad Co. v. Mississippi*, 102 U. S. 135, 141; *Tennessee v. Davis*, 100 U. S. 257, 264; *Omaha Horse-Ry. Co. v. Cable Tramway Co.*, 32 Fed. 727." *St. Paul, M. & M. Ry. Co. v. St. Paul & N. P. R. Co.*, 15 C. C. A. 167, 68 Fed 10.

Tested by the facts as they existed when this complaint was filed, by the making and partial performance of the contract by this city, by the passage by it of an ordinance which by its terms annulled and canceled the contract, and by its refusal to perform the contract from the date of this ordinance, the claim of the plaintiff that his recovery might depend upon the question whether or not that ordinance was repugnant to the constitution of the United States certainly rested on a reasonable foundation. It was undoubtedly made in good faith. There is no indication that it was merely colorable. It was the natural and logical inference from the facts which the complaint discloses. It goes without saying that there was an aspect that the case might assume in which the right of recovery would depend upon the construction of the constitution of the United States. If the contract was valid in its inception, and such a construction of the constitution should be adopted that the subsequent ordinance would not be held to be repugnant to it, this construction would be fatal to the plaintiff's recovery, while the opposite construction would insure it. In this way an immunity from the effect of state legislation on which the recovery depended would be defeated by one construction, and sustained by the other construction, of the constitution; and the case was one arising thereunder, under the definition given in *Starin v. City of New York*, 115 U. S. 248, 257, 6 Sup. Ct. 28, and the cases cited. In such a case as this the defendant cannot evade or avoid the jurisdiction of the federal court by a plea that there never was any contract, and that consequently its obligation could not be impaired by the ordinance the defendant itself has enacted to annul and cancel it. As was well said in *St. Paul, M. & M. Ry. Co. v. St. Paul & N. P. R. Co.*, 15 C. C. A. 167, 68 Fed. 9, 10:

"When a complaint filed in the circuit court of the United States discloses a controversy arising under federal laws, the jurisdiction of the court will not be defeated by any defense or plea that the defendant may see fit to make.

If the plaintiff's right to sue in the national courts is to be tested solely by his complaint or declaration, and is not aided by any plea interposed by the defendant, no matter how clearly the latter may show that the construction or application of federal laws is involved, then it follows that, if jurisdiction is fairly disclosed by the plaintiff's statement of his own cause of action, it cannot be defeated by an answer or plea so conceived and drawn as to avoid the consideration of any federal question or questions."

It is no new device for a defendant who has passed or procured the passage of a law which by its terms impairs the obligation of a contract to seek to evade the jurisdiction of the national courts by the plea that there never was any contract; hence, that the law did not impair its obligation, and no federal question can arise in the case. This device was resorted to in *Wright v. Nagle*, 101 U. S. 791, but it failed in that case, and it ought not to succeed in this. In that case the state of Georgia had made a contract with the assignor of the complainants, through the inferior court of Floyd county, that he and his assigns should have the exclusive right of opening and maintaining ferries and building bridges over the Etowah river, within certain limits. Subsequently that state, through its commissioners of roads and revenue, granted to the defendants the right to erect and maintain a toll bridge within the limits of the first grant. The complainants brought a suit in equity in one of the state courts of Georgia to enjoin the defendants from constructing their bridge, and alleged that the subsequent grant impaired the obligation of the original contract. Defendants answered that the inferior court of Floyd county had no authority to make the original contract, and, as there was no contract, there was no impairment of its obligation. The trial court so held, and dismissed the bill on that ground. This decision and judgment were affirmed by the supreme court of Georgia on appeal. A writ of error was then issued from the supreme court to review this judgment, and a motion to dismiss on the ground that the only question involved was whether or not there was a contract, and no federal question was presented, was made, and overruled by that court with this remark:

"If the court erred in construing the statute, and in holding that there was no contract, then the question is directly presented, by the pleadings and the stipulation as to the facts, whether the subsequent action of the commissioners of roads and revenue is, in its legal effect, equivalent to a law of the state impairing the obligation of the contract as it was made. In this way, it seems to us, a federal question is raised upon the record, which gives us jurisdiction."

In the case at bar the court below has found that there was a contract, and has rendered judgment for the rent which accrued under it; so that the question whether or not the plaintiff was protected, by section 10, art. 1, of the constitution, from the subsequent ordinance which in terms annulled the contract, became a vital question in the case, and, whether insisted upon or urged by the defendant or not, was necessarily decided by the court against the validity of the ordinance, in reaching its judgment. The case actually assumed the aspect in which the plaintiff's recovery depended upon the construction of this clause of the constitution,

the aspect in which one construction of it would insure and the opposite construction would defeat its recovery, and the court adopted the former. For the reasons which I have stated, I am of the opinion that the jurisdiction of the circuit court in this case should be sustained.

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## EVENING POST PUB. CO. v. VOIGHT.

(Circuit Court of Appeals, Second Circuit. March 3, 1896.)

## 1. EVIDENCE—EXPLAINING IRRELEVANT FACTS.

When irrelevant evidence, of a character likely to be injurious to the plaintiff's case, has been elicited by the defendant on cross-examination of the plaintiff, it is not error to permit the plaintiff afterwards to introduce evidence, otherwise irrelevant, for the purpose of explaining the facts.

## 2. SAME—CORRESPONDENCE.

In an action against the proprietor of a newspaper for libel, the defendant pleaded in mitigation of damages that it had sent to the plaintiff a letter, set out in full in its answer, offering plaintiff an opportunity to publish a statement in regard to the libel, and upon the trial such letter was introduced in evidence. The plaintiff was then permitted to put in evidence two letters from his attorney to the defendant, to which defendant's letter was a reply, for the purpose of showing that defendant's offer was not made voluntarily, but under threat of suit, and was not an offer of full reparation. *Held* no error, though the letters contained statements of facts of which they were not competent evidence, no objection having been made on this ground.

In Error to the Circuit Court of the United States for the Southern District of New York.

James C. Carter (Lawrence Godkin, on the brief), for plaintiff in error.

Eugene Frayer, for defendant in error.

Before PECKHAM, Circuit Justice, and WALLACE and LACOMBE, Circuit Judges.

WALLACE, Circuit Judge. This is a writ of error by the defendant in the court below to review a judgment for the plaintiff entered upon the verdict of a jury. The assignments of error impugn the rulings of the trial judge in admitting evidence, and some of the instructions to the jury given and refused.

The action was for a libel published by the defendant in the Evening Post newspaper, which, in substance, stated that the plaintiff was formerly the agent at Chicago of the American Casualty Insurance & Security Company, and was dismissed after the company had obtained a judgment against him for \$6,396 for premiums collected and unaccounted for; that, according to information obtained from the president of the company, the plaintiff had no claim of any kind upon the premiums; and that there was a long trial in Chicago, in which his accounts were thoroughly examined; and that the company could have prosecuted him for theft, if it had chosen to do so.



By its answer the defendant averred that the judgment was obtained and the plaintiff dismissed by another insurance company, the American Steam-Boiler Insurance Company; that it was for premiums which he had not accounted for; that he had no claim of any kind upon the premiums, and, if he had any, he should have stated so upon the trial; and that such company could have prosecuted him for theft, if it had chosen to do so.

The answer also set up the same facts by way of mitigation of damages, together with the averments that the defendant had at all times been ready and offered to publish any proper statement from the plaintiff upon the subject of the charges; that it had sent to plaintiff a certain letter, set forth in full, containing an offer to that effect; and that the offers were made and the letter was sent in good faith, for the purpose of enabling plaintiff publicly and conspicuously to clear himself of the charges which had been made against him.

There was no evidence whatever upon the trial that the plaintiff had failed to account to any company of which he had been an agent for any sums collected by him, or that a judgment upon such a claim had ever been rendered against him, or that there had ever been any trial, or that any company had ever asserted that he had been dishonest, or that there was any ground for a criminal prosecution of him, or that he had been dismissed because of any of these things.

The proof was that for 11 years prior to August, 1890, plaintiff was a member of the firm of Thatcher & Voight, of Chicago, who were the agents there of the American Steam-Boiler Insurance Company; that, by the course of business between the firm and the company, the agents charged themselves with the premiums upon all policies of the company issued by them, as they were written, whether they had received them or not, and transmitted daily reports to the company, together with monthly statements of account; that at stated times they remitted for all premiums collected, less their commissions; that frequently there was a large balance standing on the books of the company against the firm, sometimes as high as \$13,000; that no premiums were ever received by the firm which were not acknowledged to the company and accounted for; that in the summer of 1890 the plaintiff retired from the firm of Thatcher & Voight; that at that time there was a balance upon the books of the company against the firm of \$5,983; that the firm claimed, and had for some time, that there were equitable offsets to this account; that various efforts were made by both Thatcher and Voight to induce the company to allow the offsets, but the company refused to acknowledge the justice of the claim; that more than a year after the dissolution of the firm the company commenced a suit against them in New York City to recover the balance; and that no defense was interposed, and in December, 1891, a judgment by default was entered against them. There was ample proof of all these facts, by evidence which was competent, was not objected to, and was uncontroverted.

Several of the assignments of error are founded on the admission of evidence introduced in behalf of the plaintiff for the purpose of showing the true character of the demand on which the judgment against him was recovered, and that it did not involve any imputation of his honesty. If it should be conceded that some of this evidence was inadmissible, its reception was harmless, because all the facts relating to this issue were fully established by competent evidence, and none of them were practically disputed by the defendant. If it had appeared by the judgment record that the recovery against the plaintiff had proceeded upon averments of his dishonest conduct, it would nevertheless have been competent for him to disprove the truth of such averments. The judgment would not have been conclusive of his guilt, or of the facts upon which it proceeded, as between him and third parties; but, of course, it would have been a complete justification to that part of the libelous article which substantially stated that the judgment had been recovered against him for premiums dishonestly appropriated, and the evidence would only have been of value as negating the truth of the other libelous statements.

Other assignments of error are founded on the admission of evidence tending to show that the plaintiff had suffered loss of income in consequence of the libelous publication. It suffices to dispose of these that this issue was withdrawn from the consideration of the jury. The trial judge instructed the jury that no special damages had been proved.

Another assignment of error relates to the admission of testimony by the plaintiff that the president and secretary of the American Casualty & Security Company had been engaged jointly with him in certain Wall street speculations. The defendant had shown upon the cross-examination of the plaintiff as a witness that in December, 1890, he being at that time an agent of the American Casualty & Security Company, he was accused by some of the officers of not attending to his duties, and of spending his time in a bucket shop in Wall street, and was dismissed for that reason. Upon his redirect examination, he was permitted to show, against the objection of the defendant, that the president and secretary of the company had been engaged with him in speculations in Wall street, and that these speculations were the only foundation for the accusation. The evidence would have been inadmissible, except for that which had been elicited by the defendant, and in explanation of which it was introduced. The fact that the defendant had been discharged because he had been speculating in Wall street was foreign to any legitimate issue in controversy. The libelous publication asserted, in substance, that he had been dismissed because he had misappropriated moneys. Proof that he had been dismissed upon some other ground was utterly irrelevant. A defendant is not permitted to prove any other acts or conduct militating against the plaintiff's character except those specifically embraced in the imputation which is the basis of the action. *Pallet v. Sargent*, 36 N. H. 496; *Ridley v. Perry*, 16 Me. 21; *Burford v. Wible*, 32 Pa. St. 95; *Watters v. Smoot*, 11

Ired. 315. The only effect of the testimony elicited by the defendant was to besmirch the plaintiff's character. The explanatory testimony, though not very valuable, tended to repel the suggestion of the plaintiff's misconduct. The defendant cannot be heard to complain that the plaintiff accepted the invitation to try an irrelevant issue.

Another assignment of error relates to the reception of two letters written by the attorney of the plaintiff to the defendant after the publication of the libel, and before the commencement of the suit. The letter set forth in the answer of the defendant, and relied upon in mitigation of damages, as containing an offer to publish a statement from the plaintiff upon the subject-matter of the libel, was in evidence, having been admitted by the replication. It was an answer, and purported to be upon its face, to the two letters introduced. The first of the two letters, among other things, after referring to the libelous publication, and the retraction which had been made by the original author of the charges, informed the defendant, in substance, that the plaintiff would accept proper reparation, including a suitable retraction and a satisfactory pecuniary compensation. The second letter refers to an interview between the writer and the plaintiff, as requested by an agent of the defendant, and, among other things, states what terms of settlement would be satisfactory to the plaintiff, one of them being a satisfactory retraction. The letter of the defendant in reply to these two letters expresses the willingness of the defendant to publish "conspicuously, in the form of an interview or letter, any proper statement" which plaintiff might desire to make, and concludes by referring the matter to the defendant's attorney, in the event that the plaintiff "does not care to avail himself of this offer, and proposes to take any legal proceedings."

The offer to publish an interview with or a letter from the plaintiff was in no sense a retraction of the libel. It was doubtless made in good faith, but proceeded upon a grave misconception of the duty incumbent upon a newspaper, which has lent the sanction of its name and responsibility to the circulation of a defamatory article, to give equal sanction to the retraction. Read by itself, the defendant's letter might have been construed as a voluntary proposition to afford the plaintiff an opportunity to vindicate himself. This would have indicated a kindly disposition towards him, and, to that extent, would have repelled any inference of malice in fact. Read with the others, it was not a voluntary offer, but one made under the stress of an impending suit for damages. The three letters together also denoted that the defendant, after ample opportunity had been afforded to it to repair in some degree the wrong which it had done to the plaintiff, was still contumacious. It is always competent for a plaintiff in a libel suit to show that he endeavored to procure a retraction from the defendant, and was denied, and equally competent to show that the libeler has refused to make any reparation, notwithstanding he has been informed of the falsity of the published matter. Such evidence has an important bearing upon the plaintiff's measure of

recovery, and is admissible in aggravation of the damages. The language of Chief Justice Nelson is apposite:

"A libelous publication may be inadvertently admitted into the columns of a newspaper, and the editor chargeable only with mistake or indifference to the truth; but if, when advised of his error, he hesitates to correct it, the case rises to one of premeditated wrong, of settled and determined malignity towards the party injured, which should be dealt with accordingly. There is no longer room for any indulgence towards the act, and the party becomes a fit object for exemplary punishment. All the charities of the law give way at such a prostitution of the public press." *Hotchkiss v. Oliphant*, 2 Hill, 516.

In the two letters thus introduced there were statements of fact, some of which had already been testified to by the plaintiff, and some of which had been shown by other evidence, but of which the letters themselves were not competent evidence. If the parts of the letters which recited these facts had been objected to, it might have been error to permit them to be read, although the general rule is that, where a letter has been given in evidence by one of the parties to the action, the other party may also, for the purpose of explaining its meaning, introduce a previous letter from himself, to which this letter was a reply. *Trischet v. Insurance Co.*, 14 Gray, 456; *Rouse v. Whited*, 25 N. Y. 170. No such objection, however, was made; and in the absence of such an objection, inasmuch as other parts of the letters were admissible, it was not error in the trial judge to admit the letters.

We have carefully examined the assignments of error based upon the exceptions to the instructions of the trial judge to the jury, and upon his refusal to give instructions requested in behalf of the defendant. Upon the facts in evidence there was no question for the jury, except as to the amount of damages. The published article was plainly libelous, and not a single fact which it asserted was established by the proof. The gist of the defamation was that the plaintiff had been discovered to be a dishonest agent, who had feloniously appropriated moneys, and been dismissed therefor by his employer. The only semblance of foundation for the charge, presented by the evidence, was that he had been dismissed by another employer for speculating in Wall street. The defamatory article was published upon information derived from sources hostile to the plaintiff, and known to be so by the reporter of the defendant who prepared it; and, though the plaintiff was readily accessible, the reporter did not attempt to get his version of the facts. Neither the reporter nor any other agent of the defendant was actuated by any personal malice towards the plaintiff, but the publication was made without adequate investigation to verify the truth of the libelous matter. It belonged to that class of publications which the law regards as wantonly defamatory, because characterized by a reckless indifference to the rights of others. After the defendant had been informed that the author of the falsehood had made a written retraction, it was too indifferent to the wrong it had committed to make a retraction itself, and contented itself with offering to the plaintiff the poor satisfaction of publishing his own statement. The trial judge

would have been fully justified in taking from the jury every question except the amount of the recovery to which the plaintiff was entitled, and in instructing them that the case authorized a verdict for exemplary damages, and that there was not a fact in evidence entitled to legitimate consideration as tending in mitigation of damages. His instructions were much more liberal to the defendant. At the request of the defendant he granted instructions which were distinctly more favorable to it than the evidence warranted. Among these was the following:

"That, if the substantial imputation be proved true, a slight inaccuracy in one of its details is not material, provided such inaccuracy in no way alters the complexion of the affair, and would have no different effect on the reader than that which the literal truth would produce."

As an abstract proposition, this instruction expressed a correct view of the law, but there was no fact in evidence which sanctioned its application to the case in hand. It is insisted that his refusal to grant the ninth request was error. This refusal might be open to criticism if the request and refusal were isolated from the instructions already given. The instruction prayed for was one of three relating to the question of special damages. The trial judge, having granted the others, thereby instructing the jury that the case was not one for special damages, very properly declined to present to them any definition of the rule by which such damages were to be ascertained.

We find no error in the rulings at the trial, and conclude that the judgment should be affirmed.

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JOHNSTON v. MORRIS.

(Circuit Court of Appeals, Ninth Circuit. February 3, 1896.)

No. 257.

1. PUBLIC LANDS—FORFEITED RAILROAD GRANTS.

Under the act of September 23, 1890 (26 Stat. 496), forfeiting and restoring to the United States the title to all lands theretofore granted to any state or corporation to aid in the construction of a railroad, and opposite which the railroad had not been completed within the time limited, the lands forfeited were restored to the public domain in precisely the same condition as before they were granted, and became subject to disposition under the general land laws.

2. SAME.

Quere, whether the provision in section 6 of said act that the forfeited lands shall not "inure to the benefit of any state or corporation to which lands may have been granted by congress, except as herein otherwise provided," merely prevents a claim of indemnity by a state or a railroad corporation from attaching to the forfeited lands, for lands lost in place opposite to a completed portion of a railroad; or whether it would prevent a state which has received a grant of school lands from selecting out of the forfeited lands indemnity school lands.

8. SAME—SCHOOL LANDS—INDEMNITY SELECTIONS.

The act of February 23, 1891 (26 Stat. 796), amending Rev. St. § 2275, and granting to any state or territory whose school sections, or parts thereof, are mineral lands, other lands of equal acreage, was intended

to provide a uniform rule for the selection of indemnity school lands, and is applicable to all states and territories having grants of school lands. Hence the state of California is entitled to make indemnity selections in place of lands lost from its school sections by reason of being mineral lands.

4. SAME.—DETERMINATION OF WHAT ARE MINERAL LANDS.

When school lands surveyed by a United States deputy surveyor are certified by him to be mineral, and his field notes and plats are approved by the surveyor general and the commissioner of the general land office, and filed in the land office, this is a sufficient determination that the lands are mineral in character to give the state a right to select other lands as indemnity for the loss.

In Error to the Circuit Court of the United States for the Northern District of California.

This was an action by Henry C. Morris against A. G. Johnston to recover possession of certain lands to which plaintiff claimed title under the state of California, which had selected them as indemnity school lands. The trial below resulted in a judgment for plaintiff, and defendant thereupon sued out this writ of error.

Mullany, Grant & Cushing, for plaintiff in error.

E. P. Morgan (C. A. Keigwin, of counsel), for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and MORROW, District Judge.

MORROW, District Judge. By the act of congress approved July 27, 1866 (14 Stat. 292), certain odd-numbered sections of land were granted to the Atlantic & Pacific Railroad Company, to aid in the construction of a railroad and telegraph line from the states of Missouri and Arkansas to the Pacific coast. Section 18 of this act authorized the Southern Pacific Railroad Company to connect with the Atlantic & Pacific Railroad at such point near the boundary of California as should be deemed most suitable for a railroad line to San Francisco; and, to aid in the construction of such railroad, it was provided that the Southern Pacific Railroad Company should receive grants of land, similar to those granted to the Atlantic & Pacific Railroad Company. The grant of land, so far as it is material to this case, was every alternate section of public land not mineral, designated by odd numbers, to the amount of 10 alternate sections of land per mile on each side of the railroad whenever it passed through any state. The road was required to be completed by July 4, 1878. At that date the only part of the road constructed by the Southern Pacific Railroad Company was from San José southward to Tres Pinos, and from Huron, in the San Joaquin valley, to Goshen, and southwardly to Mojave. That portion of the line of road between Tres Pinos and Huron, in California, a distance of about 100 miles, was not built as required by the act. The act of congress approved September 29, 1890 (26 Stat. 496), forfeited and restored to the United States the title to all lands theretofore granted to any state or corporation to aid in the construction of a railroad opposite to and co-terminous with the portion of any such railroad not then completed and in operation; and such lands were declared to be a part of the public domain. The line of road between Tres Pinos and Huron had

not been built when this act was passed. Section 33, township 13 S., range 9 E., Mt. Diablo Base and Meridian, is located within the limits of the grant to the Southern Pacific Railroad Company, opposite to and coterminous with the line of the uncompleted road between Tres Pinos and Huron, and was therefore one of the forfeited sections restored to the public domain by the act of September 29, 1890.

On the 23d of July, 1892, Joaquin Vinagre made application to the surveyor general of the state of California to purchase a portion of section 33, above described, as school lands; whereupon the surveyor general filed an application with the register of the land office of the United States at San Francisco to select said land as a portion of the school lands granted to California in lieu of an alleged deficiency of school lands in certain sixteenth and thirty-sixth sections, that had been classed in the United States surveys, and designated upon the United States plats, as mineral lands. This selection was accepted and filed for listing by the register of the land office, under the direction of the commissioner of the general land office; and the surveyor general of the state thereupon issued and delivered to Joaquin Vinagre a certificate of purchase for the land. By assignment and transfer of this certificate of purchase, all the right, title, and interest of Vinagre to the land in question was conveyed to Henry C. Morris, a citizen of the state of New York, who, on the 9th of August, 1894, brought suit in the United States circuit court against A. G. Johnston to recover possession of the land. In addition to the facts already stated, the complaint alleges that the land purchased by Vinagre was in lieu of school lands lost to the state in section 36, township 3 N., range 15 E., and in section 16, township 17 S., range 31 E. The defendant, Johnston, in his answer, denies that these school sections, or either of them, were, or that any part of them was, lost to the state, so as to entitle the state to select lands in lieu of said sections, or any part of them; and alleges that prior to the 23d day of July, 1892, the said township No. 3 N., range 15 E., and township No. 17 S., range 31 E., had been surveyed under the authority of the United States; that in pursuance of law, and in accordance with the requirements of the general land office, the United States surveyor made report as to the mineral or nonmineral character of the lands embraced within such surveys, and in which report, as shown by the field notes of such surveys which were returned to the surveyor general's office by the United States surveyor, it was stated that the said school sections hereinbefore mentioned were mineral lands, and, in accordance with said return and report, the United States surveyor general delineated upon the plats of said surveys the said sections as being mineral lands; that said surveys and reports were duly approved by the United States surveyor general and by the commissioner of the general land office, and that since said surveys were made, and said plat so marked and approved as aforesaid, no proceedings whatever have been had to determine the mineral or nonmineral character of said school sections; that the selections made on the 23d day of July, 1892, in lieu of said school sections, were so made upon the assumption that the said school sections were mineral lands, whereas in fact the mineral or nonmineral char-

acter of said lands had not at that date, and never has been, determined or adjudicated. In short, the defendant avers that, by reason of the facts set forth in the answer, the whole proceedings relating to the purchase of the land by Vinagre are null and void, and of no effect. To this answer, the plaintiff interposed a demurrer, on the ground that the matters set up in the answer did not constitute a defense to the action. The demurrer was sustained, and the defendant has brought the case here on a writ of error.

For the reversal of the judgment, the plaintiff in error contends: (1) That the act of September 29, 1890, did not restore the odd-numbered sections thereby forfeited to the United States, to be disposed of under the general land laws of the United States; (2) that, if such forfeited lands are held to be otherwise subject to such disposal, then, by reason of the provisions of section 6 of that act, the forfeiture did not inure to the benefit of the state of California; (3) that the act of February 28, 1891 (26 Stat. 796), amending section 2275 of the Revised Statutes, and granting other lands of equal acreage to any state or territory where sections 16 or 36 are mineral lands, does not apply to the state of California; (4) that the selection, by the state, of the land in question, must fail in any event, since it has not been determined or finally adjudicated by the land department that the school lands in sections 16 and 36, designated as the basis of the selection, are mineral lands.

Taking these questions in their order, we proceed to consider the scope and purpose of the act of September 29, 1890. It is expressly declared in the first section that the forfeited land is to be part of the public domain. Section 2 provides that actual settlers in good faith upon such lands are given a preference to enter the lands under the provisions of the homestead law, and any person who has not before had the benefit of the homestead or pre-emption laws, or who has failed, from any cause, to perfect the title to a tract of land, under either of said laws, may make a second homestead entry under the act. Section 3 provides that certain persons, who are in possession of any of the lands affected by the grant resumed by and restored to the United States, shall, under certain circumstances, and within a certain time, be entitled to purchase the same from the United States, in quantities not exceeding 320 acres to any one purchaser, at the rate of \$1.25 per acre. It is very clear, from these provisions, that, instead of these lands being reserved from the operation of the general public land laws of the United States, it was the purpose of congress to restore them to the public domain in precisely the same condition they were in before the granting acts were passed. There can be no reservation of public lands from the general disposition provided for them, except by reason of some treaty, law, or authorized act of the executive department of the government. *Wolsey v. Chapman*, 101 U. S. 755. No such reservation of these lands having been made, it must be presumed that they were restored to the public domain, to be disposed of as other lands are disposed of by law.

The contention that, by reason of the provisions of section 6 of the act, the forfeiture does not inure to the benefit of the state



of California, is based upon the language of that section, as follows:

"That no lands declared forfeited to the United States by this act shall, by reason of such forfeiture, inure to the benefit of any state or corporation to which lands may have been granted by congress except as herein otherwise provided."

Lands had been granted by congress to the state of California, and, among others, sections 16 and 36 in each township, for school purposes, under section 6 of the act of March 3, 1853 (10 Stat. 246); and it is claimed that the selection made by the state in this case, and which is the basis of the title held by Morris, was under this grant. The contention is that, where a state had received a grant of land from congress for any purpose, it was excluded from taking any part of the lands restored to the public domain by the forfeiture act in satisfaction of its grant. The act of September 29, 1890, relates to the forfeiture of all unearned lands granted for the purpose of aiding in the construction of railroads, whether such grant had originally been made to the state or directly to the corporation. The language of section 6, now under consideration, appears to have been first employed in section 4 of the act of March 2, 1889, entitled "An act to forfeit lands granted to the state of Michigan to aid in the construction of a railroad from Marquette to Ontonagon, in said state" (25 Stat. 1008). In that act this provision has special significance, and was construed by the land department as excluding the claim of a railroad company for an indemnity selection for a completed portion of its road out of a grant to the state for another road that had been forfeited. The claim was that the Ontonagon & Brule Railroad Company had the right to select, as indemnity for land lost in place, other lands opposite to a completed portion of its road, but within the primary limits of a grant to the Marquette, Houghton & Ontonagon Railroad forfeited by the act. The secretary of the interior, referring to the provision "that no lands declared forfeited to the United States by this act shall inure to the benefit of any state or corporation to which lands may have been granted by congress," held that it was a specific provision against such an indemnity selection, "the evident purpose being to forever remove from railroad claim, and restore to the public domain, free and unincumbered, all lands forfeited by said act." *Ontonagon & B. R. R. Co.*, 13 Land Dec. Dep. Int. 476. This interpretation of the provision, as found in the act of March 2, 1889, applied to the same provision in the act of September 29, 1890, would limit its effect to the forfeiture of the right, whether asserted by a state or railroad corporation, to a claim of indemnity within the primary limits of a forfeited grant for lands lost in place opposite to a completed portion of a railroad; and, if this view of the provision is correct, it would follow that it does not apply to the state of California, as no railroad grants were ever made directly to the state by congress, and it would not apply to the selection in this case, because it is not based upon a railroad indemnity claim. But we do not find it necessary to pass upon this point, for, as we shall see presently, the question whether congress

intended to exclude, from the benefits of the forfeiture act, states that had received grants of land under any previous law, becomes immaterial in this case, in view of the conclusion reached that the selection was made under the provisions of the act of February 28, 1891, amending section 2275 of the Revised Statutes (an act passed subsequently to the forfeiture act).

The contention that the act of February 28, 1891 (26 Stat. 796), amending section 2275 of the Revised Statutes, does not apply to California, is supported by a decision of the secretary of the interior, dated July 6, 1892 (State of California, 15 Land Dec. Dep. Int. 10). The secretary had before him an appeal, taken by the state of California, from a decision of the general land office rejecting certain applications by the state to select indemnity school lands upon the basis of townships made fractional by reason of portions thereof being swamp lands. It was contended on the part of the state, among other things, that as the swamp lands situated within the state had been granted to the state by the act of September 28, 1850, those lands had been "otherwise disposed of by the United States," and that the state was therefore entitled to indemnity selection for sections 16 and 36 of such lands lost from the school grant by reason of being swamp lands. This contention was based upon the following provision of section 2275 of the Revised Statutes, as amended by the act of February 28, 1891:

"And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said state or territory where sections sixteen or thirty-six are mineral land, or are included within any Indian, military, or other reservation, or are otherwise disposed of by the United States."

The secretary held that California took her school grant under section 6 of the act of March 3, 1853, and section 6 of the act of July 23, 1866; and that the indemnity provision of section 2275 of the Revised Statutes, as amended, was not applicable to selections made by the state in lieu of the swamp land lost from the school land grant, on the ground that it would be giving to the state an indemnity for a class of lands already donated to the state; and that the principle upon which indemnity is given to the state is for a loss, and not for that which the state has already received. This is a clear and forcible statement of the reason why the state is not entitled to make indemnity selections for school lands which it had already received as swamp lands, but this reason does not apply to losses from the school grant by reason of sections 16 and 36 being mineral lands. Where such sections are found to be mineral lands, there is an absolute loss of such lands to the state, and, to that extent, a clear and unconditional diminution of the school land grant. The policy of congress has been, clearly, in the direction of an enlargement of the grant to the state, rather than a diminution. When, therefore, the secretary went beyond the question he had before him, relating to swamp lands, and determined that section 2275, as amended by the act of February 28, 1891, did not give any additional indemnity rights to the states, and that such provisions merely declared the existing laws, he certainly gave to the amendment a limitation not warranted by the

legitimate conclusion to be drawn from his own argument; and it appears to be too narrow an interpretation to hold that the amendment only provided an additional right in the adjustment of the grant to make indemnity selections in advance of the surveys, and from any unappropriated public lands in the state or territory where the loss occurs, instead of from lands most contiguous to the same. A more satisfactory interpretation of the statute as amended is to be found in a prior decision of the secretary of the interior, dated April 22, 1891, where it was held that it was intended by the act of February 28, 1891, to provide a uniform rule for the selection of indemnity of lands applicable to all the states and territories having grants of school lands. This decision is based, mainly, upon the proceedings in congress, and, particularly, on the report of the committee on public lands of the house of representatives, reciting and adopting a report previously made to the senate. This report contained the following statement:

"In the administration of the law, it has been found by the land department that the statute does not meet a variety of conditions, whereby the states and territories suffer loss of these sections, without adequate provision for indemnity selection in lieu thereof. Special laws have been enacted in a few instances to cover, in part, these defects with respect to particular states or territories; but, as the school grant is intended to have equal operation and equal benefit in all the public land states and territories, it is obvious the general law should meet the situation, and partiality or favor be thereby excluded. \* \* \* The bill as now framed will cure all inequalities in legislation; place the states and territories in a position where the school grant can be applied to good lands, and largest measure of benefit to the school funds be thereby secured." 22 Cong. Rec. p. 3632.

In construing a statute, aid may be derived from attention to the state of things as it appeared to the legislature when the statute was enacted. *U. S. v. Union Pac. R. Co.*, 91 U. S. 72; *Platt v. Railroad Co.*, 99 U. S. 48; *Smith v. Townsend*, 148 U. S. 490, 13 Sup. Ct. 634.

From the statement of the committee, it appears very clearly that the statute was intended to be general in its terms, and applicable alike to all the states and territories receiving grants of school lands; and such appears to be the view now held by the secretary of the interior, who, under date of September 27, 1895, so interpreted the statute in a decision relating to a settlement before survey on school lands in the state of Nebraska. 21 Land Dec. Dep. Int. 220.

The law being general, and providing indemnity selection for mineral lands in sections 16 and 36 of each township, it follows that California is entitled to make such a selection for the land lost to the state in section 36, township 3 N., range 15 E., and in section 16, township 17 S., range 31 E., providing it is sufficiently established in this case that the land is of a mineral character; and that question we now proceed to consider.

The school sections above described were certified by the United States deputy surveyor to be mineral. His field notes of surveys and plats thereof were approved by the United States surveyor general and the commissioner of the general land office, and filed in the

United States land office. Upon this showing, the state alleged a loss of the said sections for school purposes, and has selected other lands in lieu thereof. The objection to the selection is that such designation and return do not in fact make the sections mineral lands, within the meaning of the law.

Section 2319 of the Revised Statutes provides that:

"All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase."

The survey of public lands is provided by sections 2395 to 2413 of the Revised Statutes. Section 2406 provides that "the public surveys shall extend over all mineral lands." By paragraph 7 of section 2395, the deputy surveyor is required to note in his field books the true situation of all mines, salt licks, salt springs, and mill seats which may come to his knowledge, and also the quality of the lands. Paragraph 8 of the same section provides that:

"These field books shall be returned to the surveyor general, who shall cause therefrom a description of the whole lands surveyed to be made out and transmitted to the officers who may superintend the sales."

Section 441, Rev. St. U. S., reads:

"The secretary of the interior is charged with the supervision of public business relating to the following subjects: \* \* \* Second. The public lands, including mines."

Section 453, Rev. St. U. S., provides that the commissioner of the general land office shall perform, under the direction of the secretary of the interior, all executive duties pertaining to the survey and sale of the public lands of the United States, or in any wise respecting such public lands, and also such as relate to private claims of land.

In *Sutton v. State of Minnesota*, 7 Land Dec. Dep. Int. 562, 564, the secretary of the interior said:

"The field notes of survey, being entries in writing made by a public officer in the regular discharge of his duty, are presumptively correct, and are prima facie evidence of the fact stated, of a very high character. They must be taken as true, till disproved by a clear preponderance of the evidence."

In *Re John W. Moore*, 13 Land Dec. Dep. Int. 64, 66, he held that:

"The returns of the surveyor general and the record of the survey made under his direction are evidence of the highest character, that no private survey can be allowed to overcome."

In the case of *Bishop of Nesqually v. Gibbon*, 158 U. S. 155, 15 Sup. Ct. 779, the plaintiff claimed the right to 640 acres of land under the act of August 14, 1848, establishing the territorial government of Oregon, wherein it was provided:

"That the title to the land, not exceeding six hundred and forty acres, now occupied as missionary stations among the Indian tribes in said territories, together with the improvements thereon, be confirmed and established in the several religious societies to which said missionary stations respectively belong."

In the bill filed in the court below, the plaintiff alleged that, under and by virtue of the foregoing provision, it was entitled to a  
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tract of 640 acres at and adjacent to the present town of Vancouver, 430 acres of which were in the occupancy of the defendants as officers and soldiers of the United States, who held the same as a military reservation. In the previous controversy relating to this tract of land, it appears that the secretary of the interior had sustained the claim of the plaintiff to only a small tract (less than half an acre), upon which the building used as a church was situated, and had denied it as to the rest of the land. Afterwards the president approved a final survey and plat of the military reservation, confirmed the previous action of the war department, and declared the reservation set apart for military purposes. Commenting on these facts, the supreme court said:

"Upon these facts, it may well be doubted whether the decision of the secretary of the interior is not conclusive. The act of congress purports to confirm 'the title to the land, not exceeding six hundred and forty acres, now occupied as missionary stations.' It is a question of fact whether there was at Vancouver a missionary station, and also a like question, if one existed, how much land it occupied. The rule is that, in the administration of the public lands, the decision of the land department upon questions of fact is conclusive, and only questions of law are reviewable in the courts."

It was held further:

"While there may be no specific reference in the act of 1848 of questions arising under this grant to the land department, yet its administration comes within the scope of the general powers vested in that department."

It is not claimed in this case by the defendant in error that the classification of public lands as mineral lands by the surveyor is absolutely conclusive upon the land department as to their real character, but that, when lands are surveyed and returned by the surveyor as mineral lands, they are treated and dealt with by the land department as such as long as they are so classified. The question is, what is the status of a school section when the state comes to make a selection? If it is mineral land, it is free and open to exploration and purchase under the laws of the United States; and, if it is so classified by the land department, it cannot be taken by the state, but other lands may be selected as indemnity for the loss. In this way, there is provided an immediate adjustment of the claim of the state under the school land grant. This method of procedure appears to be fair and reasonable, and in accordance with the purpose of the law. The state was therefore entitled to make a selection in lieu of such mineral lands.

The judgment of the circuit court is affirmed.

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UNITED STATES v. McDONALD.<sup>1</sup>

(Circuit Court of Appeals, Ninth Circuit. February 24, 1896.)

No. 225.

CLAIMS AGAINST THE UNITED STATES—DISTRICT ATTORNEY'S CLERK—COMPENSATION.

A lawyer appointed by a district attorney, ostensibly as a clerk, but to assist him in the duties of his office, pursuant to a letter from the attorney

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<sup>1</sup> Petition for rehearing denied.

general authorizing such appointment on condition that the appointee should look solely to the district attorney for his compensation, which was to be paid out of the emoluments of the office, is not an employé of the United States, and cannot maintain a suit against them for his compensation. Gilbert, Circuit Judge, dissenting. 66 Fed. 255, reversed.

**In Error to the Circuit Court of the United States for the District of Montana.**

The defendant in error filed his petition in the circuit court to recover from the plaintiffs in error upon two specific claims for clerical services rendered by him, as a clerk in the office of the United States attorney for the district of Montana, during the years 1891 and 1892. The claim for services in 1892 was disallowed by the court below (66 Fed. 255), and the only question before this court relates to his claim for services for the year 1891, amounting to \$1,237.50. The petition alleges "that, pursuant to authority from the attorney general of the United States therefor, plaintiff began said services on or about the 12th day of March, 1891, under an appointment by the said United States district attorney, at an annual salary of \$1,500, and continued said services under said appointment, and at the request of said attorney general and the said United States district attorney, up to and including the 31st day of December, 1891." The answer admits "that, by authority of the attorney general of the United States, plaintiff performed certain clerical services in the office of the United States district attorney for said district, commencing on or about the 12th day of March, 1891, at an annual salary of \$1,500, and continuing said services up to the 1st day of December, 1891." The findings of the circuit court below were: "First. That from the 12th of March, 1891, to the 31st day of December, 1891, plaintiff performed services for the United States as clerk in the office of the United States district attorney for the district of Montana; that he was employed to perform said services for the United States by E. D. Weed, the United States district attorney for the district of Montana, and his salary was fixed at \$1,500 per annum; that said Weed was duly authorized to so employ plaintiff at said salary." As a conclusion of law the court found "that plaintiff is entitled to a judgment against the United States for the sum of \$1,237.50."

It is contended by the plaintiffs in error that the court erred in finding as a fact that "the plaintiff performed services for the United States," and erred in its conclusion of law. The facts relative to the appointment of the defendant in error, as shown by the bill of exceptions, are as follows: On January 26, 1891, E. D. Weed, then United States attorney for Montana, addressed a communication to the attorney general, stating that the business of the United States was increasing so fast as to place it beyond his power to give it proper attention, adding, "I have to request that you appoint Mr. John M. McDonald as my assistant, and that the compensation be allowed from the emoluments of my office in excess of the maximum." The attorney general answered this communication as follows: "On the 26th ultimo you ask for the appointment of an assistant attorney, at a compensation to be allowed from the emoluments of your office in excess of your maximum. Whenever an appointment is made in the manner mentioned, it is a difficult matter to get a settlement through the accounting officers of the treasury. The better way seems to be that you appoint a person for the discharge of clerical services in your office, at a compensation not exceeding \$1,500, such person to be an attorney at law who can assist you in the courts. If you are willing to appoint Mr. McDonald, his appointment as an assistant is authorized, upon the further condition that he is to understand that he can have no account against the United States for services, but is to look exclusively to you for compensation." Pursuant to the authority thus given, the United States attorney for the district of Montana appointed McDonald as a clerk in his office, and in due time presented his account against the United States, in which he included, "Amount paid John M. McDonald for services as assistant attorney, \$1,237.50." This item in the emolument account of the United States attorney was suspended. The reason given by the comptroller to the district attorney was as follows: "In your communication you state that, in reference to the vouchers of John M. McDonald for \$1,237.50, 'if they were made out to him as assistant United States attorney, it was an error on his part, as he is not, officially speaking, such officer, and

draws no salary as such from the United States. He is a clerk in my office, appointed by me, under directions of the attorney general, at a salary of \$125 per month, to be paid out of the emoluments of this office." The comptroller further informed the United States attorney that, before the suspended item could be allowed, "you will be required to furnish a sworn statement setting forth the fact that Mr. McDonald performed clerical services only, and did not act in the capacity or perform services as assistant attorney."

Preston H. Leslie, U. S. Atty.

Russel J. Wilson, for defendant in error.

Before McKENNA and GILBERT, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge, after stating the facts, delivered the opinion of the court.

The facts of this case present the question whether there is such a privity between McDonald and the government as to authorize him to maintain an action against the United States for the services rendered by him as a clerk in the office of the United States attorney for the district of Montana. The United States never employed McDonald to perform any services, legal or clerical, in their behalf. It is true that the attorney general gave authority to the United States attorney for the district of Montana to appoint McDonald as a clerk in his office, to assist him in the discharge of his duties as district attorney, at a named salary; but this authority was given upon the express condition that McDonald "is to understand that he can have no account against the United States for services, but is to look exclusively to the district attorney for his compensation." This authority is conclusive. Its true interpretation and meaning govern the question. McDonald was to be paid by the district attorney out of the fees and emoluments of his office. The district attorney was to be allowed for McDonald's services out of his emolument account, as an expense properly incurred in his office. McDonald had no trust relation with that fund. He could only look to the district attorney for his compensation. The settlement of the emolument account was a matter between the government and the district attorney. If any item in that account was erroneously disallowed, the district attorney could maintain an action therefor against the United States. A clerk in the office of a district attorney is not a government officer. The fact that, in the emolument accounts of the district attorney, the auditor may allow him to deduct from his fees the clerk's compensation, does not make the clerk such an officer or employé of the government as to authorize him to recover any compensation for legal or clerical services rendered in the office of the United States attorney. The claim of McDonald is analogous to that of deputy marshals or deputy clerks, and it has always been held that such officers are in no sense creditors of the United States for the amount of their compensation. Deputy marshals, although entitled to certain fees by statute, and recognized as officers of the court, are not officers of the United States, in the sense that they can maintain an action against the government for their fees. *Bollin v. Blythe*, 46 Fed. 181; *Powell v. U. S.*, 60 Fed. 687; *Wallace v. Douglass*, 103 N. C. 19, 9 S. E. 453. In *Powell v. U. S.*, Bruce, J., said:

"With the limitation that he [the deputy marshal] is not to receive more than three-fourths of the fees received or payable for the services rendered by him, he may have any contract with the marshal for his compensation which they may see fit to make. But the fees go to the marshal, whether earned by him in person or by deputy. The accounts of the deputy for services rendered go into the account of the marshal as vouchers for the money paid out by him in the execution of process, and are so presented and allowed by the court, and audited by the accounting officers of the treasury department at Washington. A system has grown up, under the statutes, for the keeping, rendering, and auditing of accounts of marshals and of other officers of the courts; and the act of March 3, 1887, did not change this system. The act did not create new causes of action, but only made the government suable upon existing causes of action, and was not intended to change the system of keeping the accounts of this class of public officers. \* \* \* The most that can be said is that the deputy has an interest in the fees of the marshal, and the limitation of three-fourths to the deputy (one-fourth going to the marshal, doubtless in consideration of his responsibility) may be reduced by the attorney general; showing that, in contemplation of the law, there can be no severance or division of interest in the fees between the marshal and his deputies, for which each can severally make claim, but the fees (the fees and emoluments of the office) go to the marshal, and he is provided with an allowance from which he pays his deputies for their services. It seems clear, from a consideration of the statutes on the subject, and the manner in which the accounts of the marshal are made up and settled by the accounting officers of the treasury department, that the deputy marshals are not employed by the government, and have no contract, either express or implied, with the United States, in virtue of which they can maintain suit in the execution of process."

In *U. S. v. Meiggs*, 95 U. S. 748, the court had under consideration the question whether a deputy clerk was entitled to the 20 per cent. additional compensation granted by the joint resolution of congress approved February 28, 1867 (14 Stat. 569), and after drawing the distinction existing between the position of deputy clerks and the employes of the government in the *Twenty Per Cent. Cases*, 13 Wall. 568, and holding that the deputy clerk was not entitled to the extra compensation provided for in the joint resolution, among other things, said:

"The circumstance that in the emolument account of the clerk the auditor allows him to deduct from the fees, which he would otherwise pay into the treasury, the deputy's compensation, does not make him an employe of the department."

The judgment of the circuit court is reversed, with directions to the circuit court to dismiss McDonald's petition.

GILBERT, Circuit Judge (dissenting). In my judgment the decision of this case turns not so much upon the question whether or not the petitioner was an employe of the government as it does upon the question whether or not he had a contract, express or implied, with the United States, out of which arises a claim which may be the basis of the present action. The doctrine of *U. S. v. Meiggs*, 95 U. S. 748, and other similar cases, is not decisive of this question. The court in that case construed an act of congress which gave additional compensation to certain employes of the government. One of the questions presented was whether a deputy clerk of the supreme court of the District of Columbia was one of the beneficiaries of the act. The court held that he was not, for the reason that he belonged to the judiciary department



of the government, whereas the act made provision only for the employés of the executive branch. After so holding, the court proceeded to say, obiter:

"The deputy served at a salary fixed by a contract between him and the clerk. He was also paid by the clerk, and worked for the clerk, and performed services which it was the duty of the clerk to perform, and for which the clerk received compensation and fees paid by the litigants for whom those services were rendered. It is very difficult to see how this deputy clerk can be called an employé of the government at all. The government was never liable to him for any salary at any time, and, if the principal clerk had failed to pay him the \$2,000, the government clearly would not have been liable for it."

More directly in point is the decision in *Manning's Case*, 13 Wall. 578. The question there presented was whether certain guards, who were appointed to assist the warden of the jails of the District of Columbia, were employés of the government. The appointment of these guards was not authorized by any statute, nor was their compensation prescribed by any appropriation. They were selected and appointed by the warden under the authority of the head of the department of the interior. It was held that they were employés of the government, for the reason that although the charge for their services was required to be approved by the warden, and included by him in his report, the report was nevertheless subject to revision by the secretary of the interior, who had the power to fix the amount of the guards' compensation. I am unable to distinguish that case from the case at bar. But I hold that it is not necessary that the petitioner in this case be deemed to have been an "employé" of the government, in the technical sense in which that term is used in the decisions, in order that he may prosecute the present action. It is sufficient if he have a claim arising "upon any contract, express or implied, with the government of the United States," as contemplated in the act to provide for the bringing of suits against the government of the United States (1 Supp. Rev. St. U. S. p. 559). The petitioner, it is true, was employed by the district attorney to assist him in his official duties, but he was employed under direct authority from the judiciary department of the government. His compensation was fixed, not by the district attorney, but by the department, and he was to be paid out of moneys belonging not to the district attorney, but the moneys of the United States. He had an implied contract with the United States. His services were rendered exclusively for the United States. In this respect his attitude differs from that of the deputy clerk in the case of *U. S. v. Meiggs*, a large portion of whose services were rendered on behalf of private litigants, and were public services only in the sense that courts are established and maintained for the public welfare. In the ordinary course of the business of the department, the petitioner's salary was payable by the district attorney, who was the disbursing officer of the government for that purpose. As the case stands upon the record, the petitioner has not been paid. There was money in the hands of the district attorney, arising out of the fees and emoluments of his office, sufficient to pay the amount for

which judgment was rendered for the petitioner in the court below. The district attorney has not been permitted to make the payment. The money remains in the treasury of the United States. The term of office of the district attorney has expired. This item of his account has been disallowed. What recourse, under the circumstances, has the petitioner? He clearly could not bring an action against the district attorney, for the latter was never personally responsible for the salary, nor has he received from the United States the money with which to make the payment; nor could the petitioner compel him to bring the action in his behalf. The stipulation in the attorney general's letter that the petitioner was to have no account against the United States, but was to look exclusively to the district attorney for his compensation, must be interpreted in the light of the whole correspondence upon the subject. When so regarded, it is evident that the petitioner was to look for his compensation solely to the fund arising from the fees and emoluments of the district attorney's office, and that, aside from his demand upon that fund, he could have no recourse against the United States. The petitioner has complied with this requirement, but the fund out of which he was to be paid is wrongfully withheld. He is entitled to receive his compensation. He is the real party in interest, and he is without a remedy, unless a remedy be afforded him in this action. In my judgment the jurisdiction conferred under the act of congress above referred to was, and was intended to be, sufficiently broad and liberal to include claims of the nature of that which is here presented, and the judgment of the circuit court should be affirmed.

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AMERICAN CEREAL CO. v. ELI PETTIJOHN CEREAL CO.

(Circuit Court, N. D. Illinois. March 25, 1896.)

1. TRADE-MARK—USE OF SURNAME.

A manufacturer cannot, by extensively advertising his name in connection with goods made by him, acquire the right to enjoin another person with the same surname from selling similar goods under that surname, when such other person has for many years been engaged in the manufacture of such goods, and puts his full name on his labels.

2. SAME—TRADE-MARK NOT BASED ON FACT.

The owner of several mills situated in different states, who has ceased to manufacture at one of his mills, and supplies the customers of that mill with the product of his other mills, cannot enjoin the violation of a trade-mark which assumes that said mill is still running.

**In Equity.** Suit for injunction by the American Cereal Company against the Eli Pettijohn Cereal Company. Complainant moves that defendant be punished for violating a preliminary injunction, and defendant moves to dissolve such injunction.

Swift, Campbell, Jones & Martin, for complainant.

Willard & Evans and Frederick Reed, for defendant.

SHOWALTER, Circuit Judge. In October, 1889, William A. Pettijohn left San Francisco, Cal., where he had been engaged in man-

ufacturing rolled wheat, and came to Minneapolis, in the state of Minnesota. He leased a mill in the latter city, and, having equipped it with machinery brought by him from California, he, with his two brothers, Samuel and Lawrence, commenced what proved to be a successful business in the manufacture of rolled wheat. This product, called by them "Pettijohn's California Breakfast Food," was put on the market in small paper or pasteboard boxes or parcels, as is the custom of the trade with similar products. The wrapper contained, as a trade-mark, the pictorial representation of a bear, and also the words: "Pettijohn's California Breakfast Food, Prepared by W. A. Pettijohn, Sole Manufacturer, San Francisco, California, and Minneapolis, Minnesota. Machinery invented for this purpose, and shipped from California." Some seven months later one Beeman was admitted as a partner, and the firm name became Beeman & Pettijohn. In October, 1890, the three brothers caused a corporation to be formed, called the "Pettijohn California Breakfast Food Company." This concern succeeded to the business of Beeman & Pettijohn, and carried on the same down to October, 1893, when it leased its mill to complainant, at the same time selling to complainant (which took possession November 1, 1893) its machinery, and all its tangible property, together with its business and good will, including its trade-marks. The bill states that, up to the time of this assignment to complainant, some \$65,000 had been expended in advertising the "Pettijohn California Breakfast Food," the trade in such article having been widely extended through the territory east of the Rocky Mountains. Upon the wrapper used at the time of the transfer to complainant, the bear appears; but not the words, "Machinery invented for this purpose, and shipped from California," though said words were used on the wrapper or boxes for a time after the Pettijohn California Breakfast Food Company had succeeded to the business. The said machinery, however, still remained in use in the mill. The complainant continued the business for about 2½ months, or until January 17, 1894, when said mill was destroyed by fire. At the time of said fire, complainant was the owner of several other mills, in different parts of the country, at which rolled wheat was made,—two in Ohio, one at Chicago, and another at Cedar Falls, in Iowa. These mills had apparently been purchased by complainant from prior owners. The rolled wheat made at each was put upon the market, with distinctive labels and markings upon the boxes, identifying the mill at which it had been made, or the place of manufacture. Upon the destruction of its Pettijohn mill at Minneapolis, complainant ceased doing business in that city, but supplied the market for the "Pettijohn California Breakfast Food" with the product made at these different mills, using for that trade the labels which had been in use at the Minnesota mill up to the time of the fire, but without the designation of the place of manufacture, or any other designation of the mill at which the product was made. In this manner complainant's business as a manufacturer of the "Pettijohn California Breakfast Food" was conducted at the time of the filing of this bill, in April, 1895.

Eli Pettijohn, father of the three brothers already mentioned, was

by trade a millwright. He went to Minnesota in 1840, and resided there until 1876, when he left Minneapolis and went to California. In 1877 he commenced making rolled wheat at the city of San Francisco, and selling it under the name of "Pettijohn's Rolled Wheat." In 1879 his son William A. became interested with him. But the enterprise was experimental, the partners were not strong financially, and from 1880 to 1884 there appears to have been a cessation in the business. In May, 1884, they recommenced; at the same time improving the product, as it would seem, by experimental modifications in the process of manufacture. Thenceforward Pettijohn's rolled wheat, under the names, "Pettijohn's Breakfast Food," "Pettijohn's Breakfast Gems," or "Pettijohn's Breakfast Pearls," has been constantly made in California, and in 1890 this product had gained wide currency in the markets west of the Rocky Mountains. It was also known to some extent in the eastern portion of the country. William A. Pettijohn was constantly employed in this business. Eli was also intermittently employed either in the sale or manufacture of the article. He claims also to have been interested as a partner with his son William in such rolled wheat business as was carried on by the son in California, but this is denied by the son. After William left California, Eli was employed in the mill of one Laumeister, where Pettijohn's rolled wheat was manufactured and sold under the name, "Pettijohn's Breakfast Gems." In 1892 William returned to California, and he and his father resumed business together in San Francisco as manufacturers of the product in question. This business was continued until December, 1892, when Eli formed a partnership with Hartwell and another, under the name, "Pettijohn's Manufacturing & Milling Company." This firm made the Pettijohn rolled wheat at a mill in Oakland, Cal. This business was carried on until March, 1894. They called their product "Pettijohn's Breakfast Pearls." Pending this last enterprise, and in November, 1893, Eli Pettijohn went from California to Minneapolis. In April, 1894, the defendant corporation, the Eli Pettijohn Cereal Company, was organized, pursuant to the laws of Minnesota. Eli Pettijohn became the owner of 20 shares, out of 250 shares of \$100 each; that being the capital stock of said company. He was made a director, and he became—and, at the time of the hearing still was—an employé of said company. The machinery for making rolled wheat, heretofore spoken of as having been brought from California, and as having been mentioned on the labels of William A. Pettijohn, and of the Pettijohn California Breakfast Food Company, and as still being in use in the mill at Minneapolis purchased by complainant, was not seriously damaged in the fire. Said machinery was purchased by the defendant company, and, with other machinery made by Eli Pettijohn, was in use by the defendant company in its mill at Minneapolis at the time this bill was filed. The rolled wheat produced at said mill is substantially the same as the Pettijohn rolled wheat made by the complainant and its predecessors prior to said fire. The sworn answer contains the statement that defendant has expended some \$25,000 in advertising the product of its mill. Defendant insists that prior to this expenditure, and prior to the commence-

ment of its business, it submitted to complainant its proposed wrapper, showing the name adopted for its product, "Eli Pettijohn's Best," together with a picture of Eli Pettijohn, and the remaining designs, colors, words, and figures, all as since used; that said proposed wrapper was in fact brought to the notice of the complainant and its officers; that they, after such notice, made no objection, until this litigation was commenced. Complainant, on the other hand, insists that its officers had in fact no notice either of the sale of the machinery or of the label; said sale having been effected by a subordinate agent of complainant, and, as to part of said machinery, to one of the incorporators of defendant company, instead of to defendant by name, and said label never having been submitted to any person authorized by complainant to consider and pass upon the same.

The cause of action in the bill is unfair competition in trade. An injunction was prayed to stop the use by defendant of the name "Pettijohn," in defendant's corporate name, and in the designation of defendant's product, and to stop the use by defendant of its wrapper, or any wrapper showing the name "Pettijohn." An ex parte injunction was granted in the state court. The cause was then removed to this court. After a somewhat prolonged contention in this court touching the validity of the service of process, which was decided adversely to the defendant, complainant moved that defendant "be punished, by fine or otherwise, as may seem proper to the court, for contempt of court in disobeying the injunction herein." Defendant appeared to that motion, and was permitted, without objection by complainant, to present at the same hearing a motion for the dissolution of said injunction.

Eli Pettijohn believed himself to be the originator of the article of food known as "rolled wheat." The record seems to show a continuing effort or purpose on his part to establish a profitable business in the manufacture or preparation of that article. He was actually engaged in that business when he went from California to Minneapolis in November, 1893, as already mentioned. It can hardly be contended that he had not then the right to make, or rather to continue making, rolled wheat, and to market the same in packages bearing his name, in any part of the United States. Neither complainant nor its assigns could, by advertising the name "Pettijohn," prevent Eli Pettijohn from doing this. It would seem to follow, also, that he might secure the co-operation of others willing to assist him financially in the business, and that he might, with such co-operation, form a corporation for the purpose of carrying on such business: provided, always, he should take reasonable precautions to distinguish the business thus carried on by him from that of a competitor rightfully using the name "Pettijohn." The defendant corporation took the name "Eli Pettijohn Cereal Company." As already stated, a picture of Eli Pettijohn appears on defendant's wrapper, and the name "Eli Pettijohn" appears in full, and in plain, large, and conspicuous type, and the product is called "Eli Pettijohn's Best." The personality of this man, as distinguished from any other Pettijohn, is made as pronounced as possible; and the

comparison obviously suggested by the word "Best" is with other like products made formerly or contemporaneously by Eli Pettijohn himself, and not by any other manufacturer, but with a suggestion of advertising puffery not uncommon, and well understood by the trading public. Assuming a right in defendant to use the name "Eli Pettijohn," I see no substantial ground of objection to defendant's wrapper. One person cannot, by colorable artifice, benefit by the trade reputation of another. Where, for instance, one man has long made ale at a place called "Stone," and has long branded his goods as "Stone Ale," another who should remove a like business to the same locality, simply for the purpose of marking his goods "Stone Ale," would be enjoined. Again, the good will of a manufacturer will be protected from a competitor who simply buys from an indifferent third person, happening to have a name identical with said manufacturer, the privilege of using that name. But William A. Pettijohn and his assigns could not, by extensively advertising the name "Pettijohn," prevent Eli Pettijohn, who has for nearly 20 years been making or selling the same product, from selling or manufacturing in any part of the United States under the name "Eli Pettijohn." So far as manufacturing and selling Pettijohn's rolled wheat is concerned, Eli Pettijohn was not an indifferent third person. To hold that he was would be plainly against the showing made here. Complainant says that, before organizing the defendant corporation, Eli Pettijohn offered to "sell his name" to complainant. This, assuming it to be true, meant nothing more than that he claimed the right to compete in the territory east of the Rocky Mountains, or in the markets available to a manufacturer at Minneapolis. He also was willing, for a price, to covenant against such competition. Said offer was in fact a notice to complainant that Eli Pettijohn supposed himself to be identified with the rolled-wheat business, and that he desired or intended to start a mill for the manufacture of that article at Minneapolis, or at some locality which would bring him into competition with the complainant. Complainant insists that retail dealers and traveling salesmen impose on the public by substituting defendant's rolled wheat for that made by complainant, and that such fraud is made possible by the use of the name "Pettijohn" by defendant. Some confusion might, no doubt, arise by the common use of this name by the two competitors, but defendant denies any instigation of frauds of this kind. I cannot hold that the wrapper used by defendant, of itself,—assuming defendant's right to use the name "Pettijohn,"—indicates any purpose of confusing one product with the other, or of playing into the hands of persons disposed to fraudulently confuse the one product with the other.

Whatever ought to be the ruling as to the matters already spoken of, there is another point in the case which seems to me decisive. Rolled wheat is an article made at divers mills in this country. Each mill appears to indicate its own product by its own peculiar markings. Each mill, in this way, preserves the identity of its own product, and commends it to the public,—in other words, retains its own patronage or good will. Several of these mills, as already stated,—two, at least, in Ohio, one at Chicago, and one in Iowa,—are

owned by complainant. After the destruction of its Pettijohn mill at Minneapolis, complainant ceased to manufacture in that city. As already mentioned, it thenceforward supplied the patronage of the Minneapolis mill with the product of the mills in Ohio, at Chicago, and in Iowa. It used the same boxes and wrappers as had been used at the Minnesota mill, but left off the words "Minneapolis, Minnesota," without specifying any other place, or indicating in any manner the mill from which the product came. The machinery brought from California, and used, up to the fire, in making the "Pettijohn California Breakfast Food," was sold, as has been already stated, to defendant, and by defendant was, and apparently is still, used to make the rolled wheat now called "Eli Pettijohn's Best." The specific complaint is that the public buy the latter product, believing that complainant's mill is still running at Minneapolis, and that said product is made by complainant at said mill; in other words, so far as the good will bought by complainant from the Pettijohn California Breakfast Food Company depends on the belief by the trading public that said product is still made at the original Pettijohn mill in Minnesota, defendant trespasses on the same. It may be that the rolled wheat produced at complainant's mills at Akron, Ohio, for instance, is just as good as, or even better than, that made by William A. Pettijohn and his successors at the original Pettijohn mill in Minneapolis. But the product of the mill at Akron, Ohio, is not the product of the Pettijohn mill at Minneapolis. It is not the "Pettijohn California Breakfast Food," as understood in the trade up to the time when the good will of the Minneapolis mill was purchased by complainant. A court of chancery cannot preserve for complainant the benefit of an impression on the trading public which no longer has any basis of fact. I cannot declare a right in complainant to have people continue in the belief that the "Pettijohn California Breakfast Food" now marketed by it, is made at a Minneapolis mill. The injunction is dissolved, and in view of this ruling, and of the circumstances of the case, the contempt proceeding may be dismissed.

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MCBRIDE v. KINGMAN et al. SAME v. SICKLES et al. SAME v. AINSWORTH et al. SAME v. RANDALL et al.

(Circuit Court, S. D. Iowa, C. D. February 15, 1896.)

Nos. 2,306-2,309.

1. PATENTS—LIBERALITY OF CONSTRUCTION.

Liberality, rather than strictness, should prevail where the fate of the patent is involved, and the question to be decided is whether the inventor shall hold or lose the fruits of his genius and labors. This principle is not, however, to be carried so far as to exclude what is in the patent, or to interpolate anything which it does not contain.

2. SAME—COMBINATIONS.

Whatever is essential to the peculiar combination sought to be patented must be included in the claims. The patent cannot be construed to cover a result not mentioned in the claims, or even in the specification, and which is merely an afterthought of the inventor.

3. SAME—OMISSION OF ELEMENTS.

The omission from the claims of one device or element described in the specifications is a dedication of such device to the public.

4. SAME—TWO PATENTS TO SAME INVENTOR.

The fact that an element or device described in the specifications, but omitted from the combination covered by the claims, is afterwards included in a subsequent patent to the same inventor, does not in any way aid in giving to the earlier patent a construction whereby such device may be included in the combination thereof.

5. SAME—RIDING ATTACHMENTS FOR PLOWS.

The McBride patent, No. 199,082, for an improved riding attachment for plows, was not, in view of the prior state of the art, for a primary invention; and the combination covered by the claims is therefore not entitled to a broad range of equivalents. The patent construed accordingly, and *held* not infringed.

6. SAME.

The McBride patent, No. 284,036, also for an improved riding attachment for plows, was not anticipated by the prior patent to the same inventor; but the invention is of a secondary character, and the claims are to be construed as covering only the particular combinations claimed. *Held*, therefore, that the patent was not infringed.

These were four patent infringement suits, brought by J. H. McBride against the following defendants, respectively: Kingman & Co., R. M. Galbraith, and the Weir Plow Company; H. H. Sickles and Deere & Co.; James Ainsworth, John S. Bonbright, and the Moline Plow Company; and George W. Randall, Adam Dickey, and the Norwegian Plow Company.

Cummins & Wright, for plaintiff.

McVey & Cheshire, for defendants Moline Plow Co. and others.

John G. Manahan and N. M. Cady (W. W. Butterworth, of counsel), for defendants Kingman & Co. and others.

WOOLSON, District Judge. The four cases above entitled were heard together. Plaintiff, McBride, bases his several actions upon two patents for improved riding attachments to plow, issued to him as patentee, viz. No. 199,082, dated January 8, 1878, and No. 284,036, dated August 28, 1883. These patents are hereinafter referred to as plaintiff's 1878 and 1883 patents, respectively. Plaintiff asks decree for damages for infringements thereof, and for permanent injunction against each defendant. The defendants in each case, while denying infringement of plaintiff's patents, set up therein the patents under which they claim their several plows are lawfully manufactured. They also, each defendant using substantially the same terms, attack the validity of plaintiff's said patents. I have not deemed it necessary to enter specifically or fully into the questions raised as to such validity, the decision reached on other grounds rendering such inquiry unnecessary.

The second patent issued to plaintiff may be broadly stated as comprising improvements, as to detail, in methods of applying the general improvements claimed in his first patent. In argument herein, as in the introduction of proof, stress is particularly laid, by counsel for all parties, upon the first patent. The invention claimed by plaintiff in his first patent, which he states is an "improved riding attach-



ment for plows," is given in his specifications in said patent as follows:

"My invention relates to that class of plow attachments designed as a means of carrying a plowman in such position, relative to a plow, that his weight will aid in making the plow run smoothly and evenly without increasing the draft and labor of the horses, and that he may, by simply adjusting levers at his side, readily govern the width and depth of the furrow, and plow a field uniformly with a common plow without walking."

As to this first patent, counsel for plaintiff, in his printed brief, says (page 3):

"The plow shown in the drawings and described in the specifications is a three-wheeled riding plow, rigid in all its parts, but capable of two adjustments, viz. one for raising or lowering the front end of the plow beam, the other for changing the vertical plane of the plow and plow beam. The claims on which the plaintiff principally relies are the first and third. They are as follows:

"(1) In combination with plow beam and hinged axle, the lever, B, having the combination rack and fender, y, and lever, B', provided with the spring latch, z', substantially as and for the purposes shown and described."

"(3) The vertical lever, B', having the combined rack and fender, y, and the gravitating latch, h, the hinged axle, C, carrying the wheel, D, and rack, g, the jointed fulcrum, t, clamping the coulter, w, x, the horizontal lever, B<sup>2</sup>, having a spring latch at its rear end, and carrying a caster wheel at its front end, and the adjustable brace, m, when arranged and combined to operate substantially as and for the purposes shown and described."

"While it is our opinion that the invention of Mr. McBride is fairly set forth in both claims, we prefer the expression found in the first claim, and shall, therefore, while insisting upon both, give our attention chiefly to the first. This claim substantially describes, and claims in combination, all the essential parts of the plow. It omits nothing save the combining mechanism and the three wheels upon which the plow is mounted, and which, as will presently be shown, are not necessary to be specified in the claim, although necessary in the practical operation of the implement. The real discovery made by the complainant was the method of so rigidly attaching a plow beam to the axle upon which the wheels were mounted as that the bottom of the plow would at all times bear a fixed relation to the furrow wheel. This was the characteristic of the invention,—a characteristic that distinguished the plow in which it was embodied from all prior structures; a characteristic that converted failure into success, and revolutionized the industry."

In construing the first claim of this patent (1878), it becomes important to determine whether plaintiff's device is a "primary invention." And this brings us at once to the doctrine to be applied in construing these claims. There can be little difference of opinion as to the basis of this construction.

In *Masury v. Anderson*, 11 Blatchf. 165, Fed. Cas. No. 9,270, Justice Blatchford said:

"The rights of the plaintiff depend upon the claims in his patent, according to its proper construction, and not upon what he may erroneously suppose it covers."

In *Keystone Bridge Co. v. Phoenix Iron Co.*, 95 U. S. 274, 278, the court say:

"If the patentees have not claimed the whole of their invention, and the omission has been the result of inadvertence, they should have sought to correct the error by a surrender of their patent, and an application for a reissue. \* \* \* But the courts have no right to enlarge a patent beyond the scope of its claim as allowed by the patent office or the appellate tribunal to which contested applications are referred. When the terms in a patent

are clear and distinct (as they always should be), the patentee, in a suit brought upon the patent, is bound by it. \* \* \* He can claim nothing beyond it."

In *White v. Dunbar*, 119 U. S. 47, 51, 7 Sup. Ct. 72, the court say:

"The claim is a statutory requirement, prescribed for the very purpose of making the patentee define precisely what his invention is; and it is unjust to the public, as well as evasion of the law, to construe it in a manner different from the plain import of its terms."

In *McClain v. Ortmyer*, 141 U. S. 419, 423, 12 Sup. Ct. 76, the court say:

"While the patentee may have been unfortunate in the language he has chosen to express his actual invention, and may have been entitled to a broader claim, we are not at liberty, without running counter to the entire current of authority in this court, to construe such claims to include more than their language fairly imports. Nothing is better settled in the law of patents than that the patentee may claim the whole or any part of his invention, and that, if he only describe and claim a part, he is presumed to have abandoned the residue to the public. The object of the patent law in requiring the patentee to 'particularly point out and distinctly claim the part, improvement, or combination which he claims as his invention or discovery,' is not only to secure to him all to which he is entitled, but apprise the public of what is open to them. The claim is the measure of his right to relief, and, while the specification may be referred to, to limit the claim, it can never be made available to expand it."

And see *Railroad Co. v. Mellon*, 104 U. S. 112; *Deering v. Harvester Works*, 155 U. S. 296, 15 Sup. Ct. 118.

The same principle of construction is clearly and forcibly stated by Circuit Judge Sanborn, in delivering the opinion in *Stirrat v. Manufacturing Co.*, 10 C. C. A. 216, 61 Fed. 980.

"The claim of a specific combination or device in a patent is a renunciation of every claim to any other combinations or devices for performing the same functions that are apparent from the face of the patent, and are not colorable evasions of the combination or device claimed. The statute requires the inventor to 'particularly point out and distinctly claim the part, improvement, or combination which he claims as his discovery.' Rev. St. § 4888. When, under this statute, the inventor has done this, he has thereby disclaimed and dedicated to the public all other improvements and combinations, apparent from the face of his specifications and claims, that are not evasions of the device and combination he claims as his own. The claims of his patent limit his exclusive privileges, and his specific actions may be referred to, to explain and to restrict, but never to expand, them."

The construction of the patent must not be made in an illiberal spirit, with a view to destroy the grant. A patent should be construed in a liberal spirit, to sustain the just claims of the inventor. This principle is not to be carried so far as to exclude what is in it, or to interpolate anything which it does not contain. But liberality, rather than strictness, should prevail where the fate of the patent is involved, and the question to be decided is whether the inventor shall hold or lose the fruits of his genius and his labors. *Rubber Co. v. Goodyear*, 9 Wall. 788. Patents for inventions are to receive a liberal construction, and, under the fair application of the rule, "ut res magis valeat quam pereat," are, if practicable, to be so interpreted as to uphold, rather than to destroy, the right of the inventor. *Turrill v. Railroad Co.*, 1 Wall. 491.

The further rule is stated by the supreme court in *Roemer v. Peddie*, 132 U. S. 317, 10 Sup. Ct. 98, that:

"When the patentee, on the rejection of his application, inserts in his specification, in consequence, limitations and restrictions, for the purpose of obtaining his patent, he cannot, after he has obtained it, claim that it shall be construed as it would have been construed if such limitations and restrictions were not contained in it."

Or, as stated in *Caster Co. v. Spiegel*, 133 U. S. 368, 10 Sup. Ct. 409:

"When a patentee has modified his claim in obedience to the requirements of the patent office, he cannot have for it an extended construction which has been rejected by the patent office; and in a suit on his patent his claim must be limited, where it is a combination of parts, to a combination of all the elements which he has included in his claim as necessarily constituting that combination."

"It must be further borne in mind that the state of the art to which an invention belongs, at the time that invention was made, must be considered in construing any claim for that invention. *Carlton v. Bokee*, 17 Wall. 463; *Railway Co. v. Sayles*, 97 U. S. 554. "It is well settled that the \* \* \* claim must be read and interpreted with reference to the rejected claims and to the prior state of the art, and cannot be so construed as to cover either what was rejected by the patent office or disclosed by prior devices." *Knapp v. Morss*, 150 U. S. 225, 14 Sup. Ct. 81.

The file wrapper and contents of plaintiff's 1878 patent are in evidence herein. These show that a patent was not allowed to plaintiff until after the patent office had five times rejected the application, and after plaintiff had five times amended his claim, and that these rejections were almost entirely based on the fact, as determined by that office, that the claims presented by the plaintiff were in conflict with prior patents. Defendants have introduced in evidence over 50 letters patent, prior to the 1878 patent to plaintiff, all of which relate to plow attachments, nearly all to different methods relating to riding plow attachments, and all in some way attempting to produce some of the results claimed herein by plaintiff as resulting from his invention, by devices in many respects closely analogous to those used, in whole or in part, by plaintiff. So that it is apparent, on inspection of those patents, that every result attempted by plaintiff, as expressed in his claim in this 1878 patent, had been thus attempted, and some of the attempts successfully, by other inventors to whom letters patent had been issued.

Counsel for plaintiff insists, however, that the real discovery made by complainant was "the method of so rigidly attaching a plow beam to the axle upon which the wheels were mounted as that the bottom of the plow would bear at all times a fixed relation to the furrow wheel." He adds:

"This was the prominent characteristic of the invention,—a characteristic that distinguished the plow in which it was embodied from all prior structures."

An insurmountable obstacle to this conclusion is that plaintiff nowhere in his claims, nor even in his specification, announces this as a result attempted or secured. In the original application presented

by him, as well as in that on which his letters patent issued, he states that he has "invented an improved riding attachment for plows." In the original application he commences his specification with:

"The object of my invention is to provide an improved means of carrying a plowman in such a position, relative to a plow, that his weight will aid in making the plow run smoothly and evenly without increasing the draft and labor of the horses, and that he may, by simply adjusting levers at his side, readily govern the width and depth of the furrow, and plow a field uniformly with a common plow without walking."

The specification, as rewritten by plaintiff, and as accompanying the letters patent issued, states:

"My invention relates to that class of plow attachments designed as a means of carrying a plowman in such position, relative to a plow."

—And then follows remainder of specification as above copied. Neither in specification nor claim is there mention or suggestion that his invention bears any relation to, or in any way will affect, the plow, so that "the bottom of the plow will bear at all times a fixed relation to the furrow wheel." If, as stated by Justice Blatchford, *supra*, "the rights of the plaintiff depend upon the claim in his patent, according to its proper construction, and not upon what he may erroneously suppose it covers," the conclusion is irresistible that the afterthought of the inventor cannot control or change his claims, as expressed in the patent, nor the only purpose or result of his invention as he at the time regarded and stated it. It may also be noted that, in his specification, accompanying the letters issued, plaintiff expressly declares, "My invention relates to that class of plow attachments designed," etc., thereby recognizing that plow attachments were then in existence which were designed to effect the result he was seeking to effect by his invention.

As touching the patent issued before the date of plaintiff's 1878 patent, we may note, out of the over 50 patents in evidence, and because of the similarity in many respects to the device of plaintiff as patented, in some of its elements, that at least 10 of these patents claim to effect the raising or elevating of the point of the plow by levers located within the driver's reach as he rides the plow; at least 5 of them effect the "canting" or oscillating of the plow by levers attached to the plow beam; and at least 5 of them have a rear or furrow wheel attached to the plow beam or frame. Especially are the patents issued to Felker (No. 48,387, June 27, 1865) and to Bailey (No. 184,579, May 27, 1876) closely similar to the devices of plaintiff as regards the devices for elevating point of plow and "canting" the plow. Had these two added a furrow wheel, attached to plow beam, it may be doubted whether plaintiff would have been granted any letters patent except on the most restricted claims, in every respect. Was plaintiff, then, a pioneer in this field of invention? It is difficult to define a primary invention, so that the definition shall accurately apply to all inventions. Perhaps as satisfactory consideration of this matter as can be found is contained in the opinion of Justice Bradley, in *Railway Co. v. Sayles*, 97 U. S. 554. The learned justice, in his consideration of the patent involved in that case (rail-road brakes) says:

"Like almost all other inventions, that of double brakes came when, in the progress of mechanical improvement, it was needed; and, being sought by many minds, it is not wonderful that it was developed in different and independent forms, all original, and all bearing a somewhat general resemblance to each other. In such cases, if one inventor precedes all the rest, and strikes out something which includes and underlies all that they produce, he acquires a monopoly, and subjects them to tribute. But if the advance toward the thing desired is gradual, and proceeds step by step, so that no one can claim the complete whole, then each is entitled only to the specific form of device which he produces, and every other inventor is entitled to his own specific form, so long as it differs from those of his competitors, and does not include theirs."

After examining the different letters patent relating to plow attachments, and especially riding attachments for plows, it is impossible to escape the conclusion that, within the statement of Justice Bradley above quoted, plaintiff was not a pioneer in the field of invention wherein his letters patent place his claims. Such was the conclusion reached by Judge Shiras, in this court (*McBride v. Plow Co.*, 40 Fed. 162), with regard to plaintiff's 1883 patent. How far, then, is the doctrine as to equivalents applicable to this invention of plaintiff, which we have found to be of a secondary nature? In *Miller v. Manufacturing Co.*, 151 U. S. 186, 207, 14 Sup. Ct. 310, as delivered by Justice Jackson in 1894, appears the following:

"The range of equivalents depends upon the extent and nature of the invention. If the invention is broad and primary in its character, the range of equivalents will be correspondingly broad, under the liberal construction which the courts give to such inventions."

As illustrating the difference, in breadth of liberality of construction, in these respects, between a primary invention and one not primary, we may profitably compare the declaration, in *Machine Co. v. Lancaster*, 129 U. S. 263, 9 Sup. Ct. 299:

"Where the invention is of a primary character, and the mechanical functions performed by the machine are, as a whole, entirely new, all subsequent machines which employ substantially the same means to accomplish the same result are infringements, although the subsequent machines may contain improvements in the separate mechanisms which go to make up the machine,"

—With the statement of the same justice (Blatchford) in *Duff v. Pump Co.*, 107 U. S. 636, 2 Sup. Ct. 487:

"The case is one where, in view of the state of the art, the invention must be restricted to the form shown and described by the patentee. \* \* \* Todd was not a pioneer. He merely devised a new form to accomplish these results. The defendant adopts another form. Under the circumstances, the Todd patent cannot be extended so as to embrace the defendant's form. The latter is not mere colorable departure from the form of Todd, but a substantial departure."

So, in *Rowell v. Lindsay*, 113 U. S. 97, 5 Sup. Ct. 507:

"The patent being for a combination, there can be no infringement unless the combination is infringed. In *Prouty v. Ruggles*, 16 Pet. 336, it was said: 'This combination, composed of all the parts mentioned in the specification, and arranged with reference to each other and to the other parts of the plow in the manner therein described, is stated to be the improvement, and is the thing patented. The use of any two of these parts only, or of two combined with a third which is substantially different in form or in the manner of its arrangement and connection with the others, is, therefore,

not the thing patented. It is not the same combination, if it substantially differs from it in any of its parts.' \* \* \* But this rule is subject to the qualification that a combination may be infringed when some of the elements are employed and for the others mechanical equivalents are used which are known to be such at the time the patent was granted."

Meter Co. v. Desper, 101 U. S. 332, states the proposition as to combination in these words:

"It is a well-known doctrine of patent law that the claim of a combination is not infringed if any of the material parts of the combination are omitted. It is equally well known that, if any of the parts is only formally omitted, and is supplied with a mechanical equivalent, performing the same office and producing the same result, the patent is infringed."

As stated in plaintiff's 1878 patent, the first claim (above copied) includes the plow beam and hinged axle (the axle extending from land wheel to plow beam, on the latter of which the axle is hinged), a vertical lever (fastened rigidly to the plow beam near the driver's seat, and whose office is to "cant" or oscillate the plow beam, and thereby the plow attached thereto), a horizontal lever (extending from front end of beam to the vertical lever), into which a spring latch (attached to the rear end of the horizontal lever) works for the purpose of holding such horizontal lever at the place desired by the driver. This claim is complete in but one result accomplished, viz. affording a device for elevating or depressing the point of the plow, by means of the horizontal lever, operated by the driver from his seat on the plow, if, indeed, the claim is complete in that result. No attachments are described for this horizontal lever, except at its rear end, where it is secured by means of the spring latch to the combined rack and fender, which latter is attached to the vertical lever, such lever being attached rigidly to the plow beam. We are authorized to thus regard the vertical lever because of the words in this claim, "In combination with the plow beam." It may be possible that the liberality of construction, spoken of above, would permit us to also include the attachments by which the horizontal lever is attached to the plow beam, since, in specification and drawing, such attachment is shown at what is called, in the second claim, a "joined fulcrum," which is an upright piece attached to the plow beam at the point where the coulter is attached. The forward end of this horizontal lever is not attached to the plow beam. But it is attached to an upright standard which passes a short distance from the front end of the plow beam through a casting (the casting being attached to the beam), and terminates at the axle of a caster wheel, resting on the ground. The operating of this horizontal lever, according to the specification, is accomplished by the driver, from his seat, elevating or lowering the rear end of the lever. As he elevates it, the upright piece ("joined fulcrum") enables him to press down upon the upright standard (which extends, as above, from the forward end of lever to caster wheel), and thereby raise the front end of the plow beam, thus elevating the point of the plow. But, unless, by the phrase, "In combination with the plow beam," the claim is made to include the caster wheel and its upright standard, this claim does not describe any effective operation of the horizontal lever, and therefore no effective attempt at raising the plow beam and plow. The claim does not per-

mit another movement of the plow, its lateral or "canting" movement. This is accomplished by means of the vertical lever. As the driver draws towards him or pushes from him the top of this upright lever, the plow is "canted" accordingly. But the claim does not describe any means for holding the plow in this "canted" position. The specification describes, and the drawing shows, a segmental rack into which a gravitation latch, also described in specification and shown in drawing, engages and locks this vertical lever. But neither this rack nor this lever is made part of the combination as claimed. So that, although the driver may thus "cant" his plow, the combination, as claimed, affords no means of maintaining such position of the plow, except as the driver may maintain it by retaining his hold on the vertical lever. By this claim, the vertical and horizontal levers are rigidly locked together, through action of the combined rack and fender described, while the plow is in operation.

Plaintiff insists that there is secured to him, under this claim, a combination whereby "the bottom of the plow at all times bears a fixed relation to the furrow wheel." The specification described, and the drawing shows, a wheel rigidly attached to or near the rear end of the plow beam, and which is behind the plow, and runs in the fresh furrow. This furrow wheel has no attachment other than to the plow beam. This claim, however, is entirely silent as to this furrow wheel. It nowhere makes this furrow wheel a part of the combination therein claimed by plaintiff as his invention. That he might have included it in this combination, and thus made it a part of his invention, is of no avail. Rather, it must be presumed that, since he might have so claimed, and did not, he elected to "dedicate to the public" this part not claimed. It may be that plaintiff might have been justified in assuming this furrow wheel as a part of the plow structure to such a degree as that it needed not specific mention, if, in the state of the art at the date of his application, riding plows were generally equipped with such wheel in the position and substantially attached as in plaintiff's specification. The proof shows no such state of the art at that time, but rather that, while some of these plows were equipped with a furrow wheel, these were exceptions rather than the general rule. Besides, if this wheel, as now claimed by plaintiff, is an essential part of his invention, if—using the words of Judge (now Justice) Brown, in *Inspirator Co. v. Jenks*, 21 Fed. 911—this wheel was "essential to the peculiar combination" plaintiff desired to patent, he should have included it in his claim for a combination. Said Judge Brown:

"In drawing the claims for a combination patent, we do not understand it to be necessary to include any elements except such as are essential to the peculiar combination and are affected by the invention. Other portions of the machine are shown usually in the drawings, to exhibit their relation to the patented combination, and they are wholly unnecessary to the validity of the claims."

It necessarily follows that whatever was "essential to the peculiar combination" sought to be patented must be included in the claim thereof. And the design stated by plaintiff in his specification—affording the plowman, "by simply adjusting levers by

his side, to govern the width and depth of the furrow, and plow a field uniformly with a common plow without walking," and that the plowman's "weight will aid in making the plow run evenly and smoothly without increasing the draft and labor of the horses"—must be accepted as having been intended and designed by him to be accomplished by the combination he claims in his application as his invention; and that whatever is not included in his claim for such combination was not then intended by him to be a part of, nor regarded as essential to, such combination.

Further, if plaintiff, in his specification, in stating the design of his invention,—what his invention was intended to accomplish,—did not state such design or result as he now states it, and especially if his present statement would make essential to the combination, to effect such result, elements which he did not include in his claim for the combination, for whose invention he asked the patent, we are authorized and forced to conclude his present statement of the design or result to be an afterthought, and not to have then been contemplated by him. His invention must stand or fall by the claims he then made, and on which his patent issued.

The second claim of this 1878 patent relates only to the jointed fulcrum as it is called, which at its upper end is attached to the horizontal lever, and at its lower end to the plow beam and coulter.

The third claim is as follows:

"The vertical lever, B', having the combined rack and fender, y, and the gravitating latch, h, the hinged axle, C, carrying the wheel, D, and rack, g, the jointed fulcrum, t, clamping the coulter, w, x, the horizontal lever, B<sup>2</sup>, having a spring latch at its rear end, and carrying a caster wheel at its front end, and the hinged and adjustable brace, m, when arranged and combined to operate substantially as and for the purposes shown and described."

The hinged brace, m, extends from the front end of plow beam to the inner side of the land wheel, D, so as to constitute a curved axle brace. In this third claim we now have the front (caster) wheel, so that this patent may be held to include such wheel as a part of the invention. But the rear (furrow) wheel is not made a part of the combination under this claim, and is not a part, therefore, of the invention secured by these letters patent. It affords us no assistance, in construing this 1878 patent, that this rear wheel is made a part of the combination described in the 1883 patent, for neither patent can thus support the other. Each must be construed, on this point, as to its own validity and effect, under the same general rules as though the patents had issued to different patentees.

But I need not pursue this matter further. The plows manufactured and sold by the several defendants, and which are claimed to be infringements of this 1878 patent, have been brought into court, and their methods of operation illustrated. They have also, by drawings, been introduced in evidence as exhibits. It would serve no useful purpose to consider each plow in detail, as to its several parts and mode of operation. I find in none of them the entire combination contained in any claim in plaintiff's 1878



patent. None of them have the rigid method of connecting the vertical lever and horizontal levers which are prominent factors of the combination in claims 1 and 3. None of them have the jointed fulcrum described in claim 2. None of them have the combined rack and fender, which are made parts of the combination in claims 1 and 3. And we find in none of defendants' said plows any devices, which so appear, in their method and result of operation, to be mechanical equivalents for the above-named elements as in any wise to become colorable evasions. All of the plows manufactured or sold by defendants which have been brought into court do not include these above-named elements of plaintiff's combinations. The operations of defendants' plows are effective, without the presence of any one of said elements. We may here adapt the language in *Miller v. Manufacturing Co.* (page 208, 151 U. S., and page 310, 14 Sup. Ct.), and say:

"The specific device [or elements] described in and covered by the [McBride] patent could not be used in defendants' combinations, nor defendants' [device or its elements] in the plaintiff's combinations. This interchangeability or noninterchangeability is an important test in determining the question of infringement."

Plaintiff's counsel, in printed brief, says:

"We may frankly say that, if the court holds that the complainant is not entitled to a reasonable application of the doctrine of mechanical equivalents, we believe that there is no infringement on the part of respondents of the first claim of the 1873 patent."

And this statement is based on his claim of mechanical equivalents as applied to primary inventions, of which he claims plaintiff's invention to be an instance. Under the well-settled doctrines applicable, I find that, as to plaintiff's said 1878 patent, no infringement on the part of any of the defendants has been proven.

As to plaintiff's second patent, that of August 28, 1883, it is insisted by defendants that said letters patent are void, because they were anticipated by the first letters issued to plaintiff, contain the same combination as the first letters, contain no new elements, and do not enlarge the claims of the first patent. Justice Jackson considers at some length, and with considerable of detail, in *Miller v. Manufacturing Co.*, 151 U. S. 186, 198, 199, 14 Sup. Ct. 310, the doctrines applicable to second patents to the same person wherein the invention relates to any part of the subject-matter of the former patent. After an extended examination of the decisions of the court, he says:

"The result of the foregoing and other authorities is that no patent can issue for an invention actually covered by a former patent, especially to the same patentee, although the terms of the claim may differ; that the second patent, although containing a broader claim, more general in its character than the specific claims contained in the prior patent, is also void; but that, when the second patent covers matter described in the prior patent, essentially distinct and separable from the invention covered thereby, and claims made thereunder, its validity may be sustained. In the last class of cases, it must distinctly appear that the invention covered by the later patent was a separate invention, distinctly different and independent from that covered by the first patent; in other words, it must be something substantially dif-

ferent from that comprehended in the first patent. It must consist in something more than a mere distinction of the breadth or scope of the claims of each patent. \* \* \* It is settled, also, that an inventor may make improvements on his own invention of a patentable character, for which he may obtain a separate patent; and the cases cited by the appellee come to this point, and to this point only, that a later patent may be granted where the invention is clearly distinct from and independent of one previously patented. \* \* \* It is not the result, effect, or purpose to be accomplished which constitutes invention, or entitles a party to a patent, but the mechanical means or instrumentalities by which the object sought is to be obtained; but a patentee cannot so split up his invention for the purpose of obtaining additional results, or of extending or prolonging the life of all or any of its elemental parts. Patents cover the means employed to effect results."

Tested by the doctrines thus announced, plaintiff's second patent is not invalid for any of the reasons assigned by defendants. The five claims included in this second patent are well and truly summarized by counsel for plaintiff, as follows:

"What we claim for the patent of 1883 is an improvement in the levers used for raising and lowering the front end of the plow and for oscillating it."

No useful purpose would be served by specifying the elements and combinations which, as claimed in the patent, bring the second patent, when compared with the first, within the doctrine announced in the above quotation. The invention claimed in the second patent is in no sense a primary invention, but in the fullest sense is secondary, and, in the state of the art when issued, can receive a construction only granting a monopoly on the particular combinations therein claimed, applied specifically thereto. Had this second patent been issued in 1878, instead of that then issued, and claims accordingly enlarged, a different result might have been obtained as to some of the plows manufactured by the defendants; or if, to the plowing machine, as shown in the 1883 patent, the doctrines relating to primary inventions were applicable, a like result might obtain. But plaintiff is held closely to the doctrines applicable to mere combinations which result in improvements on inventions which have long passed the primary stage. The claims herein do not strike out into any new field, but are merely changed and improved methods of operation in fields wherein many other inventors, including plaintiff himself in his former patent, had been at work. I will not attempt to make a detailed or specified examination or comparison herein of defendants' several plows, in evidence, with regard to this second patent of plaintiff. To so attempt would add much length to this opinion, without resulting benefit; and, on the oral hearing, as well as in his printed brief, the contest, as made by plaintiff, lay as to infringement against the first patent. I may say that, having carefully made such comparison, I find no infringement proven, on the part of any of the defendants, with regard to any of the claims contained in plaintiff's patent of August 28, 1883.

On the whole case, therefore, I find the equities with the defendants. Let decree be entered dismissing the several bills in each of the actions entitled on the first page of this opinion, with costs against plaintiff in each case. To all of which, in each case,

plaintiff duly excepts, and is given 90 days to complete and file certificates of evidence, bill of exceptions, or such other statement of exceptions as he may be advised.

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**BRESNAHAN et al. v. TRIPP GIANT LEVELLER CO.**

(Circuit Court of Appeals, First Circuit. February 14, 1896.)

No. 162.

**1. APPEALS FROM INTERLOCUTORY INJUNCTIONS—PATENT CASES—PRIOR DECISIONS.**

Upon appeal from an order granting a temporary injunction against infringement of a patent, the circuit court of appeals is governed by the same general rules as the circuit court, and must, with necessary limitations, put itself in the place of that court. It must therefore give proper effect to prior adjudications establishing the validity of the patent, or determining its construction.

**2. PATENT INFRINGEMENT SUITS—PRELIMINARY INJUNCTION—PRIOR ADJUDICATIONS.**

In general, where the validity of a patent has been sustained by a prior adjudication on final hearing, and after bona fide and strenuous contest, the matter of its validity, on motion for preliminary injunction in subsequent cases, is no longer at issue, except where a new defense is interposed, in which case the evidence to support it must be so cogent and persuasive as to convince the court that, if it had been presented in the former case, it would probably have led to a contrary conclusion. *Electric Manuf'g Co. v. Edison Electric Light Co.*, 10 C. C. A. 106, 61 Fed. 834, followed.

**3. SAME—APPEAL FROM PRELIMINARY INJUNCTION.**

Quære, whether the rule in relation to the binding effect of a previous decision, on an application for preliminary injunction, will be applied by the circuit courts of appeals to previous decisions of the circuit courts, or will be limited to adjudications of the circuit courts of appeals. See *National Cash-Register Co. v. American Cash-Register Co.*, 3 C. C. A. 559, 53 Fed. 367.

**4. SAME—CONSTRUCTION OF CLAIMS.**

It is seldom, if ever, that the words "substantially as described" aid the courts in construing the claims of a patent. In view of the fact that the statutes require the applicant to give a "written description" of his invention, the words in question are usually implied, if not expressed. They cannot enlarge a patent for a narrow invention, or narrow a claim which is justly broad.

**5. SAME—BEATING-OUT MACHINES.**

The Cutcheon patent, No. 384,893, for an improvement in machines for beating out the soles of boots and shoes, held for the purposes of this appeal, on the strength of the prior decision of the court of appeals for the First circuit in 8 C. C. A. 475, 60 Fed. 80, to be infringed as to claim 1.

**6. SAME—FORM OF ORDER.**

*Davis Electrical Works v. Edison Electric Light Co.*, 8 C. C. A. 615, 60 Fed. 276, applied as to the form of the order affirming the order below with the qualification therein stated.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

This was a bill in equity by the Tripp Giant Leveller Company against Morris V. Bresnahan and others for alleged infringement of a patent. The circuit court made an order granting a preliminary injunction (70 Fed. 982), and the defendants have appealed.

Thomas W. Porter, for appellants.

Causten Browne and Alexander P. Browne, for appellee.

Before PUTNAM, Circuit Judge, and NELSON and WEBB, District Judges.

PUTNAM, Circuit Judge. This is an appeal from the order of the circuit court granting a temporary injunction against the infringement of claim 1 of patent No. 384,893, dated June 19, 1888, issued to James C. Cutcheon, as follows:

"A machine for beating out the soles of boots and shoes, provided with two jacks, two molds, and means, substantially as described, having provision for automatically moving one jack in one direction, while the other is being moved in the opposite direction, whereby the sole of the shoe upon one jack will be under pressure while the other jack will be in a convenient position for the removal of the shoe therefrom."

In *Davis Electrical Works v. Edison Electric Light Co.*, 8 C. C. A. 615, 60 Fed. 276, this court suggested that, on an appeal of this class, it probably would not cut down an appellant to the mere question whether the court below had acted within the limits of its discretion. Nevertheless, this court, in the determination of the question of the allowance of a temporary injunction in favor of a patentee, is governed by the same general rules as the circuit court, and must, with necessary limitations, put itself in the place of that court. This observation applies to the extent of requiring us to give their proper effect to prior adjudications establishing the validity of the patent in suit, or determining its construction. The force of such adjudications in connection with applications for temporary injunctions in patent causes has been uniformly stated in substantially the same terms, but nowhere better than by the circuit court of appeals for the Seventh circuit in *Electric Manuf'g Co. v. Edison Electric Light Co.*, 10 C. C. A. 106, 61 Fed. 834, 836, as follows:

"It may be difficult to formulate a rule that will comprehend all the conditions which could be presented, but we think it safe to say that in general, where the validity of a patent has been sustained by prior adjudication upon final hearing, and after bona fide and strenuous contest, the matter of its validity upon motion for preliminary injunction is no longer at issue, all defense, except that of infringement, being reserved to the final hearing, subject, however, to the single exception that, where a new defense is interposed, the evidence to support it must be so cogent and persuasive as to impress the court with the conviction that, if it had been presented and considered in the former case, it would probably have availed to a contrary conclusion."

Whether this court will apply the rule in favor of decisions of the various circuit courts, or will limit it to adjudications of the appellate courts, as was apparently done by the circuit court of appeals for the Third circuit in *National Cash-Register Co. v. American Cash-Register Co.*, 3 C. C. A. 559, 53 Fed. 367, we need not inquire, as the prior adjudication relied on in this instance was our own.

Prior to the filing of the bill in the case at bar, a suit in equity was brought in the circuit court for the district of Massachusetts, charging infringement of the same patent and the same claim as are in question here. The claim was sustained. The opinion of the court was reported in *Cutcheon v. Herrick*, 52 Fed. 147. The case involved

an examination of the prior state of the art and several alleged anticipations, and the court said:

"The result of this brief review of the prior art shows that, previous to the Cutcheon patent, the operation of clearing the last from the die had never been done automatically. The essence of the Cutcheon invention is that it was the first machine in which both the motions of compressing the last and of clearing the last from the die were performed automatically."

The case came here by appeal from the usual interlocutory decree for a perpetual injunction and a master, and was here fully argued and carefully considered. It was disposed of by us at the October term, 1893, under the title of *Herrick v. Tripp Giant Leveller Co.*, reported in 8 C. C. A. 475, 60 Fed. 80. The decree below was affirmed, and the following is the whole of our opinion on the topic now in controversy:

"The court below was right in holding that the first and third claims of the Cutcheon patent were valid, and were infringed by the machine used by the appellants; that the iron last in the appellants' machine was a mechanical equivalent for the jack of the patent; and that there was no sufficient proof that the mechanism of the third claim was in use by others prior to October 28, 1887, the date of the application for the patent. See the opinion of the court below in *Cutcheon v. Herrick*, 52 Fed. 147."

These proceedings were laid before us at this hearing, but, if they had not been, we, probably, would have been entitled to take notice of them, as they appear of record in this court. *Butler v. Eaton*, 141 U. S. 240, 243, 244, 11 Sup. Ct. 985; *Aspen Mining & Smelting Co. v. Billings*, 150 U. S. 31, 38, 14 Sup. Ct. 4.

The parties are not shown to us to be the same in the two proceedings, nor to be so far in privity that the earlier decree operates as an estoppel; but the circumstances require us to apply the rule we have cited from *Electric Manufg Co. v. Edison Electric Light Co.*, *ubi supra*. And we may add that no case could afford a better practical illustration than this of the wisdom of the indisposition of courts to try anew the merits of patents on the crude and incomplete class of proofs frequently incident to motions for temporary injunctions.

The main defense in this case is that defendants' machine does not infringe the claim in issue. This machine is the same as the infringing machine in *Herrick v. Leveller Co.*, *ubi supra*, with certain modifications explained by the defendants as follows:

"Complainants' machine comprises two pairs of toggle joints, each pair having an arm extending from the lower half or member of such toggle; a two-throw crank shaft arranged in rear of the plane of the upper and lower pivots of said toggles; a pitman connected with each of said cranks, and connected with said arm extending from said toggles; a treadle, which, when depressed, locks the driving pulley on its shaft to start the machine, by which starting the treadle is locked down so that the machine goes on to the end of the movement, and so when one shoe is put under pressure, and the other released and lowered, the machine then stops, provided the operator has released his foot from the treadle. There is also a table pivoted to the upper end of the upper arm of each of said toggles, and upon said tables are arranged the lasts or jacks. Thus, when complainants' machine is put in operation, the rotation of the crank shaft, acting upon its pitman, bends one toggle joint, and straightens the other, by which means one shoe is cleared from the mold and the other is brought into contact with the mold; each such movement, when once started, going on automatically till it is completed. The defend-

ants have no crank shaft in rear of their toggle joints, for the simple reason that they have no toggle joints; and for the same reason they have no pitmen extending from the throws of the crank to the toggle joints. They have a two-throw crank shaft, on each throw of which is mounted a pitman, and the upper end of each pitman is pivoted to a table which carries a last, said tables being each connected with a block that slides upon an oblique bar, and is so formed that the last table moves up and down in said block. There are also a pair of treadles and an oscillating frame, together with a rock shaft having oppositely extended arms, to which the treadles are respectively connected; and said rock shaft also has an arm that is arranged to be engaged by two trundles on a gear or wheel which alternately actuate it in opposite directions, so that, when the operator depresses the proper treadle, the oscillating frame is thereby depressed, by which the pulley on the driving shaft is locked, the rock shaft is slightly turned, and the machine set in motion, and will make a half revolution, provided the operator constantly holds the treadle depressed; and, when the half revolution of the crank shaft is made, the proper treadle actuates said rock shaft, thereby raising the depressed treadle, thus allowing the oscillating frame to rise, and stopping the machine, whether the operator wills or not. But, as above stated, all through each half revolution of the crank shaft the operator must incessantly hold the treadle depressed or the machine instantly stops. Then the other treadle is depressed, and the operation repeated. At each half revolution of the crank shaft the pitman on the rising crank is carried bodily upward and inward, till the sliding block on the oblique rod has reached a position directly over the crank shaft, and then the pitman is carried straight upward to the full extent of the throw, and till the shoe is under full pressure against its mold. When each pitman is being raised, the inward swinging of the upper end is aided by a roll secured to the pitman above the crank, said roll acting within a cam secured to the frame of the machine; and, when the pitman is being moved downward, the swinging to the front of its upper end is aided by a roll secured to it below the crank, which acts against a cam secured to the frame of the machine."

The circuit court, on granting the injunction order appealed from, found that these modifications did not relieve the character of the machine as infringing. The court defined the changes as follows:

"The differences between the two machines consist mainly in the specific form of connecting mechanism between the crank shaft and the jacks, and in the form of the treadles. In place of the toggle joint and arms connecting the crank shaft with each jack described in the Cutcheon patent, the defendants have substituted a crank and connecting rod." "The specific construction of the treadle is also different in the defendants' machine, though the mode of operation is in substance the same. In the defendants' machine the operator must hold the treadle down until the machine stops; while in the Cutcheon machine the treadle, when depressed, is held down by a catch until the machine is stopped. The difference between the two devices lies in the absence of the catch in the defendants' treadle." "In both devices, when the treadle is depressed, the machine is automatically stopped upon each half revolution of the crank shaft."

We agree with this description of the substance of the changes made in the machine. Our former decision gave such breadth to the claim in issue as to cover the alleged infringing machine in the earlier suit. We are of opinion that the modifications described do not withdraw this case from the scope of that decision. Claim 1 of the patent in suit is a very broad one, and, as we held it valid, it would seem that no method of making the connection between the actuating jacks and the crank shaft, by means well known in the arts at the date of the patent, would evade it. We are also unable to perceive that the discussion in relation to the treadles and their connections are

pertinent, as there is nothing in the letter of claim 1, or in the opinions of either this court or the circuit court in the former case, which makes any automatic stop movement, or any other stop movement, an element. When the circuit court said in the case at bar that the automatic stop movement "is the essential characteristic of the Cutch-eon device," it departed from what was decided by us in *Herrick v. Leveller Co.*, *ubi supra*. There was nothing in that case in either court which called for any elements except those stated in the claim; and these, as explained by the circuit court in the extract we have made from its opinion, cover the first device in which both of the operations of compressing and clearing were performed automatically, and specify no elements except two jacks, two molds, and means for automatically moving one jack in one direction while the other is being moved in another direction. The automatic stop movement is the subject-matter of a later claim or claims.

But the appellants maintain that they now furnish some additional proofs and considerations which enable us, in connection with the words "substantially as described," to limit claim 1. It is rare that these words aid the courts in construing patents, if ever they do. In view of the fact that the statutes require an inventor seeking a patent to give in his application a "written description" of his invention, the words in question are usually implied when not expressed. They cannot enlarge a patent for a narrow invention, and that they cannot narrow a claim justly broad is sufficiently illustrated by *Machine Co. v. Lancaster*, 129 U. S. 263, 9 Sup. Ct. 299. In so far as *Robinson on Patents* (section 750), and *Walker on Patents* (3d Ed., § 182), sustain these views, these authors must be regarded as in harmony with the law. Of course, it is theoretically possible that there is something in the state of the art to narrow this claim, which, as interpreted in *Herrick v. Leveller Co.*, *ubi supra*, is so broad on its face. But unless a new case has been made, differing from that then before us to the extent required by the rule given in *Electric Manuf'g Co. v. Edison Electric Light Co.*, *ubi supra*, we would not be justified in revising, on an appeal of this character, our conclusions in the earlier suit as to the validity and construction of the claim in issue. The circuit court seems to have found some new facts or considerations in the case at bar which induced it to modify, apparently, its view of the claim; but we are confident that there is nothing in the record so "cogent and persuasive," to use the language of the case cited, as to require us to depart from our earlier decision. We would annul the effect of our own determinations, and encourage interminable litigation, and also, in view of the crude and incomplete records which come up on many appeals of this character, fail to do justice, unless we apply this rule strictly. In this case we also observe that this bill was filed in January, 1895, and, with due diligence on the part of the appellants in asserting their rights under equity rules 66 and 69, it might, apparently, have been long since dismissed or heard finally. As, ordinarily, questions arising under the statutes relating to patents for inventions can best be determined on a final hearing, we ought not to encourage delays in the regular progress of a bill in

equity pending proceedings of the character we are now considering.

In view of the possibility that this case may come to us again on an appeal from a decree after a hearing on bill, answer, and proofs, we do not deem it prudent to express ourselves more in detail than we have.

It is urged that the complainant below is not constructing machines under the patent in issue, or otherwise making use of it; but there is no assignment of error in regard to this proposition, nor is the record in condition to enable us to dispose of it intelligently.

We adopt the form of order used in *Davis Electrical Works v. Edison Electric Light Co.*, 8 C. C. A. 615, 60 Fed. 276, 283, already cited, reaffirming the expression which, in the opinion in that case, immediately preceded the order. The order appealed from is affirmed, with costs.

ATLANTIC DYNAMITE CO. et al. v. CLIMAX POWDER MANUF'G CO.

(Circuit Court, W. D. Pennsylvania. March 10, 1895.)

PATENTS—CONSTRUCTION AND INFRINGEMENT—HIGH-GRADE POWDERS.

The Schrader patents (No. 333,344, for an explosive compound or porous-grained dope, and No. 333,347, for dynamite) are not of a pioneer character, entitled to a broad construction, but, in view of the prior state of the art, the limitations of the specifications and claims, and the disclaimers made by the applicant, must be restricted to a dope and high-grade powder made of the proportions of ingredients disclosed, or of their substantial equivalents, and possessing the characteristics designated in the patents. *Held*, therefore, that the patents are not infringed by the "Big Chief" powder, made by defendant, which contains some ingredients of a different kind, and in materially different proportions, and in which the proportion of nitroglycerine is but 6 per cent. as compared with a minimum of 10 and a maximum of 20 per cent. in the powder of the patents.

This was a bill in equity by the Atlantic Dynamite Company and the Repauno Chemical Company against the Climax Powder Manufacturing Company for alleged infringement of two patents relating to explosives.

Betts, Hyde & Betts, for plaintiffs.  
Bakewell & Bakewell, for defendant.

BUFFINGTON, District Judge. This is a bill in equity, brought by the Atlantic Dynamite Company and the Repauno Chemical Company, assignees of two patents, hereinafter referred to as the "Schrader Patents," for alleged infringement of the same, against the Climax Powder Manufacturing Company. The patents in question are No. 333,344, for an explosive compound, applied for May 29, 1884, and issued December 29, 1885, to John C. Schrader and Russell S. Penniman, his assignee (the single claim of which is for "the porous-grained dope, substantially as hereinbefore set forth, embodying in each grain thereof a cellular mass of sulphur, within which combustible or noncombustible matters, such as vegetable or woody fiber, or coal, or asbestos, or furnace slag, or nitrates, are held as components of said grains"), and No. 333,347, for dynamite, applied



for June 3, 1884, and issued December 29, 1885, to the same parties (the single claim of which is for "the explosive compound, substantially as hereinbefore described, containing nitroglycerine housed and retained within hard cellular grains, composed in part of particles of solid carbonaceous matter held by a porous structure of sulphur").

The first patent is for a "dope" or base for an explosive; the second, for the dope embodied in the first patent with nitroglycerine added. Complainants contend their patents are pioneer ones, and, as such, their claims are entitled to a broad construction; while respondents contend the patents are void for lack of invention, or, if valid, that, by reason "of the express limitations and restrictions of the specifications and claims of the said letters patent, and the disclaimers made by said patentee during the prosecution of the applications for said patents, neither of said letters patent can be construed to cover or include anything ever made, sold, or used by the respondents." The record presents a great amount of testimony, a very considerable portion of which is given by eminent chemists, and presents many questions of interest. It has received from the court the most careful and painstaking consideration of which a nonprofessional person in those lines of learning is capable. The view we take of this case does not require us to pass upon every question raised in the proofs, interesting as such inquiry would be to us; but we deem it our province to confine ourselves wholly to those questions which, in our judgment, constitute the issues in this case. Conceding, for present purposes, the validity of the patents, we have two inquiries before us: First, the nature of the invention disclosed by the patents, and the interpretation of their claims; and, secondly, have the claims, as thus determined, been infringed by respondents?

As complainants contend their patents are pioneer ones in nitroglycerine explosives, inquiry must be made as to the prior art. Nitroglycerine was discovered by Sobrero, an Italian chemist, in 1846. It is a fluid, formed by the action of concentrated nitric acid, in the presence of strong sulphuric acid, upon glycerine, at a low temperature. It freezes or crystallizes at 40 degrees Fahrenheit, and slowly liquifies again at 50 degrees. It must be handled with great care, as it is readily exploded by a blow or shock. This fact, added to its liability to leakage, virtually prevented its transportation. Sobrero's discovery proved of little practical importance until about 1864, when Alfred Nobel, a Swede, made its commercial use possible. He found that "kieselguhr," an infusorial earth obtained in Germany, could be used as a dope or base to absorb and retain as much as 75 per cent. of nitroglycerine, and the powerful explosive thus produced could be transported with comparative safety. His new mixture was given the now familiar name of dynamite, and to Nobel is due the credit of the application of nitroglycerine to practical use. The kieselguhr dope, it will be noted, was, so far as the explosive was concerned, an inert mass; and its sole purpose was as a receptacle for nitroglycerine. In 1873, Nobel, in his patent, No. 141,455, disclosed the idea of using a combustible dope, which, while capable of carrying the nitroglycerine, would also contribute to the explosive force of the

compound. His compound consisted of 70 parts of pulverized nitrate of soda, 10 parts of pulverized resin and 20 parts of nitroglycerine. He specified that, "instead of resin, other carbons or hydrocarbons, coal," etc., might be used, and that 5 to 8 parts of flour sulphur may be added. These ingredients were to be thoroughly mixed, "so that, so far as possible, each separate particle of the pulverized solid ingredients may have a coating of nitroglycerine." In 1874, Mowbray, in patent No. 150,428, taught the use of extremely minute scales of mica as a base, which, though noncombustible, were externally coated with nitroglycerine, as contrasted with the absorbing or capillary action of Nobel's kieselguhr. The external coating or film of nitroglycerine, thus shown with a noncombustible dope, has been used to great advantage to increase the efficacy of the explosive, when, in the subsequent development of the art, it was applied to a combustible dope. It will be noted that all of these powders required a large amount of nitroglycerine; the lowest, the Nobel, having 20 per cent. They were of a class which, from this fact, came, in the after development of the art, to be styled "high-grade powders."

In 1876, Egbert Judson, of California, made a marked departure from prior methods, in patent No. 183,764. His idea was to largely reduce the amount of nitroglycerine, and thus cheapen cost, but at the same time produce a powerful explosive. His specification recites that, in former practice, seldom less than 15 per cent. of nitroglycerine had proved effective, while, in fact, from 30 to 40 per cent. was generally used; that his purpose was to produce a cheap, safe, and powerful explosive, with 1, 2, or 3 per cent. nitroglycerine. He contemplated, also, as we shall see, the possibility of the use of as much as 15 per cent. The specification recognized that, owing to the absorbent nature of prior dopes, a small percentage of nitroglycerine was "so completely absorbed or taken up by the dry mixture that the compound becomes practically inexplusive." Judson's object was to so modify or counteract the absorbent capacity of the dope "that," as he says, "its grains \* \* \* will receive and retain the nitroglycerine upon their surfaces, or mainly upon their surfaces, with little or no absorption." By this means, a very small proportion of it would maintain an external continuity throughout the grain mass, and make the whole explosive. He also purposed lessening its tendency to absorb moisture. To secure these results, he directed that "the grains or particles of the dry mixture shall be coated, cemented, varnished, or smeared with some combustible substance, offering resistance to absorption of nitroglycerine and of water," etc. He suggests a range of variation in the ingredients, from such as are "extremely fine or pulverulent," to those which are coarser,—a fact worthy of consideration in determining the scope of the patents and the experiments made by the respective experts. As illustrative of one method of making his powder, he takes 15 parts of sulphur, 3 of resin, 2 of asphalt, 70 of nitrate of soda, and 10 of anthracite coal. The sulphur, resin, and asphalt are melted together, and well stirred, and in this mixture, while melted, the nitrate of soda and coal, both pulverized and thoroughly dried, are to be mixed and well stirred, until thoroughly varnished, cemented, or coated by the melted mix-

ture. After this, the mixture is gently and constantly stirred, until it is so cool the grains cease to adhere to each other. He adds:

"The dry mixture is then complete, and ready to receive the nitroglycerine, which may be added as desired. One, two, or three per cent. of nitroglycerine will now convert the compound into a powerful explosive; or the proportion may be increased, at pleasure up to 15 per cent., or even more."

That Judson did not contemplate that his grains should be absolutely nonabsorbent is clear. On the contrary, he goes to the length of expressly disavowing such an absolute character for them. He says he uses the term, "nonabsorbent," in contradistinction to such absorbent mixtures as have heretofore been used in this class of powder," and says they are sufficiently nonabsorbent "as to mainly counteract the absorption of the nitroglycerine," and, as noted above, that his invention demands that the coating or varnishing shall be with some combustible substance, "offering resistance to absorption of nitroglycerine." That the grain was also of varying character, within certain limits, is also evidenced by the wide range of nitroglycerine that may be added, viz. from 1 to 15 per cent., or more. Construing the term "nonabsorbent," here used, as we think it must be, with reference to the prior art, and in accordance with the teaching of the patent, as shown in the context, we think it means relatively nonabsorbent, as compared with prior practice. Indeed, the explicit disclaimer by Judson of an absolutely nonabsorbent character for his grains affords additional ground for such construction to those in *Adams v. Iron Co.*, 26 Fed. 324, where "a perfect cast-copper cylinder, \* \* \* free from blow holes and other defects," was held to mean one "so free from blow holes as to be considered sound," or in *Blumenthal v. Burrell*, 3 C. C. A. 462, 53 Fed. 105, where the court said: "We do not suppose that the language of the patent [chymosin "uncombined with pepsin"] demands an absolutely chemically pure article, but an article practically free from pepsin."

As we view the advance made by Judson in the art, he taught the making of a grain of such nonabsorbent, or relatively nonabsorbent, character, as compared with prior dopes, that from 1 to 15 per cent. of nitroglycerine could be utilized to make a powerful explosive. That he was the first to produce a "low-grade," nitroglycerine powder seems quite clear from a study of the art, and we think he is justly styled, by Mr. Penniman, complainants' chemist, "the inventor and founder of the low-grade powder business in the United States." Whether the variations he suggests in the way of pulverizing the materials he specifies would produce a powder of the free-running capacity afterwards suggested in the patents now in suit, and whether, if so, his patent was an anticipation of these patents, we do not deem it necessary to now decide, seeing we have assumed, for present purposes, the patentable novelty of that which it is therein claimed. Under the peculiar conditions of mining existing on the Pacific coast, where Judson manufactured, the free-running capacity of powder was, or would have been, a matter of indifference. There is no evidence that he ever made a free-running powder, nor that the trade needs demanded such an article there; but it is highly suggestive, when considering the scope of his patent, that defendant's experts,

by using the ingredients suggested in his patents, and pulverizing them to an extent certainly not at variance with his suggested directions, have produced a low-grade powder which has a free-running capacity, for which free-running capacity, in part, the complainants would ascribe a pioneer character to the Schrader patents.

The patent of Thomas Varney, of 1881, No. 249,701, shows an attempt to produce a low-grade powder, in which, as distinguished from Judson's, the grains were of a highly absorbent character. Varney states that, to obtain the highest degree of explosive force from the absorbent, it must be finely divided, but that such fine division makes it more absorbent. The result is that from 15 to 85 per cent. of nitroglycerine is required, and to produce a powder capable of detonation with from 3 to 6 per cent. of nitroglycerine requires the absorbent to be very coarse, which weakens the powder. "My invention," he says, "does away with the necessity of coarseness by giving the absorbent a peculiar porosity, which facilitates detonation and the decomposition of the absorbent." His suggested method is:

"The powder, which I call 'Varney Powder,' is prepared as follows: The materials of the absorbent are made fine. The finer they are, the stronger will be the powder. These fine particles are then aggregated, or collected into small assemblages. This is done by distributing among them, evenly, a certain proportion of some pulverized solid substance capable of being softened or made pasty while in mixture, whereby each soft particle will attach to itself all the solid particles in contact with it, and, when hardened, will hold them in this contact, and thereafter remain in the mixture in this aggregated form."

He adds:

"Used as an absorbent, it admits of detonation with a very small proportion of nitroglycerine; in general, about one-fourth of the amount required before aggregating. It also gives, so far as I have been able to ascertain, all the strength due to fineness. This strength and readiness to detonate I attribute to the kind and degree of porosity, and exposure of the fine particles, by which the explosive influence from the exploder is applied to the nitroglycerine, and the heat of the detonating nitroglycerine is applied to the absorbent more favorably than when the absorbent is coarse."

He states:

"From 3 to 6 per cent. of nitroglycerine, according to the character of the exploder, mixed with any of these absorbents, can be detonated with remarkable explosive effect. Of course, greater proportions of nitroglycerine may be used, if desirable."

While this powder was commercially a failure, yet, as showing the extent and scope of the patents in suit, with reference to the pioneer character claimed for them, the admission of Prof. Chandler, one of complainants' experts, is suggestive. He was asked: "In making this Varney dope, if you had simply increased the proportion of sulphur from 8 per cent. to 16 per cent., and had treated the mass so compounded in precisely the same way as you treated the mass for making the Varney dope, wouldn't you have obtained precisely the same result as you obtained in making the so-called Schrader dope?" To which he answered: "I think very likely."

In this state of the art the patents in suit were applied for in 1884. To us it is quite clear that, at that time, the object of Mr. Schrader was, and we think this is quite clear from a detailed study of the pat-

ents, to provide a high-grade absorbing powder, and a dope for such a powder,—one that would internally take up and securely retain large and effective quantities of nitroglycerine, without having it show substantially on the surface, and that the powder should be dry-grained and free-running powder and was to be of a different class from either Judson's or Varney's. Their purpose was to make a low-grade powder; his, a high-grade one. That such was the fact is evidenced by his own words. Thus, he says he has "invented certain new and useful improvements in high-explosive compounds." "I am the first to invent and produce a dry-grained, free-running, high-grade, nitroglycerine powder." That he named a maximum of 20 and a minimum of 10 per cent. of nitroglycerine as his contemplated limits of nitroglycerine absorption is, to our mind, clearly evidenced. Thus, he says: "The subject hereinafter described is a dry-grained, free-running powder, containing as high as, say, 20 per cent. of nitroglycerine, or any lesser proportion of the liquid explosive that may be deemed desirable." The limit, however, of this decreasing proportion he had previously named, saying, "My novel powder, as a class, although containing large proportions of the liquid explosive, ranging from 10 per cent. upward," etc. He very explicitly stamps it as a high-grade powder, and differentiates it from low-grade ones in the language following. Thus, he says of Judson's, "My high-explosive powder is radically unlike that variety of low-grade nitroglycerine, composed of grains," etc. He speaks of his grains as capable of taking in and retaining "large and effective proportions" of nitroglycerine. And of Varney's he says:

"My powder is also radically unlike certain other varieties of low-grade nitroglycerine powders, which are composed of finely-comminuted solid matters, and, say, from 3 to 6 per cent. of the liquid explosive, because the solid matter referred to is in such a finely-comminuted condition that any greater proportion of the liquid will render the mass clingy or pasty; and, although such powders are of the low-grade variety, they are not free-running, because of the natural cohesion of the finely-comminuted solid matters, and also because of the incapacity of said solid matters to take up and house effective proportions of the liquid explosive without becoming adhesive, and also because of the employment, in many cases, of solid matters, which readily succumb to the softening influences of the liquid explosive."

That the high proportions of nitroglycerine which he has before mentioned were the very essential features and characteristics of his patent is evidenced when he says:

"It is obvious that additional ingredients may be employed in the grained compound without substantial departure from any invention, provided nothing is added which will materially impair the capacity of the grains for taking up the liquid explosive by plugging or sealing the cells of the grains against its entrance, as by the use of tar, asphaltum, &c."

In addition to this, it should be noted that there is no express averment in the patents that his method could be applied to making low-grade powders, and no implied suggestion, save the mention of 20 per cent. "or any lesser proportion," quoted above, which, we have seen, must be read in connection with his prior expressed minimum of 10 per cent. This powder he purposes making from ingredients, all of which, he says, are old. It is obvious, then, that the novelty must consist in producing a novel powder or dope by means of new combinations of proportions of old materials, for no specially new

methods of treatment are taught. As pertinent to the present case, the ingredients suggested are 12 parts of bituminous coal, 16 parts of sulphur, and 72 parts of nitrate of soda. These ingredients, dry, finely ground, and well mixed, are heated and developed into grains. The proportions may be varied, but care must be "taken to have enough sulphur, when melted, to properly control the dry matter for graining, and also to avoid such an excess of sulphur as would result in grains which would be practically inaccessible to, or, at least, materially obstruct, the entrance of the liquid explosive." The grain thus produced is described as a "friable, cellular" one, as having a capacity of taking up and securely retaining, by capillary attraction, as high as 40 per cent. of liquid explosive, without materially affecting the dry-grained, free-running, or crisp characteristics which said grains possessed prior to charging them with said liquid explosive. And that this process of housing the liquid was not a surface one is clearly shown when he says the grains are "capable of taking up, completely housing, and securely retaining highly effective proportions of any liquid explosive, so that, when thus charged, the dope will maintain substantially its original condition, or, in other words, so that the presence of the liquid explosive will not be substantially observable as a liquid, or as an adhesive medium." The absorbent characteristic of the grains was emphasized in applicant's argument upon rejection, where it was said:

"The dope described by applicant's claim is porous and highly absorbent, because the sulphur in each grain is a cellular mass."

And again:

"The porous character of applicant's dope is an essential feature, and this could not possibly be present in the grains of the patent 4,200, of '80, because, in the latter, 'resin' is employed, which would obviously render them impervious and nonabsorbent, and unsuited for applicant's purpose."

So, also:

"It might be well to here observe that applicant \* \* \* describes 'pressure' in the process of forming the grains, but it will be seen that it must be 'light pressure,' because the grains must be very porous, instead of 'very solid and nonporous,' as when produced by Nobel," etc.

It is also to be noted that, after rejection of the claim, the term "porous" was added to the claim, in the "porous-grained dope" finally allowed.

In view of the advance disclosed by the prior art and of the limitations expressly stated and necessarily following from the statements in the patents themselves, we cannot accord to them the pioneer character, or to their claims the broad construction, contended for by complainants. To do so would be fatal to the patents. To us it seems the claims must be limited to a dope and high-grade powder made of the proportions of ingredients disclosed, or of their substantial equivalents, and which possess the characteristics indicated in the patents.

Construing the claims thus, we next inquire whether infringement, the burden of which rests on the complainants, has been proved? The powder manufactured by respondents, and complained of as infringing, is known as "Big Chief." In the art of powder making, it seems well established that, the larger the proportions or the greater

the efficacy of the binding material used, the less porous will be the grain, and that increasing the binding material made a harder, tougher, and less absorbent grain, and, conversely, that decreasing it made a more friable and absorbent one; in other words, that binders are employed at the expense of grain strength. It would also seem, from the weight of the proofs in this case, that, as bearing on the relative efficiency of the binders concerned in this case, resin has the greatest binding efficacy, glucose the next, asphalt next, and sulphur the least. It would also seem that, from the same ingredients, grains of a greater or less relative nonabsorbent character can be made, as the apparatus employed has a greater or less grain-compacting efficiency. The less compacted the grain is, the greater will be its relative absorbent capacity.

Turning, now, to the question of ingredients, we take the analysis of a sample of Big Chief powder, reported by Dr. Munroe, one of complainants' experts, as a standard of comparison. It is as follows:

Resin .....	4.77
Glucose.....	2.84
Coal .....	10.50
Sulphur .....	19.81
NaNO .....	57.09
Nitroglycerine .....	4.99
Total .....	100.00

And the probable composition of the powder is stated by him at:

Glucose.....	3	per cent.
Resin .....	5	" "
Coal .....	11	" "
Sulphur .....	21	" "
Soda .....	60	" "
Total .....	100	" "

And five pounds of nitroglycerine for every hundred pounds of dope.

Applying these proportions of ingredients to batches of dope of 541 and 500 pounds, respectively, the quantity testified to by respondent's workmen as commercially made by them, and comparing the results to the ingredients of the Big Chief dope, as testified to by them, we have the following:

Dr. Munroe's Analysis of Probable Constituents.	Probable Constituents Applied to 541-lb. Batch.	Same to 500-lb. Batch.	Constituents Testified to by Workmen in 541-lb. B. C. Dope.	Same in 500-lb. Batch.
Glucose..... 8 per cent.	16 lbs.	15 lbs.	15 lbs.	15 lbs.
Resin..... 5 "	27 "	25 "	25 "	25 "
Coal..... 11 "	60 "	55 "	63 "	55 "
Sulphur..... 21 "	114 "	105 "	105 "	105 "
Soda..... 60 "	325 "	300 "	338 "	300 "
Total..... 100 "	543 "	500 "	541 "	500 "
Nitroglycerine... 5	27 lbs.	25 lbs.	81 lbs.	81 lbs.

These results would seem to render comparatively certain the ingredients employed in the alleged infringing powder. Resin, as we have seen, is a most efficacious binder. It renders the grains less porous and less absorbent. It is not used in the Schrader patent formula, and, as we have seen, in the argument made for the allowance of the patent, it was stated to be at variance with the object of the patent, and its use destructive to the desired porosity of the grains. Thus:

"The porous chemicals of applicant's dope are an essential feature, and this could not possibly be present in the grains of the patent 4,200 of '80, because, in the latter 'resin' is employed, which would obviously render them impervious and nonabsorbent, and unsuited for applicant's purpose."

The language is so explicit that, taken in connection with the occasion of its employment, it amounts to a disclaimer of the use of resin. See *Smith v. Gas Co.*, 42 Fed. 150, and cases cited.

Dr. Munroe's analysis shows that Big Chief contains 3 per cent. of glucose and the proofs show that 15 parts of glucose out of 541, and 15 out of 500, were used in manufacture by defendant. The Schrader patent formula calls for none, and, as we have seen, glucose is a binder of high relative efficacy, and tends to make the grains less absorbent. Dr. Munroe's analysis shows 21 per cent. of sulphur in Big Chief, and the proofs show the use of 105 parts out of 541 and the same number out of 500. In the Schrader patent formula, the percentage of sulphur is 16 per cent., or 80 parts to 500. In the Schrader formula 72 per cent. of nitrate of soda is used; in the Big Chief, 60 per cent; and, in the dope proven by the workmen, 333 out of 541, or 300 out of 500. The proportion of coal is substantially the same in each, but the amount of inert material in the two is relatively considerably greater in the Schrader. Thus: In the Schrader formula: Coal, 12; soda, 72,—total, 84. In Morton's analysis of Big Chief: Coal, 11; soda, 60,—total, 71 per cent. These figures show that the amount of binding material in the Big Chief is practically 29 per cent., and that a considerable proportion of these binders, very nearly one-third, is of higher relative binding efficacy than sulphur, which is the only binder used in the Schrader formula, and of it only 16 per cent. The binding material in the Big Chief is more than one-third the weight of the material to be bound, while in the Schrader it is less than one-fifth. The significance of these proportions is apparent when coupled with the proofs of complainants' witnesses. Mr. Schrader, the patentee, says "that, as the proportion of sulphur introduced is increased, it correspondingly and proportionately tends to fill up the crevices in the grains; hence, renders the grains less absorbent, if the same amount of pressure in each case,—that is to say, as the proportion of sulphur varies,—is applied to said grains." And, when asked how much sulphur would have to be added to his patent dope to make a practically solid grain, without subjecting it to pressure, says: "It depends upon the fineness of the ingredients and the amount of agitation, which, to a certain extent, means pressure on a small scale. I should, however, say that, with ingredients of moderate fineness, such as would pass through, say, a No. 20 or 30 mesh sieve, 22 per cent. of sulphur will make nearly a solid grain."



There is also a difference between the Schrader patent teaching and respondent's method of manufacturing. It will be noted that, in the argument, before referred to, for allowance of the patent, the porosity of the grain and the desirability of a lightly-compressed grain were referred to, and the fact that any pressure applied to it must necessarily be a light one. In the manufacture of the Big Chief very considerable pressure is exerted, and this with a view to making a hard, strong, and relatively nonabsorbent grain. Mr. Hopke, one of respondent's expert chemists, made several batches of dope, some at Pittsburg and some at respondent's works at Emporium, Pa. He says:

"In addition to the above causes, I may mention that the apparatus used by the defendant in their manufacture of the Big Chief powder, consisting of vertically moving paddles or beaters, which act with percussion as they stir the dope in the kettle, and also the mode by which the plastic mass is forced against and through the meshes of a screen, materially compact and force together the particles. This I have determined by careful tests, making dopes of a similar composition in an open kettle with paddles, and also in the defendant's apparatus, and these tests respectively show that the dope made in the defendant's apparatus is denser and more compact."

To the same effect is the testimony of Mr. Handy, another of respondent's chemists, who says:

"The compacting action is partly due to the action of the paddles or stirrers in the kettles, and partly to the forcing of the dope through the graining screen. This will account for the greater hardness of the 4-mesh grains of Schrader and Judson dopes, made in August, in the defendant's apparatus. They are distinctly harder and more dense than the Judson and Schrader dopes made by me in the open, hemispherical, steam-jacketed kettle, in November, and which were not forced, while hot, through a screen. The defendant's apparatus is not suited for the manufacture of dopes with small amounts of binding material, such as the Schrader dope."

From the differences in ingredients, in proportions used, and in methods of treatment, we would naturally expect differences in the grains produced. Such we find to be the case. The Schrader patent claims for its grains the qualities of hardness, friability, and crispness. "Friable" is defined by Webster as, "easily crumbled, pulverized, or reduced to powder." And "crisp," as "brittle or friable; in a condition to break with a short, sharp fracture." If, by the term "hard," as used in the patent, it is meant "relatively hard," as compared with the grains of Varney, or those of Nobel's patent, we can accept it; but, if the term is used as meaning not yielding to pressure, firm, and solid, and therefore not crisp or friable, we cannot accept it, for it is manifestly at variance with the teaching of the patent. Nor, indeed, do the proofs anywhere show that hard grains have been produced by using the ingredients and treatment of the Schrader patent. Accepting, then, as we think we must, the characteristics of a friable and crisp grain, we find the Big Chief in marked contrast with it in this regard. Dr. Morton, one of complainants' experts, concedes that, in dopes made by him, that made under the Schrader patent was much more easily crushed than the Big Chief, and that the difference between the two was decided. Mr. Hopke, respondent's expert, testifies that he subjected the Schrader handmade dope of Dr. Morton

to crushing tests, and found they broke when a weight of 500 grammes was applied, while grains of Big Chief broke at 3,400.

The patent of Schrader calls for porous and highly absorbent grains, such as "can be relied upon for taking up and securely retaining, by capillary attraction, a liquid explosive, up to, say, 20 per cent., without materially affecting the visible characteristics of said grains, and they will then be as dry-grained and free-running as when in their uncharged conditions." Mr. Schrader explicitly distinguished his powder from that of Judson, for which, though a relatively nonabsorbent one, a capacity was claimed of taking up 15 per cent. of nitroglycerine. The proofs show that the Big Chief powder, made and sold by respondent, contains about 6 per cent. With that amount, its presence is at once detected; and that it is present on the exterior of the grain, in substantial and appreciable amount, is shown by the fact that it freezes into a solid mass, and the grains are held together by a frozen film of nitroglycerine. Where 6 per cent. of nitroglycerine is added, the relative proportion of it to the dope, bulk for bulk, is a teaspoonful to a pint of dope. This fact, in itself, is suggestive that, if an appreciable amount was absorbed, the external continuity of film, which is conducive to the explosion, would be lost, and that freezing could not take place. That the Big Chief grain, as commercially made, is relatively nonabsorbent and nonporous is also shown by the clear weight of the evidence; and, if 10 per cent. of nitroglycerine is added, the minimum of the Schrader patent, instead of being absorbed, it leaks out, gathers in drops, and becomes unsafe to handle or transport. That the Big Chief is a free-running powder may be conceded, but this does not prove infringement. Conceding that Schrader may have been the first to produce a powder that was free-running by the use of certain ingredients, that fact does not block the way against every effort to produce a free-running powder by means that are substantially different, and at variance with Schrader's proposed methods. See *Incandescent Lamp Patent*, 73 O. G. 1289.<sup>1</sup> He taught that high-grade powder could be made having a free-running capacity. He neither taught nor claimed that a low-grade powder of that capacity could be made. The fact that the powder of Schrader's patent and the powder manufactured by respondent have this one point in common cannot obliterate the marked distinctions between them in ingredients and mode of manufacture. These differences are sufficient in kind and degree to very clearly relieve the respondent from the charge of infringement.

We are therefore of opinion infringement has not been shown. Let a decree dismissing this bill be prepared.

<sup>1</sup> *Consolidated Electric Light Co. v. McKeesport Light Co.*, 159 U. S. 465, 16 Sup. Ct. 75.

## THE CERES.

WESSELS et al. v. THE CERES.

SYDVENSKA ANGFARTYGS AKTIEBOLAGET v. WESSELS et al.

(Circuit Court of Appeals, Second Circuit. March 17, 1896.)

## 1. CHARTER PARTY—GUARANTY OF SPEED—"LIGHT LADEN."

A charter party of a steamship for the fruit trade guarantied that she should make a certain average speed in moderate weather, "fruit or light laden." *Held*, that the guaranty was not merely that she could attain that speed at the commencement of the term of hiring, but was a continuing guaranty that the average speed should be accomplished during the term of the charter under the conditions stated, and that "light laden" meant a cargo, the equivalent of a fruit cargo, or one not more cumbersome or more unfavorable to speed. 61 Fed. 701, affirmed.

## 2. SAME—DAMAGES FOR BREACH.

A guaranty, in a charter party for the fruit trade between Central America and New York, that the steamer shall make a certain average speed, is to be interpreted with a view to the necessity for speed with a perishable cargo; and deterioration of cargo occasioned by loss of time from failure to maintain such speed must be considered as damage in the contemplation of the parties on making the contract. 61 Fed. 701, affirmed. Wallace, Circuit Judge, dissenting.

## 3. SAME.

The charterers under such a charter party are not to be charged with heedlessness in continuing to run the vessel in the fruit trade after she had failed on several voyages to maintain the guarantied speed, where the owners prevailed upon them not to throw up the contract by promises that the speed should be improved. Wallace, Circuit Judge, dissenting.

## 4. SAME—"LAY-UP" CLAUSE.

A provision, in a charter of a steamship for the fruit trade, that she "is to lay up for overhauling, two weeks each year, in winter, at time charterers designate," gives the charterers a right to have the vessel laid up annually, without paying hire, for two weeks, in the winter time, for the usual overhauling, but they cannot require her to lay up when all the circumstances show that the pretended lay-up is a subterfuge to evade payment of hire in the meantime. 61 Fed. 701, reversed.

## 5. SAME—CANCELLATION OF CHARTER—NOTICE.

A provision in a charter party giving the charterers an option to terminate it at any time on giving 30 days' notice, does not entitle the owners to 30 days' notice of a cancellation for breach of a guaranty on their part contained in the instrument.

Appeals from the District Court of the United States for the Southern District of New York.

These were cross libels for damages on a charter party of the steamship *Ceres*,—the first by Gerhard Wessels and others, the charterers, against the vessel; the second, by the *Sydvenska Angfartygs Aktiebolaget*, her owner, against the charterers. The district court entered a decree on the first libel in favor of libelants for \$7,320.04, and dismissed the cross libel. 61 Fed. 701. From each of these decrees the owner of the ship appealed.

J. Parker Kirlin, for appellants.

Harrington Putnam, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

**SHIPMAN, Circuit Judge.** The libelants in the principal libel are importers of fruit in the city of New York, under the firm name of G. Wessels & Co., who, on May 25, 1891, entered into a charter party with the agents of a Swedish corporation which owned the steamship *Ceres*, for the hire of that ship, by a demise charter, for 4 months from the time of delivery, with the option of continuing the charter for the further period of 12 months, on giving 30 days' notice, previous to the expiration of the first term, and with the further option of canceling the charter party during the extended term upon like 30 days' notice. The charter was extended October 2, 1891. The charter party declared that the vessel had 581 tons net register, and 720 tons dead-weight capacity, exclusive of bunkers, which are of 2 tons capacity, and had about 63-300 feet clear cargo capacity, exclusive of bunkers. At the top of the printed charter party were the words "New York Fruit Form." It was a form used by New York fruit merchants, and contained the following clause:

"The owners guaranty the steamer to make an average speed, under steam, of not less than (11) eleven knots per hour, fruit or light laden, in moderate weather, and with good American coal."

Other clauses indicate that the saving of time was a point of importance, and that the transportation of bananas or other perishable property was in contemplation.

The eighteenth and twenty-eighth clauses are as follows:

"(18) Ship's bottom to be kept properly cleaned and painted, and steamer to be docked whenever captain and charterers may think it necessary, but at least once in every four months, and payment of the hire to be suspended until she is again in proper state for the service."

"(28) Steamer is to lay up for overhauling two weeks each year (in winter, at time charterers designate)."

The steamer was delivered to Wessels & Co. on July 2, 1891, and thereafter made six voyages, which were completed December 4, 1891. She was then sublet to one Vanderbilt for three months, and made one voyage, when she went to Mobile, where Vanderbilt failed, and gave up his subcharter on January 14, 1892. On the same day Wessels & Co. notified the agent of the owners that they wished the steamer to "lay up for two weeks \* \* \* without pay from 17th January." Before the expiration of the two weeks, Wessels & Co. sublet the vessel to a coal company, and she made two voyages, which expired March 22d. She thereafter made, for Wessels & Co., two voyages, called, in the record, voyages 8 and 9, to Colon, for bananas and other freight, and to return with the cargoes to New York. She returned on April 10th.

The first libel, which was filed August 2, 1892, was brought to recover from the ship compensation for the damages which the bananas sustained on these two voyages, by means of her inability to maintain the guaranteed speed. The charter was canceled on May 21st, without giving the specified 30 days' notice, upon the ground that she was unable to comply with its conditions. The owners filed a cross libel to recover \$1,586, the amount of hire alleged to be due for the two-weeks "lay-up" at Mobile, and for damages, amounting to \$244, for the cancellation of the charter without giving 30 days'

notice. The district court decreed, upon the first libel, that the libelants recover \$7,320.04, and dismissed the cross libel. 61 Fed. 701. From each of these decrees the owner appealed.

The answer to the first libel, which was filed September 30, 1892, alleged the neglect of the charterers to supply the *Ceres* with good American coal as the reason for her failure to make an average speed of 11 knots per hour, which failure, during most of the voyages, was admitted. After considerable testimony had been taken, the owner alleged, by an amendment, filed October 10, 1893, that the failure was also due to the fact that the steamer was not fruit or light laden, and that the voyages were not made in moderate weather. The defense in regard to poor coal was practically abandoned during the trial in the district court. These averments are to be read in connection with the construction which the claimant gives to the charter party, and which is that the guaranty of speed was a warranty that, at the commencement of the charter, the *Ceres* had a capacity of 11 knots under the conditions named, but not that she would continuously maintain it, and that the clause, "fruit or light laden," means laden with fruit, as usually stowed, or with a light cargo, not including any cargo which exceeds in weight such a fruit cargo, and that, under such a construction, the *Ceres* was too heavily laden. During the last two voyages she was not entirely fruit laden, but had additional cargo.

Upon the construction of the warranty, the vessel was manifestly hired for the main purpose of carrying a very perishable cargo. The clause provides for her speed, not as it existed at the date of the charter, but as it would exist, provided, among other conditions, she was furnished with good American coal. The speed is also to be an average speed, and not one which she can occasionally make. The object of the provision was to guaranty an actual result during the voyages, and not an ability to attain the result at the commencement of the term for which the vessel was hired. We agree with the conclusion of the district judge that the warranty "was intended to be a continuing guaranty that the average speed of 11 knots should be accomplished under the conditions stated," in the absence of any faults of the charterers. The inharmonious testimony of experts, in regard to their definition of the term "light laden," proved that it had no settled meaning, but that its meaning is to be determined from the context, or by the circumstances under which it is used. This being true, we agree with the district judge that its meaning, in the charter party, is "that the ship shall make 11 knots laden with a fruit cargo, or with its equivalent, i. e. when as light laden as with a fruit cargo, or one not more cumbersome, nor more unfavorable for speed." If expert testimony is important, this definition has the support of competent witnesses.

Upon the questions of fact which arose under the guaranty clause, the district court found that an average speed of 11 knots was not maintained, that the charterers never waived their objections on account of the defect, and, further, that they complained of it from the first, and were constantly met by excuses, promises, and hopes of improvement. During the last two voyages, which are the subjects

of these suits, a speed of 11 knots was never attained, even for a day. The only question on this subject, therefore, is whether the conditions of the guaranty were complied with, as respects the weather, cargo, and coal, and whether the failure to make 11 knots is to be ascribed to any fault of the charterers in the loading and trim of the ship. The court further found that the Ceres did not transgress the conditions in regard to amount or weight of cargo, but had less cargo than she was entitled to carry, if entirely laden with fruit, and that she was not loaded too much by the stern. Upon these questions of fact, the failure of the vessel to make the specified average speed, during most of the voyages, was admitted in the answer, and this admission was adhered to in the amendment. As the claimant probably foresaw, it lost nothing by making this admission, for the testimony as to the last two voyages enforced it. In view of the inherent weakness in the testimony for the claimant, in regard to the alleged excessive amount of cargo and improper trim of the vessel, no addition to the comments which the district judge made upon those two defenses is required.

The district judge referred the question of damages to a commissioner, whose careful investigation showed that a large part of the damage which the bananas sustained upon the last two voyages was occasioned by the ship's inability to make the guarantied speed. From the total loss resulting from the decay of the fruit he deducted 20 per cent., as loss which would have resulted if there had been no breach. The district judge added a further deduction of 5 per cent., and, with this modification, confirmed the report. The claimant insists that the damages to the fruit should not be allowed, because they are too remote, and because, before the last two voyages were attempted, the libelants knew that the speed required for the safety of the cargo was impracticable. The important question in this part of the case is whether the damages to the cargo can be regarded as the natural consequences of a breach of the contract which were within the contemplation of the parties, or whether the damages, in the event of a breach, must be considered as confined to the increased consumption of coal, loss of time, and that class of damage. If this guaranty had been contained in an ordinary charter party, by which the vessel was to be used for general purposes, the position of the owners would have been sound, and the guaranty would be construed to have reference to the value of the vessel to the charterers, in respect to economy of time, wages, supplies, hire, and the like general particulars which are immediately connected with the ship itself. But the charter party bore upon its face that it was a form for a fruit charter. The owner, by its agent, and the charterers, understood that the vessel was wanted for a particular use, and the warranty of speed had reference to the adapt- edness or fitness of the vessel for that use. The charter party was entered into in view of the necessities of speed in the business in which the vessel was to engage, so that the damage to a perishable cargo, which directly occurred from a failure to make the requisite speed, must have naturally been in the mind and con-

templation of the owner's agent when the contract was executed.

The claimant's next point is that charterers cannot be allowed damages to cargo for a continued breach of the guaranty if they continuously ran the vessel with reasonably certain knowledge that she could not comply with the charter party, and that loss was the certain result; and it is said that it was their duty to use reasonable exertions to make the injury as light as practicable, and not persistently to allow the damages to be multiplied or increased. This proposition is true; but, in this case, the agents of the owner desired that the charter should not be canceled. On November 4, 1891, the charterers notified the agents that the vessel would be returned because she was not up to the guaranteed speed. On the next day the agents promised to endeavor to remedy any faults that were not in accordance with the charter party, and requested a withdrawal of the notice of the preceding day, which request was complied with on November 6th. On November 24th the charterers again notified the agents that they might throw up the vessel in consequence of her failure to make the required speed, and the agents requested that they would "allow the matter to stand until the vessel arrived." On December 18th the charterers informed the owner that, from the assurances of the agents and captain they thought that the speed would be improved. After the charter was canceled, the agents write, on May 23, 1892, that the ship is capable of performing the guaranty with proper coal. The continuance of the use of the vessel was not a heedless act, but was at the expressed desire of the agents, and apparently upon their assurances of improved speed.

The cross libel was for the recovery of the hire of the vessel for the half month during which she was laid up at Mobile, and for the loss of £50 sterling by reason of the failure of the charterers to give 30 days' notice of cancellation. The owner insists that, whereas the eighteenth clause provides for a suspension of payment of the hire while the vessel is docked, the twenty-eighth clause does not provide for such suspension while the vessel is being overhauled. The charter party required the owner to maintain the vessel in a thoroughly efficient state, in hull and machinery, and also provided that she was to lay up two weeks in each year for overhauling, and at the time in the winter which the charterers should designate. We agree with the district judge that the latter clause required an annual overhauling of two weeks, and, for the convenience of the charterers, they had a right to designate the time in winter when the lay-up and overhauling should take place; and we also are of opinion that, if the designation was not a subterfuge, and a mere stratagem to evade the payment of hire, such payment was suspended during the lay-up. We are not, however, of opinion that charterers can be permitted to escape payment as the reward of an unfair artifice.

The vessel was sublet, on November 30, 1891, to Vanderbilt, for a period of about three months. He became insolvent, and the vessel reached Mobile about January 5, 1892, with half the hire due on December 23d unpaid. The charterers instructed the cap-

tain not to leave Mobile until that amount, and also the hire to be due on January 8th, were paid. After litigation in Mobile, the hire was paid until January 24th, and on January 14th Vanderbilt surrendered the vessel, in Mobile, to the charterers, who, on the same day, notified the owner's agents in New York that they wished the Ceres to lay up for two weeks from January 17th, without pay. The owner's agents asked permission to run the ship during that time, and perhaps two weeks more, on its account, and were told that the charterers would be willing to make some such arrangement for four or six weeks. This proposed arrangement apparently fell through, because the owner protested against withholding the hire for the two weeks after the 17th. On January 23d the charterers wrote the captain that they regret to lay him up, "but bananas won't pay to run at present, and we are doing same with America." On January 26th the charterers sublet the vessel to W. D. Munson, who took her on February 1st. The vessel had been docked in New York, on December 6th, at the charterers' request, when repairs were made at an expense of about \$700 or \$800. The charterers had no knowledge whether she needed repairing in January. This pretended lay-up for overhauling was a subterfuge, for the purpose of getting rid of payment of the hire of a vessel which had suddenly come back upon their hands, by shoving her over as suddenly upon the owner.

The claim of the owner that it was entitled to 30 days' notice of the cancellation of the charter party which was based upon and was authorized by a continued breach of one of the vital parts of the contract is without adequate foundation.

The decree of the district court, upon the libel of Wessels & Co., is affirmed, without interest, and without costs of this court, with the exception that the decree of the district court shall be without costs of that court. The decree of the district court, upon the cross libel of the owner, is reversed, without costs of this court, and the cause is remanded to that court, with instructions to enter a decree in favor of the libelants for \$1,586, and interest from January 17, 1892, without costs.

WALLACE, Circuit Judge (dissenting). I am of the opinion that the libelants ought not to recover, as damages for the breach of warranty of the vessel's speed, the consequential loss arising by decay and depreciation of the cargo upon the two voyages in question, known as the eighth and ninth voyages. The theory of the libelants is that if, upon these two voyages, the vessel had maintained the contract speed from New York to Colon and back, she would have been able to deliver her cargo of bananas at New York two days earlier than the time when she was actually ready to make delivery, and that, during the two-days delay, the cargo decayed, and became greatly deteriorated in value. By reason of the delay, it has been found that there was a depreciation in the value of the cargo upon the first voyage of \$5,624, and upon the second voyage of \$5,178. According to the proofs of the libelants, if the vessel had maintained her contract speed throughout her first voy-



age, she would have arrived at Colon on Friday, April 8th, at 3 o'clock p. m.; would have been able immediately to receive cargo; could have sailed the next Saturday night; and could have reached New York, and commenced to discharge, on the morning of April 18th, at which time the fruit was in sound condition; but that, by reason of her insufficient speed, she did not reach Colon until 8 o'clock Saturday evening, April 8th. The next day, Sunday, the negro laborers refused to work. Consequently, she could not load and sail until Monday, April 11th, at noon, and did not reach New York, ready to discharge cargo, until the morning of the 20th, at which time the fruit had decayed. Upon the second voyage, if the vessel had maintained her contract speed, she could have reached Colon, Thursday, May 5, 1891, at 1:15 p. m.; could have loaded and sailed by 9:30 p. m., Friday; could have reached New York, May 14th, at 9:30 a. m., at which time her cargo was in sound condition; and could have been discharged that day. Whereas, she did not reach Colon until 8:30 p. m. of May 5th; arriving at that hour, could not commence loading until Friday morning; could not complete loading and sail until 8 p. m., Saturday; and did not reach New York until May 16th, at noon, at which time the cargo had decayed.

The charter was for four months, with the option to the charterers to renew upon the same terms for a year longer, and contained a condition that they might cancel the contract at any time upon 30 days' notice. Its provisions indicated that the vessel might be employed in carrying fruit cargo, but the charterers were at liberty to employ her in any other kind of transportation, at their pleasure, between ports in Canada or the United States and the West Indies or Central or South America; and they were at liberty to sublet the vessel or assign the charter. The speed warranty was as follows:

"The owners guaranty the steamer to make an average speed, under steam, of not less than 11 knots per hour, fruit or light laden, in moderate weather, and with good American coal."

Before the charterers exercised their option to renew the charter, the vessel had been unable to make the contract speed. Her owners had insisted that the speed guaranty was inserted in the charter by their brokers without authority from them. Nevertheless, before and after the renewal, they had promised, from time to time, to endeavor to have the speed increased to conform with the warranty. After December, 1891, however, at which time some repairs were made to the vessel, nothing was done or attempted by the owners to increase her speed, and they insisted that they had done all they could, and that the charterers had waived performance. Long before the voyages in question, the charterers understood that the vessel was unable, and was likely to continue unable, to make a higher speed than she actually made upon the two voyages in question. February 5, 1891, they wrote to the owners as follows:

"We note that you consider that we have waived certain clauses of the Ceres charter, and that we shall not run her after March 1st. We do not

know where you got this information, but it is entirely incorrect. We have waived no clauses of the charter, and until you receive proper notice that we shall stop running her, it is not your province to assume that we shall give her up at any time. \* \* \* It is our present intention to continue running this boat, but we must again call your attention that you have guaranteed her to make a certain speed, and that we insist that such guaranty shall be carried out. We have, from good feelings towards Capt. Svensson, made no claim for damages, owing to nonfulfillment of this clause, as yet; but it will not be entirely safe to judge, from this, that we will do the same in the future. We have written to you several times on this subject, and do not propose to do so again."

There is no pretense that, from the time that letter was sent, the libelants were under any expectation that the owners would endeavor to increase the speed of the vessel.

The libelants have been awarded damages for a loss which was not such a probable and necessary consequence of a breach of the warranty as may fairly be supposed to have entered into the contemplation of the parties when the contract was made. Such a recovery is not sanctioned by authority. *Griffin v. Colver*, 16 N. Y. 489. *Baldwin v. Telegraph Co.*, 45 N. Y. 744; *Murdock v. Railroad Co.*, 133 Mass. 15; *Pennypacker v. Jones*, 106 Pa. St. 237; *Howard v. Manufacturing Co.*, 139 U. S. 199, 11 Sup. Ct. 500.

If the present warranty had been contained in a charter for a single voyage between specified ports for the transportation of a fruit cargo, a loss caused by a decay of the fruit upon the voyage in consequence of the inability of the vessel to perform her contract might properly be considered to fall within the established rule of damages. But the warranty was contained in a charter which was practically for 16 months, and which authorized the charterers to engage in carrying any kind of cargo, and make a great variety of voyages. The contract was, not that she should make the specified speed under all circumstances, but only that she should do so in moderate weather. The many voyages that might be made during the charter period were subject to contingencies which it was impossible to forecast. The conjectural character of the loss which was likely to occur in case of a breach of the warranty is illustrated by the one which actually took place. Because of 5 hours' delay upon the first voyage in arriving at Colon, the vessel has been made responsible for the consequences of the delay there of 36 hours, and the refusal of the laborers to work. If she had started a day earlier, Sunday would not have intervened. A delay of 30 hours might not have resulted in the decay of the fruit. If the weather upon the voyage had been colder, possibly the delay would not have materially injured the cargo. If it had been hotter, possibly the loss would have been very much larger. And, if the vessel had encountered heavy storms, notwithstanding she had made her contract speed, her cargo might have been ruined by the delay. Whether a cargo of fruit would be injured upon any voyage by reason of the inability of the vessel to make her contract speed would depend upon the condition of the fruit when shipped, the length of the voyage, the weather conditions, and other circumstances which could not be anticipated. When-

ever special or extraordinary damages, such as would not naturally or ordinarily follow a breach, have been awarded for the nonperformance of contracts, it has been for the reason that the contracts have been made with reference to peculiar circumstances known to both parties, and the particular loss has been in the contemplation of both, at the time of making the contract, as a contingency that might follow the nonperformance.

Aside from the objection that the damages which have been awarded are too remote and too speculative, there are graver objections to the recovery. The libelants, having been aware that there was no probability that the vessel would be able to maintain the contract speed, had no right to undertake to transport fruit cargoes upon long voyages, during which a few hours' delay might entail an enormous loss by decay, with the expectation of shifting such loss upon the vessel owners. It was their right to refuse to keep the ship, and rely upon a legitimate claim for damages. Such damages would have consisted in a recovery of the cost of procuring a substituted vessel for the rest of the charter term, and for the difference in value, during the prior period of the charter, between a vessel such as the contract called for and such as they had received. The party injured by the breach of a contract can charge the delinquent with such damages only as, with reasonable endeavors and expense, he could not prevent. It is his duty to use reasonable diligence to reduce the damages arising from the breach as far as practicable. *Wicker v. Hoppock*, 6 Wall. 94; *Warren v. Stoddart*, 105 U. S. 224; *Bagley v. Rolling Mill Co.*, 22 Blatchf. 342, 351, 21 Fed. 159; *The Oregon*, 6 U. S. App. 581, 5 C. C. A. 229, and 55 Fed. 666. Reason and good conscience will not permit him to claim damages which arise in consequence of his own inactivity; still less, with such as arise from his own reckless and improvident conduct. Not content with the experiences of the first of the two voyages in question, the libelants undertook the second with the full knowledge of all the chances which might arise; and, by the judgment of the majority of the court, this experiment has been sanctioned, and the heavy loss which has resulted from it has been shifted from those who undertook the hazards, with the full knowledge of the risks, upon the vessel owners.

I am also of the opinion that, in the absence of any provision in the charter to that effect, the hire was not to cease during the two-weeks lay-up of the vessel; but, as the court has reached the conclusion, upon other grounds, that the appellant is entitled to recover the hire during that period, I do not care to enter upon a discussion of the question.

## ST. PAUL, M. &amp; M. RY. CO. v. DRAKE et al.

(Circuit Court of Appeals, Ninth Circuit. February 3, 1896.)

No. 238.

## 1. WRIT OF ERROR—ABSENCE OF BILL OF EXCEPTIONS.

A writ of error addresses itself to the record, and therefore, when the record itself discloses the ground on which a reversal is sought, the absence of a bill of exceptions is no reason for declining to consider the merits of the cause.

## 2. COURTS—PROPERTY IN CUSTODIA LEGIS.

Third parties, claiming property levied on by the marshal, will not be permitted to take it out of his possession, under color of process, by means of a separate suit, even in the same court. The remedy is by ancillary proceedings in the same cause.

In Error to the Circuit Court of the United States for the Eastern Division of the District of Washington.

This was an action of replevin brought by the St. Paul, Minneapolis & Manitoba Railway Company against James C. Drake and Samuel Vinson to recover possession of two locomotives, levied upon by defendants as United States marshal and deputy marshal, respectively. A demurrer to the answer on the ground that the facts stated constituted no defense was overruled by the circuit court, and, plaintiff having elected to stand on his demurrer, judgment was entered for defendants. Plaintiff thereupon sued out this writ of error.

Jay H. Adams, for plaintiff in error.

H. M. Herman, for defendants in error.

Before McKENNA, GILBERT, and ROSS, Circuit Judges.

ROSS, Circuit Judge. The plaintiff in error was plaintiff below in an action of replevin, brought on the 1st day of February, 1895, in the circuit court for the district of Washington, Eastern division, for the recovery of the possession from the defendants of two certain locomotive engines, of the alleged value of \$10,000. On the same day the plaintiff filed in the same court and cause a motion reciting that it was "about to institute a suit in this court, in its Eastern division, wherein James Drake and Samuel Vinson, respectively marshal and deputy marshal of this court, are and will be necessary defendants, and which suit will involve the right to the possession of property situate and located in the county of Spokane, in such Eastern division," and praying the court to appoint some disinterested person "to whom writs, precepts, and other process shall issue in said cause, and who shall be authorized to execute and return such process into this court according to law." Pursuant to that application, the judge appointed C. A. Cole "to execute and make return of all precepts, writs, and other process issued in the said cause," and directed that all such precepts, writs, and other process should be directed to the said Cole for execution and return. The necessary affidavit and bond having been given on behalf of the plaintiff, a writ of

replevin was issued to Cole, directing him to take from the defendants, Drake and Vinson, the two engines, and hold the same for redelivery to the defendants upon their execution of a bond according to law; and, upon their failure so to execute such delivery bond, then to deliver the possession of the engines to the plaintiff. Under this writ the special officer took the engines into his possession, and, the defendants not having given any bond for the retention of the property, the engines were delivered to the plaintiff. A motion was subsequently filed on behalf of the defendants to dismiss the action, upon the ground that the court had no jurisdiction in such a proceeding, which motion, however, does not appear to have been determined or ever heard. Thereafter the defendant Vinson filed an answer to the complaint, in which he alleged that Drake is the duly appointed and qualified marshal of the United States for the district of Washington; that he (Vinson) "is the chief deputy in charge of the business for the Eastern division of such district of Washington"; that by virtue of an execution issued in the case of *John McLaughlin v. The Great Northern Railway Company*, issued by the clerk of the circuit court for the district of Washington, Eastern division, to James C. Drake, United States marshal for the district of Washington, authorizing him to levy upon the property of the Great Northern Railway Company to satisfy the judgment rendered in said case of *McLaughlin v. The Great Northern Railway Company*, he (Vinson), as such chief deputy, in the absence of the marshal, "proceeded to levy upon the two locomotives mentioned in the complaint of plaintiff in said action; and that the only right, title, claim, or interest which said Vinson had in or to the said locomotives as such United States deputy marshal was by virtue of the execution," a copy of which is attached to the answer, and made a part thereof. The execution commanded the marshal of the district that of the goods and chattels of the Great Northern Railway Company in the district of Washington he cause to be made the sum of \$5,000, to satisfy the judgment against that company in favor of *McLaughlin*, besides costs; and that, if sufficient goods and chattels of the company could not be found within the district, then that he cause the amount of the judgment, costs, and accrued costs to be made out of the real estate of the company; and the return to the execution shows that by virtue of it the marshal, by his deputy, Vinson, levied upon the two locomotive engines in question, and held them by virtue thereof at the time they were taken from his possession by the special officer appointed in the present suit. The prayer of the answer was that the action be dismissed for want of jurisdiction in the court, and that the defendant Vinson recover his costs. To the answer the plaintiff demurred, on the ground that it did not state facts sufficient to constitute a defense to the action, which demurrer was by the court below overruled, and to which ruling the plaintiff excepted; the order overruling the demurrer reciting: "And on request of plaintiff it is granted until the 16th day of May, 1895, in

which to file its reply." On the 18th day of May, 1895, this order and judgment was entered:

"Whereas, on the 29th day of April, 1895, the demurrer to the answer of said defendant, Samuel Vinson, having been argued and submitted to the court, and said demurrer having been overruled, the court, finding that the several matters and things set forth in the answer of the said Sam. Vinson are sufficient in law to bar the action of the said plaintiff against the said defendant, considered that the said demurrer be overruled; and, the said plaintiff having obtained leave from the court to serve a reply to said answer on or before the 16th day of May, 1895, and the said plaintiff having elected to stand upon its demurrer and the order overruling the same, now, on motion of H. M. Herman, counsel for the defendant, and after hearing Jay H. Adams, counsel for the plaintiff: It is ordered that the defendant have final judgment herein upon the record and pleadings. It is therefore considered by the court that the said defendant do have a return of the goods and chattels taken from him in this action, and now in possession of said plaintiff, under said proceedings; and, in default of the said goods and chattels being so returned, the said defendant do recover against said plaintiff the said sum of ten thousand dollars (the value of said property as fixed by said plaintiff), his damage so assessed, and also his costs in and about his suit in that behalf expended, taxed at ——— dollars and ——— cents.

"Done at Spokane, in open court, May 18th, 1895.

"C. H. Hanford, Judge."

On the 20th of May following, the plaintiff sued out a writ of error, and on the same day filed his assignment of errors, the first of which was that the court below erred in overruling the demurrer of the plaintiff to the answer of the defendant Vinson; and the second, that the court erred in rendering judgment for the defendants upon the overruling of the demurrer.

The objection of the defendant in error to the consideration of the merits of the case because there is no bill of exceptions is not well taken. The writ of error addresses itself to the record (*Storm v. U. S.*, 94 U. S. 76), and the record itself discloses the ground upon which the plaintiff in error seeks a reversal of the judgment.

The writ under which the marshal levied upon the locomotives in question did not command that officer to levy it upon that particular property, or upon any other specific property, but came within the second class of writs described by the supreme court in *Buck v. Colbath*, 3 Wall. 334, 343, where the officer was directed to levy upon property of the defendant to the writ sufficient to satisfy the demand against it, without describing any specific property to be thus taken. In such a case the obvious duty of the officer is to levy upon property of the defendant to the writ, and not upon property of somebody else. He has, as said by the court in the case cited, "a very large and important field for the exercise of his judgment and discretion. First, in ascertaining that the property on which he proposes to levy is the property of the person against whom the writ is directed; secondly, that it is property which, by law, is subject to be taken under the writ; and, thirdly, as to the quantity of such property necessary to be seized in the case in hand. In all these particulars he is bound to exercise his own judgment, and is legally responsible to any person for the consequences of any error or mistake in its exercise to

his prejudice. He is so liable to plaintiff, to defendant, or to any third person whom his erroneous action in the premises may injure. And, what is more important to our present inquiry, the court can afford him no protection against the parties so injured; for the court is in no wise responsible for the manner in which he exercises that discretion which the law reposes in him, and in no one else." In the case at bar the answer relied on by the defendant in justification of his act contains no denial that the property seized was the property of the plaintiff to the suit, nor any averment that it was the property of the defendant to the writ, or in any way subject to be taken thereunder. But the answer does aver that, by virtue of the execution issued in the case of *McLaughlin vs. The Great Northern Railway Company*, directed to the marshal, the defendant Vinson, as his deputy, levied upon and took into his possession the locomotives in question. For any tort committed by the officer under such a writ he would be liable in trespass, or to any other legal remedy, at the suit of the party injured, in any proper court, with this limitation: that no such court can be permitted to interfere with the property while it is in the actual or constructive possession of the court under whose process it was taken. *Buck v. Colbath*, *supra*. The principle upon which this limitation is based is that the possession of the property levied upon by the marshal under claim and color of the authority conferred by a writ of execution or other similar writ is the possession of the court under whose process the officer acted; that the property is thereby brought within the custody of the law, and, so long as that custody continues, "no other court has a right to interfere with that possession, unless it be some court which may have a direct supervisory control over the court whose process has first taken possession, or some superior jurisdiction in the premises." 3 Wall. 341. Accordingly it was held, in *Freeman v. Howe*, 24 How. 450, that where a wrongful attachment had been levied by the marshal upon property of a party not named in the writ, the rightful owner cannot obtain possession by a suit in replevin in a state court. The same rule was applied in respect to property wrongfully levied upon by the marshal under writ of execution in the case of *Covell v. Heyman*, 111 U. S. 176, 4 Sup. Ct. 355, the court holding that the possession of the property by the marshal under claim and color of the authority conferred by the writ of execution is, in itself, without regard to the rightful ownership, a complete defense to an action of replevin brought in a state court. The unseemly conflict and confusion that might, and often would, otherwise arise between courts of co-ordinate jurisdiction, and which is obviated by the application of the principle alluded to, would exist, although perhaps in a less degree, were third parties permitted, by a separate and independent suit in the same court, to take property levied upon by the marshal and held by him under claim and color of process, out of his possession, and thus out of the custody of the court issuing the process under which the marshal acted. Nor is there any necessity for the true owner, whose property has been thus wrongfully, but under color

of process, taken and withheld from him, to resort to a separate and independent suit to recover its possession; for, in order to prevent injustice by an abuse of their process, the courts hold that any person, not a party to the suit or judgment, whose property has been so wrongfully taken and withheld from him, may prosecute, by ancillary proceedings in the court whence the process issued, his remedy for restitution of the property, or its proceeds, while remaining in the control of that court; and that all other remedies to which he may be entitled, against officers or parties, not involving the withdrawal of the property, or its proceeds, from the custody of the officer and the jurisdiction of the court, he may pursue in any tribunal, state or federal, having jurisdiction over the parties and subject-matter. *Covell v. Heyman*, 111 U. S. 176-179, 4 Sup. Ct. 355; *Krippendorf v. Hyde*, 110 U. S. 276, 4 Sup. Ct. 27. Judgment affirmed.

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TOWNSEND et al. v. HAGAR.

(Circuit Court of Appeals, Second Circuit. March 3, 1896.)

1. PARTNERSHIP—LIABILITY OF PARTNERS—NOTICE.

When negotiable securities, transferable by delivery, are intrusted by the owner to one partner of a firm, to be used in raising money for the owner's benefit, and are by such firm afterwards used in raising money for its benefit,—the proceeds of the loans so secured and sales made being credited to the partner to whom the securities were intrusted,—the other partners are affected with his knowledge of the real owner's interest, and all are equally liable to the owner for the moneys raised by means of the securities and used by the firm.

2. PLEADING—NEW YORK CODE—DISREGARDING IRREGULARITIES.

Under the provision of the New York Code of Civil Procedure (section 1207), that when there is an answer the court may permit the plaintiff to take any judgment consistent with the case made by the complaint and embraced within the issue, a judgment will not be reversed because the complaint is inartificially drawn, or sets out a cause of action as for conversion, which should properly be for money received to the plaintiff's use, if the vital issue of the case is preferred in the complaint and controverted in the answer, and the defendant has had full opportunity to adduce any evidence available in defense.

In Error to the Circuit Court of the United States for the Eastern District of New York.

This case comes here upon a writ of error to the circuit court, Eastern district of New York, to review a judgment entered April 9, 1895, upon a verdict in favor of the defendant in error, who was plaintiff below. A motion for new trial was denied. 67 Fed. 433. The judgment is for \$1,145.63 and costs against both plaintiffs in error, and for the additional sum of \$1,653.22 and costs against the plaintiff in error Townsend. The facts are stated in the opinion.

Peter S. Carter, for plaintiffs in error.

T. M. Taft, for defendant in error.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. On and prior to December 8, 1887, the defendant Townsend and one George Edgett were co-partners in business in the city of New York under the firm name of Townsend



& Edgett. This partnership continued until May 1, 1891, on which day the defendant Downey became a partner with the other two, the firm name remaining unchanged. On November 30, 1891, Edgett retired, and thereafter the firm continued under the name of Townsend & Downey. This action was brought against the defendants now surviving and Edgett, who died before the cause came on for trial. The action was not revived against his personal representatives.

On December 8, 1887, the plaintiff, Hagar, was the owner of seven first mortgage bonds of the Mexican-Central Railroad, in the amount of \$1,000 each. They were in the ordinary form of such negotiable securities, not registered, and payable to bearer. He delivered these to Edgett upon an agreement whereby Edgett was to pledge them as security for a loan of \$3,500, remitting the proceeds to Hagar, or using the same to pay indebtedness for which Hagar was responsible. It appears conclusively that Edgett accounted to Hagar for \$1,367 of the \$3,000 which he raised on the bonds. Whether he ever accounted to him for the remaining \$1,633 is not clear, upon the proofs; but, in view of the way in which the case was disposed of at circuit, it is immaterial whether he did or not. The judge held that defendants were not responsible for the \$3,000 originally borrowed on pledge of the bonds, and the plaintiff has not assigned any error. The equity in the bonds over and above the \$3,000 for which, with his assent, they were pledged, remained the property of Hagar. The \$3,000 was loaned December 14, 1887, by the German-American Bank, on a note of Townsend & Edgett, with these seven bonds as collateral security. This \$3,000 was placed to the credit of the firm on the books of the bank, and subsequently paid out on their checks. On the books of the firm, Edgett was given credit for \$3,000 advanced to the firm, and subsequently drew out that sum from the concern. The bonds remained pledged with the bank as security for this \$3,000 note until November 20, 1891, when a new note of the same firm, in the amount of \$4,000, was given, and the same bonds pledged as collateral therefor. The bank retained \$3,000 to pay the old note, and the additional \$1,000 was passed to the credit of the firm upon the books of the bank, and was subsequently drawn out on checks of the firm. On the firm books, Edgett was credited with \$1,000. On February 31, 1892, the new firm (Townsend & Downey) paid off this note of \$4,000, and obtained a renewal loan for the same amount on their firm note, pledging the bonds as security therefor. Subsequently the bank pressed for payment of this last note, whereupon the defendants directed the bank to sell the bonds and pay itself out of the proceeds. The bonds were then sold for \$5,526.85, out of which the bank paid the \$4,000 note and interest, crediting the firm of Townsend & Downey with the balance, \$1,460.88, which was subsequently drawn out on the checks of the firm. On the firm books, \$1,460.88 was credited to Edgett; and it appears that whatever credits he had with the firm were, in due course, paid over to him.

It is apparent from this narrative of the transactions that, so far as the firm was concerned, these bonds were treated in all respects

as if they were the individual property of the partner Edgett, loaned by him to serve as security for firm paper, and everything realized from such bonds by the firm was credited to him as an advance of money, and in due course repaid to him. Practically, the situation is the same as if the firm had bought the bonds from the partner Edgett. Inasmuch as the bonds were negotiable securities, payable to bearer, the legal title to which passed by delivery, this would give them a good title, and cut off any equities, provided they acted without notice of Hagar's rights. The difficulty, however, with the contention of plaintiffs in error, is that not only did one of the partners, Edgett, concededly have full knowledge of the facts, but the jury, by a special verdict, in answer to a separate question submitted to them, have found, upon conflicting evidence, that the other partner, Townsend, knew before the \$1,000 (additional) was advanced by the bank, November 20, 1891, that the bonds belonged to Hagar. With this knowledge the third partner, Downey, is affected. Daniel, Neg. Inst. § 802; Railroad Co. v. Mowry, 28 Hun, 79. The judge who tried the cause in the circuit court instructed the jury that Downey could be held responsible only for the final balance turned over by the bank, \$1,460.88, and not for the \$1,000 advanced to the firm when the note was first increased from \$3,000 to \$4,000, evidently under the supposition that Downey was not then a member of the firm. This is manifest from the language of the opinion filed on the denial of motion for a new trial. In this assumption, however, the learned judge was in error, since the evidence shows that Downey became a member of the firm of Townsend & Edgett in May, 1891, and, that the additional \$1,000 was raised on the bonds, and passed to the credit of that firm, six months later,—November 20, 1891. The plaintiff was entitled to the same judgment against both defendants, but, since he has not assigned error, the judgment entered against Downey should not be disturbed.

The defendants further contend that plaintiff was not entitled to judgment for the \$1,000 and the \$1,460.88, under his complaint. That pleading is unnecessarily voluminous. It sets forth all the facts substantially as above recited, except that it does not aver what sum the bonds brought when sold by the bank, nor the precise amount of proceeds of the sale, over and above repayment of the note, which came into the possession of, and were used by, defendants. These averments are repeated in two separate alleged causes of action, in the last of which it is averred that, by the actions of defendants in procuring the bank to sell the bonds, said bonds became wholly lost to plaintiff, and the proceeds were applied to the use of the defendants. The prayer for relief asks judgment for a return of the bonds, or for damages suffered by plaintiff from the loss thereof. This complaint is inartificially drawn. It fails to aver that the proceeds of the bonds were received by defendants to the use of plaintiff, and is, in form, one for conversion, rather than for money had and received. But the Code of Civil Procedure of the state of New York (section 1207) provides that, "when there is an answer, the court may permit the plaintiff to take any judgment consistent with the case made by the complaint and embraced within the issue." And

the power given to the court to amend a pleading, even after judgment, is most liberal. Section 727. Every issue of fact essential to make out a cause of action for money rightfully the property of plaintiff, received by defendants to his use, was tendered in the complaint, except that the precise amount thus received was not set forth,—probably because it was not within plaintiff's knowledge,—an amount greater than the true amount being averred. The facts proved—indeed, the undisputed facts, since the knowledge of Edgett was the knowledge of his partners, irrespective of the jury's finding as to Townsend's knowledge—show that the plaintiff was entitled to recover the \$2,480.88 which the defendants had received by selling his bonds without his consent. Under these circumstances, it would be a failure of justice to send the case back for a new trial, by reason of technical defects in the complaint, when defendants have had full opportunity to adduce, and have adduced, on the trial, whatever evidence was available to them as a defense against such cause of action. The vital issue of fact, namely, the transfer of the bonds from Hagar to Edgett upon an express agreement that they should be used only for a special purpose, and then returned to plaintiff, was proffered in the complaint, and controverted by the answer. It must be assumed that on that issue defendants produced all the proof they had. Certainly, if they did not it was not because they were misled, either by the complaint or by any action of the trial judge. Every other fact necessary to recovery—the existence of the partnership; the dates when Downey came into it, and when Edgett left; the time of, and circumstances attending, the raising of the additional \$1,000; the fact that it was passed to the firm's credit, and drawn out of the bank on its checks; the instructions to the bank to sell the bonds; the amount of the surplus realized on such sale; the passing of that surplus to the credit of the firm, and the drawing of it out by firm checks—all appeared by the uncontradicted evidence of one of the defendants himself. As we find no error in the admission of evidence, or in the instructions to the jury, the judgment of the circuit court is therefore affirmed.

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#### NEW MEMPHIS GAS & LIGHT CO. v. CITY OF MEMPHIS.

(Circuit Court, W. D. Tennessee, W. D. March 20, 1896.)

##### 1. POLICE POWER—REGULATING PRICE OF GAS—REASONABLENESS.

Under an act of a state legislature authorizing a taxing district to regulate the price of gas furnished by gas companies within such taxing district, provided the price shall not be fixed below a certain minimum, such power to regulate cannot be exercised arbitrarily, without investigation of the facts bearing upon the reasonableness of the rate to be fixed, or in such a manner as to bring about a destruction or confiscation of the property of the gas companies; but due regard must be given to the right of such companies to receive such an income from their business as to pay operating expenses, legitimate fixed charges, and a reasonable profit.

##### 2. EQUITY PRACTICE—PRELIMINARY INJUNCTION.

Accordingly, upon a bill charging that a rate for gas, fixed under such a statute by a taxing district, was fixed arbitrarily, without investigation, and was so unreasonably low that the company affected would be unable

to meet its expenses and fixed charges, and would be rendered insolvent, and praying for an injunction to restrain the enforcement of the ordinance fixing the rate, *held*, that a preliminary injunction restraining its enforcement should be granted, upon the gas company's giving a bond to refund to the consumers of gas the excess of charges if its bill should fail.

3. SAME.

On application for preliminary injunction it is not proper to decide the merits of the controversy, especially where the case turns on grave questions of law. All that the judge should, as a general rule, require, is a case of probable right and probable danger to that right without the interposition of the court, and the judge's discretion should then be regulated by the balance of inconvenience or injury to the one party or the other.

4. SAME.

The judge should, in a case of probable right, grant the provisional injunction where the relief sought is essentially preventive and a denial of the injunction might in effect amount to denial of all relief.

Brown, Hirsh & Brown and Thos. M. Scruggs, for complainant.  
S. P. Walker, City Atty., for defendant.

CLARK, District Judge. The question now considered in this case is whether a preliminary injunction shall be allowed. This question arises upon bill, answer, and affidavits in support of the charges in the bill. The act of the legislature of the state of 1887 (chapter 91), confers upon the taxing district of Memphis the power to regulate gas companies, and also to regulate the price to be charged for gas furnished to the city and its inhabitants, with a provision that it shall not reduce the price below \$1.50 per 1,000 feet, when paid within the customary discount days. Pursuant to this legislative authority, the taxing district, by ordinance, October 29, 1895, undertook to exercise the power of regulation by reducing the price of gas from \$1.75 per 1,000 feet, as theretofore charged, to the lowest limit which, under the statute, it was permitted to go, namely, \$1.50 per 1,000 feet. The ordinance was subsequently amended so as to make its violation a misdemeanor and a subject of prosecution. The substance of the charges made in the bill, as ground for an injunction, is that this ordinance is invalid because the price fixed thereby was arbitrarily done; the taxing district going to the lowest limit possible, without any method whatever of inquiry to ascertain whether the rate fixed was reasonable, or such as would enable the company to maintain its existence or to make a reasonable profit on the money invested in the enterprise. Various questions are made in the bill, as well as in the brief, as to the constitutionality of the legislative act, and of the ordinance passed under authority of that act. So, too, various questions arise as to whether or not the New Gas Company, by virtue of its organization under the act of 1885, has so connected itself with the contract rights and privileges of the old company under its charter as to be exempt from regulation, beyond such as might have been had in regard to the old company, and under the original charter of that company.

It is to be borne in mind that it is not proper, on an application of this kind, to decide, or to consider with a view to final decision, the merits of the controversy, especially where such merits turn

on grave questions of law. It would no more be proper to do so on a motion for an injunction than on a motion to dissolve an injunction. *Owen v. Brien*, 2 Tenn. Ch. 295. It is consequently settled that, upon preliminary application for an injunction, all that the judge should, as a general rule, require, is a case of probable right, and probable danger to that right without the interposition of the court; and his discretion should then be regulated by the balance of inconvenience or injury to the one party or the other. 2 Beach, Mod. Eq. Prac. § 756; *Flippin v. Knaffle*, 2 Tenn. Ch. 238. Such being the practice upon this subject, I do not now deem it proper to discuss the more serious legal questions here involved. I think it is safer to make such examination as is now required from the standpoint of the contention made by the able counsel for the taxing district, and determine how far this contention meets the prima facie case made in the bill for injunction, and whether such contention offers valid ground for refusing the preliminary injunction.

The defendant's contention is that the New Gas Company became incorporated in 1894 subsequent to the passage of the act of 1887 authorizing regulation, and that it therefore took its franchises subject to the provision of said act, and that the ordinance of the taxing district, although passed subsequent to the incorporation of the New Company, was merely in execution of the legislative act, and is therefore entirely valid, if the act of the assembly is itself valid. I think this contention is in the main sound. And I desire to say, in passing, that, if the New Company can so connect itself with the old company as to stand in the shoes of the old company in all respects, I do not think that it by any means follows that the company is not subject to regulation as to the price which it shall charge for gas. It would require provisions in the original charter sufficiently definite to amount to a contract right to exemption from regulation, before its claim to this effect could be sustained. But the real attack made in this bill upon the ordinance in question is not so much that the act of assembly authorizing an ordinance is, when properly construed and enforced, not valid, but that the ordinance is not a legal and proper exercise of the power conferred by that act. The objection is not so much to the legislation on its face, as to the manner in which the taxing district has undertaken to enforce the act. The act of the general assembly is to receive such construction as will render it, if possible, constitutional and valid, and not invalid; and it must be borne in mind, constantly, that when a corporation is chartered under the general incorporation law, with the right to manufacture and sell gas, the right to charge a reasonable rate for all gas furnished is a right implied, and one that forms part of the charter contract with the state, which cannot be impaired by legislation. And a reservation of the right to repeal, modify, or amend the charter does not change this rule, so long as the state chooses to allow the charter and the charter rights to remain. Conceding for the present that under this reserved power the state might withdraw the franchises granted, and extinguish the corporate existence, that is not the question here,

as the state has not attempted to do anything of the kind, and no attempt has been made to amend or modify the charter. An extinguishment of the charter and of corporate existence must be distinguished from an unreasonable regulation of the corporation while its existence is permitted by law; and the legislature would have no more power, by an unreasonable amendment of the charter, to destroy the company's business, and thereby destroy its property, which is devoted to, and valuable only for its use in the conduct of, such business, than it would have to accomplish this result by an independent statute. The state is under an obligation to act justly, and without arbitrary discrimination, between corporations of the state, just as it is between citizens of the state enjoying equal rights. The state cannot, under the guise of a regulation, bring about a destruction and a confiscation of a company's property; and the state's power to absolutely abolish the corporation must be distinguished from its power to destroy its business and confiscate its property, so long as it chooses to permit its existence and to authorize its business by a valid charter. *Chicago, M. & St. P. Ry. Co. v. Minnesota*, 134 U. S. 418, 10 Sup. Ct. 462, 702. And this is the fair result of what are known as the "Reagan Cases." 154 U. S. 362, 420, 413, 418, 14 Sup. Ct. 1047, 1060, 1062. And the question of the reasonableness of a rate of charge is eminently a question for judicial investigation, requiring due process of law for its determination. And to deprive a company of the power of charging reasonable rates for the manufacture and sale of gas is to deprive it of the use of its property, and, in effect, of the property itself, without the due process of law. *Chicago, M. & St. P. Ry. Co. v. Minnesota*, *supra*. The act of assembly under consideration, therefore, must be given a construction which would not render it invalid, or obnoxious to constitutional objections, for otherwise the act itself would be void. It is clear, therefore, that the act in question, in fixing a limit below which the taxing district should not go, did not thereby authorize the taxing district to reduce the price of gas to that limit arbitrarily. And the very use of the term "regulation" implies that an investigation shall be made; that an opportunity to present the facts shall be furnished; that, when the facts are established, they shall, by the regulating power, be given due consideration; and that such action as shall be taken in view of these facts, thus ascertained, shall be just and reasonable, and such as enables the company to maintain its existence, to preserve the property invested from destruction, and to receive, on the capital actually and bona fide invested in the plant, a remuneration or dividend corresponding in amount to the ruling rates of interest. The company has a right to such gross income from the sale of gas as will enable it to pay all legitimate operating expenses, pay interest on valid fixed charges, so far as bonds or securities represent an expenditure actually made in good faith, and also to pay a reasonable dividend on stock, so far as this represents an actual investment in the enterprise. All of these items, and perhaps others, must be taken into account, in any regulation which may be made in respect to the prices of gas. Such investigation and

such regulation as are contemplated by the statute might enable the company to fix the price at \$1.50 per 1,000 feet, or at any named figure between that and the former price of \$1.75 per 1,000 feet. This would depend on the reasonableness of the regulation, in the sense above explained; keeping constantly in mind that the power to regulate rates is not a power to destroy, and that limitation is not the equivalent of confiscation. It is common for railroad charters to provide that the carrier may charge a rate for transportation of goods and passengers, not exceeding a fixed amount; for example, five cents a mile for every passenger. But this is a restriction on the company itself, as to its charges, and it is entirely competent for the legislature, notwithstanding this provision, to regulate the charges, within reasonable limits, and to fix a sum below the maximum, beyond which the company could not go. *Ragan v. Aiken*, 9 Lea, 609. Such is the doctrine of the *Reagan Cases*. Indeed, this is all now very well understood and is familiar.

So the minimum fixed in this statute, below which the taxing district cannot go, is a restriction on the taxing district itself, and a limitation on its power in this respect; and it is compelled to fix a limit above this sum, if it is just and reasonable to do so. Now, if the contention made in this bill is true, the taxing district, without any inquiry, and without any adequate knowledge whatever, and without any effort to know the truth and do justice, has undertaken, in the first instance, and by way of arbitrary action, to exercise its power down to the lowest limit. So, I repeat, the objection is not so much to anything in the terms of the ordinance, or of the act of the assembly, as in the facts which exist outside of the ordinance. If the plaintiff can, by proof, sustain the charges of this bill, it results inevitably that the ordinance is not a legal and valid exercise of the power conferred on the taxing district by this statute, but is an attempt to exercise the power in a manner which clearly amounts to destruction, and in such manner, too, as that if the act of assembly had undertaken, in terms, to authorize it, would render the act unconstitutional and void on its face. The distinction is between a valid and just execution of the power given by the act, and an illegal and unwarranted execution of such power. The bill charges distinctly that under the rate of charges, as fixed by this ordinance, the corporation would not be able to pay its expenses, interest on its fixed charges, much less a reasonable interest or dividend on its stock, and that an attempt to operate under such a rate of prices would result in its bankruptcy. And the bill, in its main allegations in this respect, is supported by affidavits of persons experienced in the manufacture and sale of gas, and some of them, so far as the record discloses, without any interest in this controversy. So that, according to the *prima facie* showing, if the injunction should be refused, and the city allowed to put this destructive rate in force, the insolvency and dissolution of this company would speedily follow. It seems to me clear, therefore, that, considering as I must do, the balance of inconvenience and injury which may result to one party or the other from my action on this injunction pending the litigation, the injunction

should be allowed. The public can be protected by a bond in a suitable sum, with condition to refund either to the persons who consume gas, or to the taxing district, for the use and benefit of such persons, all sums which may be charged over the rate fixed by this ordinance, in the event plaintiff's bill shall fail, and the regulation by said ordinance be sustained as valid on final hearing. It will not be difficult to thus reimburse fully each purchaser of gas for the excess which may be paid over the rates fixed by the ordinance, if finally sustained, and no serious injury can therefore result to the public, while to refuse the injunction would possibly result in the destruction of the plaintiff's business and property before this litigation can be terminated. It is to be observed that this is a bill essentially for preventive relief only, and a denial of the injunction might, in its practical effect, amount to a denial of all relief. The injunction is therefore granted, upon the execution of such bond, and, in case the amount thereof is not agreed upon by the solicitors in the case, the amount will be fixed through the aid of the clerk of this court, upon proper inquiry made by him for that purpose.

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ROSS-MEEHAN BRAKE SHOE FOUNDRY CO. v. SOUTHERN MALLEABLE IRON CO. et al.

(Circuit Court, E. D. Tennessee, S. D. March 20, 1896.)

No. 466.

1. EQUITY PRACTICE—CREDITORS' BILLS.

Bills for the foreclosure of a mortgage and as general creditors' bills were filed against the S. Co. A receiver was appointed in the first suit, and the receivership extended to the others, and all the suits were then consolidated. An auxiliary suit having been brought by the receiver to enforce a subscription to the stock of the S. Co., the defendant set up in his answer objections to the jurisdiction of the court in the original suit, on the ground that, as the consolidated bills did not show exhaustion of the legal remedy by returns of nulla bona, the cause was not one of equitable cognizance. *Held* that, even if the defendant in the auxiliary suit could raise objections to the jurisdiction of the court in the original suit, the objection was without merit, since the bills were for foreclosure as well as general creditors' bills, and simple contract creditors have the right to intervene in such suits, while it is the practice in the circuit court for the Eastern district of Tennessee to make all foreclosure suits against insolvent corporations general creditors' bills as well, in order to secure complete winding up.

2. CONSTITUTIONAL LAW—TRIAL BY JURY—SUITS IN EQUITY.

The enforcement of the liability of a subscriber to the stock of a corporation by an auxiliary suit in equity, brought by the receiver of the corporation appointed in a creditors' suit instituted upon its insolvency, does not infringe the constitutional right of such subscriber to a trial by jury.

3. CORPORATIONS—SUBSCRIPTIONS TO STOCK—CALLS.

When a corporation is insolvent, and proceedings are pending, instituted by creditors, to wind up and distribute its assets, no call or assessment is necessary before the institution of suits to collect unpaid balances on subscriptions to its stock.

4. SAME MISREPRESENTATIONS.

When proceedings are instituted to collect a subscription to the stock of a corporation after its insolvency and the institution of proceedings to wind



it up, the subscriber cannot defend against the claim on the ground of fraudulent misrepresentation in securing his subscription, without showing that he exercised the greatest diligence to discover the fraud and repudiate his contract of subscription.

5. SAME—CONSTRUCTION OF CHARTERS—GENERAL ACTS.

The rule that a grant by legislative charter is to be strictly construed, and that nothing passes by implication, applies with even greater force to articles of association organizing a corporation under general laws than to a charter granted by special act.

6. SAME—INCREASE OF STOCK—TENNESSEE STATUTE.

The general incorporation act of Tennessee, as adopted in 1875, provides that a corporation organized under it "may, by by-laws, make regulations concerning the subscription for or transfer of stock, fix upon the amount of capital stock, \* \* \* the division of the same into shares, the time required for payment thereof," etc. An amendment, adopted in 1883, provides that "any corporation which may desire to change its name, increase its capital stock," etc., may do so by filing a certificate, with the same formalities as its original articles of association. *Held* that prior to the amendment of 1883 no power was given by such act to corporations organized under it to increase their capital stock, and that an attempt by such a corporation to increase its stock by a by-law was of no effect, and the subscriptions to the increased stock were void.

7. SAME—ILLEGAL ACTS—ESTOPPEL.

When corporate stock has been illegally increased, not by a mere irregular exercise of an existing power, but by an act which the corporation was wholly without power to do, a subscriber to such increased stock is not estopped to defend an action on his subscription on the ground of the illegality, by having acted as president and manager of the corporation, and representing the stock at meetings of stockholders, whether the action be brought by the corporation itself or by a receiver acting in the interest of creditors.

Wheeler & McDermott, for receivers.

White & Martin, for defendant Elliott.

CLARK, District Judge. The above is a consolidated cause pending in this court. Three separate bills have been filed against the defendant company as an insolvent corporation. Receivers were appointed under the first bill, and the receivership extended to the subsequent bills as filed. The bills, as now consolidated, are for the foreclosure of a mortgage on defendant's property, and as general creditors' bills, to wind up the defendant company as an insolvent corporation. The usual steps taken in such cases have been had in this. In the progress of the case, and on December 5, 1894, the receivers appointed prepared and presented to the court, Judge Key presiding, a bill against the defendant Elliott, a citizen of the state of Alabama. It is alleged in the bill (as appears to be the case) that a large balance of indebtedness exists against the corporation, after all of its other assets shall have been exhausted, and that it is necessary to collect unpaid subscriptions, and that defendant Elliott is indebted to the company for a large balance on his subscription to capital stock. This bill was presented to Judge Key, who made the following order thereon:

"File the foregoing bill or petition as a dependent and auxiliary bill in this cause, upon a proper cost bond, with security, being executed by the petitioners, and issue process as prayed for.

"Sept. 7th, 1894.

D. M. Key, Judge."

Thereupon the bill was filed, and defendant Elliott answered the same, and in his answer sets up various defenses, and among them objections to the jurisdiction of the court in the original case in which this is filed as a dependent bill. The insolvent corporation was organized under the general incorporation act of 1875, and its original or initiatory stock was fixed by by-law at \$50,000, and was subsequently and at different times attempted to be increased by resolution of the stockholders to \$70,000, again to \$80,000, and finally to \$100,000, and defendant Elliott is a subscriber to the last increase of stock from \$80,000 to \$100,000. The defendant Elliott was president and general manager of the company for the period of about 11 months, beginning in 1892 and extending into 1893. He also attended meetings of stockholders representing his stock, as well as meetings of directors. No certificate of stock appears to have in fact been issued to defendant Elliott, but his subscription is in proper form. The issues now to be disposed of arise under this bill by the receivers against Elliott, and a more particular statement of the facts and history of the case is not deemed necessary to an understanding of this branch of the litigation.

Defendant's first contention is that the court is without jurisdiction, and the point made is that the present suit is in no sense a dependent and auxiliary bill, but an independent suit. The court has, however, by express order, made it such, and this bill is filed in the original case, and such order has not been set aside or reversed, and the objection is, therefore, according to *Davis v. Gray*, 16 Wall. 204, not well taken. Moreover, the proposition that this bill is in its essential character auxiliary or ancillary to the original suit, and that the court has full jurisdiction of it as such, is fully sustained by the case of *White v. Ewing*, 159 U. S. 36, 15 Sup. Ct. 1018; and the entire procedure in the case before Judge Key is fully sanctioned by the cases of *Davis v. Gray* and *White v. Ewing*. The defendant contends that, treated as an auxiliary bill, the court was without jurisdiction of the original bill, and that plaintiffs have no right, for this reason, to recover. Passing by the question whether the defendant can, in this dependent suit, make an objection to jurisdiction in the original case, it is clear, I think, that this contention cannot be sustained. The objection made is that the consolidated bills do not show exhaustion of the legal remedy by *nulla bona* return, and that the case is not, therefore, one of equitable cognizance. As the bills are bills for foreclosure as well as general creditors' bills, it is not perceived on what basis an attack upon the jurisdiction can rest. The court certainly had jurisdiction to foreclose the mortgages, and it was pointed out in *Hollins v. Iron Co.*, 150 U. S. 379, 14 Sup. Ct. 127, that in such foreclosure suit simple contract creditors can intervene, and assert any equity or priority in respect to the property, and secure protection in that proceeding, and it has become the well-established practice of this court in foreclosure suits against an insolvent corporation to make the suit also a general creditors' bill, for the purpose of having all liens and priorities settled, and a complete winding up and distribution of assets made. And it was decided in *Hollins v. Iron Co.*, that the objection that plaintiff had not

exhausted the legal remedy before commencing proceedings in equity must be made in limine, and, if not so made, that a court of equity is not ousted of jurisdiction; and certainly this defense, coming, as it does, in an ancillary suit, and in an answer at the hearing after the original case is well-nigh ended, is too late. And, the corporation being confessedly insolvent, it is doubtful if there is any basis in the facts of the case for this defense, aside from the legal objection to the time and manner in which it is attempted to be presented.

It is next objected that suit cannot be maintained in a court of equity in the United States court, because the demand is purely legal, and deprives the defendant of trial by jury. This contention is again met and answered adversely to defendant by *White v. Ewing*, supra, and *Porter v. Sabin*, 149 U. S. 473, 13 Sup. Ct. 1008, in which Mr. Justice Gray, giving the opinion of the court, said:

"It is for that court, in its discretion, to decide whether it will determine for itself all claims of or against the receiver, or will allow them to be litigated elsewhere. It may direct claims in favor of the corporation to be sued on by the receiver in other tribunals, or may leave him to adjust or settle them without suit, as in its judgment may be most beneficial to those interested in the estate. Any claim against the receiver or the corporation the court may permit to be put in suit in another tribunal against the receiver, or may reserve to itself the determination of; and no suit, unless expressly authorized by statute, can be brought against the receiver without the permission of the court which appointed him."

The principle is that jurisdiction of the creditors' suit and the receivership draws to such jurisdiction all litigation necessary to completely wind up the insolvent corporation, and distribute its assets legally; and it has never been supposed that the constitutional provision for trial by jury in any manner restricted or affected jurisdiction of a chancery court as it existed at the time of the adoption of the constitution. This contention is therefore wholly untenable. It is again insisted that plaintiffs cannot recover because the suit was not preceded by a call or assessment against the defendant as a subscriber, and that until this is done no right of action accrues. In a suit by a solvent, going corporation to collect subscription, and in certain suits provided by statute, this would be true; but it is now quite well settled that when the corporation becomes insolvent, with proceedings instituted by creditors to wind up and distribute its assets, no call or assessment is necessary before the institution of suits to collect unpaid balances on subscription. *Hatch v. Dana*, 101 U. S. 205; *Holmes v. Sherwood*, 3 McCrary, 405, 16 Fed. 725; *Washington Sav. Bank v. Butchers' & Drovers' Bank* (Mo. Sup.) 17 S. W. 644; *Bank v. Gillespie*, 115 Pa. St. 564, 9 Atl. 73; *Tayl. Priv. Corp.* § 703.

The defendant also sets up as a defense that his subscription to this stock was obtained under fraudulent misrepresentations as to the condition and past business operations of the company, and that the subscription is, for this reason, invalid. I am clearly of the opinion that this defense comes too late. All of the facts now known to the defendant as grounds for rescinding his contract were such as he could, at any time, have discovered by reasonable inquiry, and where the means of knowledge are open to him the ef-

fect is the same as knowledge itself; and, if the defendant could in any case make this defense after insolvency, and after institution of proceedings to wind up the corporation, it would be necessary for him to show that he exercised the greatest diligence to discover the fraud, and to promptly repudiate his contract of subscription. *Chubb v. Upton*, 95 U. S. 665; *Upton v. Englehart*, 3 Dill. 496, Fed. Cas. No. 16,800; *Cunningham v. Railroad Co.*, 2 Head, 23.

The only remaining defense is that the attempted increase of stock to which the defendant became subscriber was one which the corporation was without authority to make, and that it was, therefore, illegal, and the defendant's subscription thereto void, and this presents a serious issue. Was the increase of stock, as here attempted by the resolution of the stockholders, if we treat this as equivalent to a by-law, illegal? And, if so, has the defendant, by his connection with the company as above stated, estopped himself to make this question? Whether or not the corporation has power to increase its stock by by-law, after the capital stock has been originally fixed, was a question expressly reserved by the supreme court of the state in *Cartwright v. Dickinson*, 88 Tenn. 476, 12 S. W. 1030. It was decided in that case that subscription to capital stock above the amount fixed by by-laws, when that had been previously all taken, is absolutely void. The general incorporation act, under which defendant company was organized, contains the following provision upon this subject: "The corporation may, by by-laws, make regulations concerning the subscription for or transfer of stock, fix upon the amount of capital stock to be invested in the enterprise, the division of the same into shares, the time required for payment thereof by the subscribers for stock, the amount to be called at any one time; and, in case of failure of any stockholder to pay the amount thus subscribed by him at the time and in the amounts thus called, a right of action shall exist in the corporation to sue said defaulting stockholder for the same." Plaintiffs' learned counsel directs attention to the fact that "by-laws" is employed in the plural, instead of the singular, number in the statute, as indicating that more than one such by-law might be made in regard to the capital stock of the corporation, and defendant's able counsel attaches importance to the terms "fix upon the amount of capital," as indicating permanency in the original amount determined upon. As various other subjects are enumerated to be regulated by by-laws, as well as the amount of capital stock, I do not think much force is derived from this circumstance, nor do I think that the primary definition of the term "fix" is of serious consequence in this connection. Mere verbal distinctions such as these can have little influence in the determination of a question so important as the one now considered. The remainder of the context in which the words occur, as well as the entire statute upon the subject, must be taken into account, and the reasoning must be somewhat broad and practical. Prior to the incorporation act of 1875, the method of forming corporations had been by special legislative charters, in which the amount of the capital stock was definitely fixed, and publicly and easily known. A certain mode of ascertaining the real capital of the company was

thus secured to the public, and such legislation with reference to these companies gave the public definite information as to their property in much the same way that registration laws furnish information as to the condition of private property generally. When a change in the mode of establishing corporations was made,—as by act of 1875,—the previous law and its construction by the courts is to be considered in the interpretation of the new law and in determining the extent of the change. Settled legislative policy is not to be regarded as abandoned further than the terms and objects of the new legislation require.

"A controlling purpose," said the supreme court of Alabama, "as we suppose, in authorizing or in compelling the creation of private corporations under general laws, is to secure uniformity and equality of corporate powers, functions, and privileges, that all corporations of the same class, formed for like purposes, should possess the same capacities and properties, and exercise and enjoy the same franchises and privileges. Unless it was intended to work a radical change in the nature and character of these artificial beings, the mere creations of the law, and to subvert the whole theory which had prevailed in reference to them, it cannot have been contemplated that they should for themselves create power and privileges by declaration or reservation, whether the declaration or reservation is expressed in the articles of incorporation or in the constitution or by-laws ordained by the corporators for their government. Such declarations or reservations would soon become more liberal and diverse than was the liberality and diversity of the grants of corporate power by special legislative enactment, the evil it was intended to remove." *Insurance Co. v. Kamper*, 73 Ala. 325.

In a direct grant by legislative charter the rule that the grant is strictly construed, and that nothing passes by implication, has become axiomatic in the law of corporations. And this general rule of construction applies with still greater force to articles of association organizing a corporation under general laws, such as the act of 1875. In *Oregon Ry. & Nav. Co. v. Oregonian Ry. Co.*, 130 U. S. 26, 9 Sup. Ct. 409, the supreme court of the United States said:

"It is to be remembered that where a statute making a grant of property or of powers or of franchises to a private individual or a private corporation becomes the subject of construction as regards the extent of the grant, the universal rule is that in doubtful points the construction shall be against the grantee and in favor of the government or of the general public. As was said in the case of *Charles River Bridge v. Warren Bridge*, 11 Pet. 420: 'In this court the principle is recognized that in grants by the public nothing passes by implication.' See, also, *Railroad Co. v. Litchfield*, 23 How. 66; *Turnpike Co. v. Illinois*, 96 U. S. 63. Therefore, if the articles of association of these two corporations, instead of being the mere adoption by the corporators themselves of the declaration of their own purposes and powers, had been an act of the legislature of Oregon conferring such powers on the corporations, they would be subject to the rule above stated, and to rigid construction in regard to the powers granted. How much more, then, should this rule be applied, and with how much more reason should a court, called upon to determine the powers granted by these articles of association, construe them rigidly, with the stronger leaning in doubtful cases in favor of the public and against the private corporation. We have to consider, when such articles become the subject of construction, that they are in a sense *ex parte*. Their formation and execution—what shall be put into them as well as what shall be left out—do not take place under the supervision of any official authority whatever. They are the production of private citizens, gotten up in the interest of the parties who propose to become incorporators, and stimulated by their zeal for the personal advantage of the parties concerned, rather than the general good."

In harmony with this rule of strict construction, the cases are unanimous in holding that a corporation has no power to increase or diminish its capital stock, unless expressly authorized to do so. No such power can be claimed by implication. *Railroad Co. v. Allerton*, 18 Wall. 235; *Scovill v. Thayer*, 105 U. S. 143; *Insurance Co. v. Kamper*, 73 Ala. 325; *Spring Co. v. Knowlton*, 103 U. S. 49; *Kampmann v. Tarver* (Tex. Sup.) 29 S. W. 768; *Tayl. Priv. Corp.* 133.

In view of previous legislation and public policy involved in fixing permanently and definitely the amount of capital stock, so as to furnish a certain and easy mode of inquiry as to the condition of corporations, I think the conclusion is unavoidable that a corporation organized under the general law is authorized by by-law to fix only the original or initiatory capital stock of the company. It is clear that the statute does not, in terms, confer any power to either increase or diminish such stock, when once fixed, by subsequent by-law, and it has been seen that no such power can exist by implication. Indeed, the fact that with the previously well-known rule of strict construction no such power is added by apt words, furnishes an argument of much force against the existence of the power. It is impossible to think that the legislature, in view of the established law, could have intended to grant such power without doing so in suitable language. If the corporation may, by implication, increase its stock, it may with equal reason decrease the same, and so enlarge or diminish the amount of capital stock without restriction; and in the general incorporation law no notice or intimation whatever is given of the existence of such power. It is quite obvious that such a construction of the statute as this would furnish opportunity for the loosest possible methods in the business of these important and large concerns, and would open wide the door to fraudulent imposition on the public. In the case already referred to,—*Insurance Co. v. Kamper*,—the supreme court of Alabama, denying that such power could arise or exist by implication, said:

"Changes of the capital stock of corporations of this character involve changes in organization, and a displacement of the power and influence the original stockholders, or their legitimate successors, are of right entitled to exercise in the election of officers, and in the general management of the corporate affairs and business. That corporations have not an implied power to effect such change—that it can be effected only by legislative sanction—seems to be settled. *Green's Brice*, *Ultra Vires*, 112; *Thomp. Liab. Stockh. par.* 115; *Lathrop v. Kneeland*, 46 Barb. 432; *Insurance Co. v. McKelway*, 12 N. J. Eq. 133; *Railroad Co. v. Schuyler*, 34 N. Y. 30; *Railway Co. v. Allerton*, 18 Wall. 233; *Scovill v. Thayer*, 105 U. S. 143."

This is almost the exact language of the court in *Railway Co. v. Allerton*. This power of a corporation over its stock is fundamental and important. If the capital stock may be enlarged or diminished at will by the simple method of by-law, a temptation to constant change would be offered. The power would be resorted to as often as business reverses or the results of speculation might suggest. An unsuccessful concern could be thus bolstered up from time to time, and its operation extended over a period far beyond its usefulness, thereby causing greater loss to innocent creditors on the one hand and unwary subscribers to stock on the other. The only method pro-

vided by the general incorporation law, as now amended by the act of 1883 (chapter 163, § 19), by which the right to increase the capital stock, or any other corporate power, can be obtained, is by an amendment of the charter. That act, so far as it relates to the matter now under consideration, is as follows:

"Any corporation which may desire to change its name, increase its capital stock, or obtain any powers granted herein, shall have the right to do so, by the board of directors of said corporation copying said amendment, and making an application in these words:

" 'State of Tennessee—Act of Incorporation.

" 'We, the undersigned, comprising the board of directors of (here insert the name of the corporation), apply to the state of Tennessee, by virtue of the general laws of the land, for an amendment to said charter of incorporation, for the purpose of investing said corporation with the power (here state the clause in the general law aforesaid, which is desired as an amendment, or if it be simply to change the name, so state the fact).

" 'Witness our hands the — day of —.

" '(To be signed by the directors.)'

"This instrument shall be probated or acknowledged as hereinafter provided, and the certificate of registration, given by the secretary of state, under the great seal of the state, shall complete the amendment to said act of incorporation, and the validity thereof shall not, in any legal proceedings be collaterally questioned."

This statute is itself a legislative interpretation that the power to increase the capital stock did not exist under the previous law of 1875, for otherwise this statute would have been useless. And I think it is significant, too, that when the attention of the general assembly was thus deliberately directed to this point, it was unwilling to clothe such corporations with the power to increase or decrease their capital stock, except in a manner which was equally public, and attended with the same formalities, as was the original charter. It is obvious, I think, that the general assembly fully recognized the evil of leaving it within the power of the corporation, after having fixed upon the amount of its capital stock, to constantly increase and diminish the same, thereby rendering it impossible for the public to know anything of the amount of such capital stock. This act maintains the policy of previous laws upon this subject, and gives reasonable permanence and publicity to the amount of capital stock of the company. I am therefore clearly of opinion that the attempted increase of stock in this case, to which the defendant Elliott became subscriber, was illegal, and his subscription void, conferring on him no right, and subjecting him to no liability.

It remains only to determine whether or not defendant has by his conduct precluded himself from making this defense. In considering this question, I have been fully mindful of the distinction as it affects the case between a suit at the instance of the creditors and one by the company itself. It is clear, I think, that in a suit by the company to collect defendant Elliott's subscription, it would be open to him to make this defense. This suit is, however, in the interest of creditors of the corporation, and does this change the result? I think the case of *Scovill v. Thayer*, 105 U. S. 143, answers this question in the negative. That was a suit by creditors to recover an unpaid balance on subscription, and the defendant in

that case had attended the meeting at which it was voted to issue the illegal stock, had received and held a certificate for such stock, and the officers of the company had publicly represented its capital to be equal to the amount of both the authorized and unauthorized capital stock. Plaintiff's counsel relies on a number of cases which hold that where the power to issue the stock exists an irregular exercise of this power is such defect as may be waived, and that defendant may be estopped from making such defense. These cases, however, have no application to an increase and subscription where there was an entire want of power. The distinction is that, between the existence of a power irregularly exercised and the absolute want of power to do the act in any manner whatever, in which latter case the act is absolutely void, is incapable of ratification, and is not cured by estoppel. In this case not even an abstract power to increase its stock resided in this corporation without amendment of the charter, and a right to obtain such power by amendment of its charter was not the power itself, any more than the right to obtain an original charter would be the powers under the charter when obtained. The right to obtain the power and the power when obtained are clearly distinguishable. An amendment of the charter must be registered just as the original, and until this is done is subject to the same objection which renders void a defectively registered charter. *Anderson v. Railroad Co.*, 91 Tenn. 44, 17 S. W. 803. It is true that *Scovill v. Thayer* was distinguished, and its limits stated, in *Banigan v. Bard*, 134 U. S. 294, 10 Sup. Ct. 565, and *Handley v. Stutz*, 139 U. S. 424, 11 Sup. Ct. 530, but the doctrine of the case has not been questioned, and it has become a leading authority. It is also true that in that case there was an express statutory restriction on the amount of the capital stock, and that the increase was above this limit; but where the power is wanting it can make no difference in the effect whether this lack of power results from an express limitation or a limitation by implication, for, as the court in *Marbury v. Land Co.*, 10 C. C. A. 401, 62 Fed. 342, said:

"It is well-settled law in this country and in England that a corporation is impliedly prohibited from doing anything which it is not expressly permitted by its charter to do, or which is not fairly incidental and necessary to the enjoyment of that which is expressly permitted."

The case of *Scovill v. Thayer* was cited with approval in *Cartwright v. Dickinson*, and was followed in *Insurance Co. v. Kamper*, 73 Ala. 325, where this subject is much considered in an able opinion by Chief Justice Brickell. And in the recent case of *Kampmann v. Tarver* the cases of *Insurance Co. v. Kamper* and *Scovill v. Thayer* are expressly approved, and their doctrine applied, by the supreme court of Texas; *Gaines, C. J.*, saying:

"The opinions in these two cases are well considered, elaborate, and are well supported by the numerous authorities therein cited. We think they render any further discussion of the question on our part unnecessary." 29 S. W. 768.

And see *Thomas v. Railroad Co.*, 101 U. S. 71; *Mallory v. Oil Works*, 86 Tenn. 598, 8 S. W. 396; *Elevator Co. v. Memphis & C. R. Co.*, 85 Tenn. 703, 5 S. W. 52.



It is sufficient, therefore, without pursuing the discussion further, to say that I am of opinion defendant Elliott may make the defense that his subscription to this increase of stock is void, and that this defense is a complete answer to the suit. The court has treated the method of increasing the stock in this case as equivalent in effect to a by-law, and rested the ruling on the entire want of power; for, if the power existed, the exercise by resolution instead of formally adopted by-law would be an irregular exercise of power which it is believed would, on the facts of this case, be cured by estoppel. The result is that the bill is dismissed, and plaintiffs will pay the costs of the suit out of the funds in their hands to the credit of the receivership.

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WHEELER v. WALTON & WHANN CO.

(Circuit Court, D. Delaware. March 19, 1896.)

No. 157.

INSOLVENT ESTATES—COLLATERAL SECURITIES.

When a creditor of an insolvent estate holds collateral securities for his debt, he is not required to exhaust his remedy upon such securities, nor to surrender them to the assignee or receiver administering such assigned estate, before receiving a dividend therefrom.

Bradford, Vandegrift & Byrne, for receivers.  
W. C. & A. W. Spruance, for the bank.

WALES, District Judge. By a decree of this court, made on June 5, 1894, the defendant company was declared to be insolvent, and on the same day receivers were appointed to take charge of their affairs. The receivers are now ready to make a pro rata distribution among the creditors of so much of the assets of the company as have been collected up to the present time, and as are applicable for that purpose; but, before making such distribution, they ask the instruction of the court on exceptions which have been filed to the claims of such creditors as hold collateral securities for the payment of the debts due to them. The case presented for the special consideration of the court is that of National Bank of Wilmington and Brandywine, which at the time of the appointment of the receivers was a creditor to a very large amount, for which it held collateral security, consisting chiefly of bills receivable. By far the greater portion of these securities have been paid and the moneys received from them have been credited to the company on the account between it and the bank, leaving a balance now due to the bank of \$5,912.37. The securities still remaining in the hands of the bank have no market value, and have not been appraised. Their face value is equal to the amount on which the bank is claiming a pro rata dividend. The receivers object to the payment of the bank's claim until it shall have exhausted its remedies against the collateral securities which it still holds, or until it shall surrender these securities to the receivers, to be added to the general fund for distribution among all the creditors, and without giving any undue advantage to one class of creditors over another. The bank promises to use all diligence in collecting the unpaid securities, and in

applying the proceeds to the payment of its debt, and, after that has been done, to surrender the securities which may be left to the receivers.

It is a general rule that an assignee for the benefit of creditors holds the property assigned subject to the same equities as the debtor held it, and to a certain extent the same rule applies to receivers appointed by a court of equity to take charge of an insolvent estate, and distribute its assets. To determine the question raised by the exceptions, it is only necessary to ascertain the rights of a creditor occupying the position of the bank; and this question must be decided according to the rules and practice which have been settled and recognized by courts of equity, without reference to statutory requirements. "It is a settled principle of equity that a creditor holding collaterals is not bound to apply them before enforcing his direct remedies against the debtor." *Lewis v. U. S.*, 92 U. S. 623; *Kellock's Case*, 3 Ch. App. 769. This equitable rule is the natural result of the contract entered into between a lender and a borrower of money by which the parties agree that the creditor shall have, in addition to the personal obligation of the debtor, the possession of certain specific property which is to be applied to the repayment of the debt, or any part thereof, which the debtor is unable to pay. Thenceforth the debtor has no control over the collaterals which he has deposited with the creditor, until the debt has been fully satisfied; and in the meantime, when the debt has matured, the creditor can take proceedings for its recovery either against the collaterals or against the debtor. It may happen that the debtor may be able to pay a part of the debt, in which case the creditor may apply so much of the collaterals as will pay the balance, or the creditor may dispose of all the collaterals, and collect the balance of the debt from the debtor.

The law is clearly stated in *Jones, Pledges*, § 590:

"In short, in the case of a pledge, just as in the case of a mortgage, a creditor may use any remedy he has against the debtor or his property for the collection of his principal debt, without destroying or impairing his security for the debt, until it is actually paid. A creditor is entitled to hold his securities, whatever they may be, until he gets his pay. The securities belong to him, and he may enforce the debt without surrendering them. \* \* \* It is of the very nature of collateral security that it may be resorted to for a satisfaction of the principal debt, if its payment shall not be otherwise obtained."

It is a mistake, therefore, to suppose that the bank will not be entitled to a dividend until it has exhausted the securities or surrendered them. The twentieth section of the bankrupt act of 1867 (since repealed) required the creditor to sell, release, or deliver up his collaterals before he could prove any part of his debt; but that requirement was never applicable outside of that law. *Bisp. Eq.* § 343.

Under an assignment for the benefit of creditors, which is virtually the case now before the court, a creditor holding notes of third persons as collateral security, by collecting those notes before a dividend is made, must credit the amount collected upon the principal debt, and take a dividend upon the remainder only of the debt. He cannot collect the collaterals, and then claim a dividend upon the principal debt as it was at the time of the assignment (*Jones*,

Pledges, § 587), although some of the authorities go to that extent, with the proviso, that, in no event, will the creditor be allowed to receive more than his original debt (*People v. E. Remington & Sons*, 121 N. Y. 328, 24 N. E. 793). There would be no more inequality of distribution among creditors by allowing the claim of the bank than in applying the proceeds of the sale of the mortgaged real estate of an insolvent to the payment of the debt due to the mortgagee. In either case the creditor would only receive the fruits of his diligence and prudence in taking security for his debt. The opinion of Chancellor Wolcott, in *Re Polk & Lord Chemical Co.*,<sup>1</sup> cited by the receivers' counsel, has no direct application to the present case. The facts were entirely different. Mrs. Lord was an execution creditor of the Chemical Company, and the sheriff had levied on certain personal property of the defendant before the appointment of the receivers. The chancellor decided that the proceeds of the sale of the property which had been taken in execution should be applied to Mrs. Lord's judgment, but that she could have no priority over the unsecured creditors in the distribution of the general fund. The chancellor was asked to decree the payment of the balance of Mrs. Lord's debt according to the rule for the distribution of intestate's estates, as regulated by the statute of this state, under which judgment creditors take precedence of simple contract debtors; and this he refused to do. Mrs. Lord's judgment was in no sense a collateral security, and the chancellor merely decided that the statute of Delaware, regulating the settlement of intestate's estates, did not apply to the distribution of an insolvent's estate in a court of equity. The exceptions are overruled.

NOTE. Since the above opinion was filed, the attention of the court has been called to the recent case of *Levy v. Bank* (Ill Sup.; Oct., 1895) 42 N. E. 129, in which the identical question of the right of a creditor, holding collaterals, to a dividend of the assets of an insolvent debtor, was involved. In the case referred to, the supreme court of Illinois, on facts precisely like those stated above, except as to amounts, decided that "the amount upon which the secured creditor is entitled to receive dividends from the assets of the insolvent estate is the amount actually due to the creditor when he files his proof of claim, or presents his claim under oath. The subsequent hearing upon objections or exceptions should be directed to the inquiry as to what was due at that date. The amount due at that date is to be ascertained by the deduction from the principal debt of all payments made before that date, whether realized from collaterals or otherwise, but amounts realized from collaterals after that date are not to be deducted, subject, always, to the qualification that the dividends received from the general assets and the amounts realized from the collateral security shall not together exceed the amount due the creditor upon his claim."

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LUTCHER et al. v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. February 17, 1896.)

No. 394.

DEPOSITIONS—INFORMAL PAPERS.

A statement of fact in writing, without date or venue, purporting to be signed by a witness, but giving neither his age nor residence, not shown to have been made under oath or after waiver of oath, or to have been

<sup>1</sup>Not reported.

taken on notice or in the presence of the parties or before any official authorized to administer oaths, and which is not accompanied by any certificate of a competent official from which compliance with any of the requisites for taking depositions can be inferred, is not a deposition, and cannot be read in evidence even under an agreement that neither party will take any objection "to the form of taking testimony \* \* \* by the other de bene esse, under sections 863, 864, U. S. Revised Statutes," when it appears that the agreement was not made with special reference to the paper in question.

**In Error to the Circuit Court of the United States for the Eastern District of Texas.**

This is a suit at law brought by the United States in the circuit court for the Eastern district of Texas against Henry J. Lutcher and G. Bedell Moore, composing the firm of Lutcher & Moore, to recover damages for timber unlawfully taken from the public lands in Louisiana, and sold to said firm. On the trial, various bills of exception were taken by the defendants to the rulings of the court, admitting and rejecting evidence, and refusing instructions to the jury. There was a verdict for the United States, on which judgment was rendered, to reverse which this writ of error is prosecuted. On the trial the United States offered certain written statements, and was permitted to read in evidence a paper containing alleged depositions de bene esse of certain nine persons said to live in the state of Louisiana. The paper offered has for caption the court and the title and number of the case, and first shows an affidavit by Montfort S. Jones, as assistant to the United States attorney for the Eastern district of Texas, to the effect that he is advised and thoroughly believes that the testimony of certain persons named living in the Western district of Louisiana, more than 100 miles distant from the place in the Eastern district of Texas where the court is held, is material and necessary for the plaintiffs in the prosecution of said cause, and that it is not probable that the presence of said witnesses can be had at the trial; further, that the defendants lived in the Eastern district of Texas; and that he is informed and believes that James L. Bradford is the attorney of said defendants, and resides at New Orleans, in the state of Louisiana. This affidavit was sworn to before J. B. Beattie, United States commissioner for the Western district of Louisiana, on the 25th of January, 1890. Annexed to this affidavit is the following:

"Let E. J. Cain, A. J. Cain, Jno. R. Smith, James Kelly, Lafayette Jackson, Emanuel Huddleston, Wm. H. Craft, A. J. McCranie, Silas Fowler, Wm. J. Knight, Gus Skinner, Hardy Jordan, Henry Dickson, and D. R. Knight, the witnesses named in the foregoing affidavit, be examined de bene esse before me accordingly, at Alexandria, Louisiana, on the — day of —, A. D. 1890, at — p. m., and let — days' notice be given to said defendants (or to —, the attorney of said defendants, as either may be nearest) of such examination, provided either defendants or —, said attorney, may live or be found within one hundred miles of Alexandria, said place of examination.

"Witness my hand and seal, officially, this, the 25th, day of Jany., A. D. 1890.

"[Seal.]

J. B. Beattie, U. S. Com'r W. Dist. La."

"U. S. Circuit Court, Galveston.

"U. S. vs. Lutcher & Moore. No. 1,444.

"No date was fixed in the order annexed to the affidavit for the taking of testimony in this case, therefore no notices were served.

"Witnesses ex.: Wm. J. Knight, Henry Dixon, Emanuel Huddleston, Lafayette Jackson, A. G. Skinner, Hardy Jordan, D. R. Knight, Jas. Kelly, J. R. Smith, Edward J. Cain.

"In the Circuit Court of the United States at Galveston, in the Fifth Circuit and Eastern District of Texas.

"United States vs. Lutcher & Moore. No. 1,444.

"Sir: You are hereby notified that E. J. Cain, J. A. Cain, Leesville, La.; John R. Smith, James Kelly, Lafayette Jackson, Emanuel Huddleston, Wm. H. Craft, A. J. McCranie, Silas Fowler, W. J. Knight, Almadane, Vernon Ph.,

La.; Gus Skinner, Hardy Jordan, Elmwood, Vernon Ph., La.; Henry Dixon and D. R. Knight, of Robeline, Natchitoches Ph., La.,—will be examined de bene esse before me at Alexandria, La., on the — day of —, 1890, at —, as witness for the plaintiff in the above-entitled cause, according to the act of congress in such case made and provided; said witnesses residing in the Western district of Louisiana, and out of the Eastern district of Texas, and more than one hundred miles distant from Galveston, in said district, the place at which the court in which such cause is pending is appointed by law to be held, at which time and place appointed for the examination of said witnesses you are entitled to be present, and to put interrogatories to the same.

"J. B. Beattie, U. S. Com'r W. Dist. of La.

"To G. B. Moore, Above Defendant, or J. L. Bradford, Attorney for Defendants."

"In the Circuit Court of the United States, at Galveston, in the Fifth Circuit and Eastern District of Texas.

"United States vs. Lutchter & Moore. No. 1,444.

"Sir: You are hereby notified that E. J. Cain, J. A. Cain, Leesville, Vernon Ph., La.; Jno. R. Smith, James Kelly, Lafayette Jackson, Emanuel Huddleston, Wm. H. Craft, A. J. McCranie, Silas Fowler, W. J. Knight, all of Almadane, La.; Gus Skinner, Hardy Jordan, Elmwood, Vernon Ph., La.; Henry Dixon, D. R. Knight, Robeline, Natchitoches Ph., La.,—on the — day of —, 1890, at —, as witnesses for the plaintiff in the above-entitled cause, according to the act of congress in such case made and provided; said witnesses residing in the Western district of Louisiana, and out of the Eastern district of Texas, and more than one hundred miles distant from Galveston, in said district, the place at which the court in which such cause is pending is appointed by law to be held, at which time and place appointed for the examination of said witnesses you are entitled to be present, and to put interrogatories to the same.

J. B. Beattie, U. S. Com'r, West. Dist., La.

"To H. J. Lutchter, Above Defendant, or J. L. Bradford, Attorney for Defendants."

Following the above are the statements of the alleged witnesses, some signed by mark "X," with a caption like the following, "U. S. Circuit Court, 5th Circuit, Eastern Dist. La.," but generally with the caption, "United States Circuit Court, Eastern District of Texas," although one has "United States Circuit Court, Eastern District Court." Where the statements are signed by mark, the alleged witnesses' signatures are attested by two witnesses, who apparently wrote their own names.

The foregoing is a full description of the alleged depositions, except that they were indorsed as follows: "C. L. 1444. Publication made in open court, by order of court, at request of M. S. Jones, Asst. U. S. Attorney, Apl. 1, 1890. C. Dart, Clerk. Filed April 1, 1890. C. Dart, Clerk."

The defendants objected to the reading of the said paper in evidence, on the following grounds:

"(1) That said paper did not on its face purport to be or contain the depositions of said witnesses, or any of them, and was nothing more than a series of written statements purporting to have been signed by them respectively.

"(2) That said paper was not accompanied by any caption, as required by law, showing by and before what magistrate or authority the same was taken and signed.

"(3) That said paper was not accompanied, as required by law, with any certificate of any officer or magistrate showing the reasons for the taking of the same, the time and place of taking, that the statements therein contained were written down by witnesses in the presence of the magistrate, or by the magistrate himself, or that the same were sworn to by said witnesses, or any of them."

The objections were overruled, and the statements permitted to go to the jury as evidence on the part of the plaintiff, for the following reasons:

"(1) That a motion to suppress and objections to said evidence had not been filed before the parties announced ready for trial in said cause.

"(2) Because said paper had been on file in said cause since the 1st day of

April, 1890, one day before the agreement was signed and filed, and that said paper was received in an envelope indorsed as follows: 'D. L. 427 & other cases. Received from the post office at Galveston, Texas, March 27th, 1890. C. Dart, Clk., by W. L. Hanscom, Deputy. Filed March 21st, 1890. C. Dart, Clerk, by W. L. Hanscom, Deputy. Publication made in open court by order of court at request of M. S. Jones, U. S. Attorney, April 1st, 1890. C. Dart, Clerk. M. S. Jones, Asst. Atty. Galveston, Texas.' Indorsed on back: 'Official Business. Mr. M. S. Jones, Asst. U. S. Atty., Galveston, Texas, care Clk. U. S. Courts.' Each of said written statements of the witnesses aforesaid had the following caption: 'U. S. Circuit Court, 5th Circuit, Eastern Dist. Texas, United States vs. Luther & Moore. No. 1,444. — [giving name of witness] sworn and examined on behalf of plaintiff.'

"(3) Because the plaintiff and defendants had made and filed among the papers of this cause the following written agreement, viz.:

" 'United States vs. Luther & Moore. Nos. 425, 426, 427, 428, U. S. Dist. Ct., & 1,444, 1,443, 1,551, 1,451, 1,486, 1,490, 1,509, 1,521, 1,536, U. S. Circuit Ct., 5th Circuit, & E'n Dist. of Texas.

" 'It is agreed in the cases of the United States vs. Luther & Moore that the same will be continued to the next term in the condition in which they now stand, and that neither party at the trial of said cause will take any objection to the form of taking testimony in any of said cases by the other de bene esse, under sections 863 and 864, U. S. Revised Statutes. This applies to the testimony already taken only.

" 'April 2nd, 1890.

" 'Montfort S. Jones, Spl. Asst. U. S. Atty.

" 'Joseph H. Wilson, U. S. Atty. E'n Dist. Texas.

" 'J. L. Bradford & W. B. Benson, Attys. for Luther & Moore.

" 'Filed April 2, 1890.' "

To which ruling of the court the defendants duly excepted.

J. L. Bradford, for plaintiff in error.

F. B. Earhart, U. S. Atty.

Before PARDEE and McCORMICK, Circuit Judges, and BOARMAN, District Judge.

PARDEE, Circuit Judge (after stating the case as above). The paper permitted to be read in evidence on the trial is so deficient in all the forms and requisites that it cannot be properly called a "deposition" or even an "affidavit." It does not show any notice of the taking; that the statements were taken before any officer; that the persons making the statements were sworn. The statements bear no date or venue, and are accompanied by no certificate. The trial court appears to have admitted the statements contained in the paper to be read in evidence because they had been placed in the files of the case, had not been objected to before the parties announced ready for trial, and because of the agreement made between counsel for the United States and Luther & Moore in certain 15 cases between the same parties pending in the United States circuit and district courts in the Eastern district of Texas, to the effect that neither party at the trial would take any objection to the form of taking testimony in any of said cases by the other de bene esse, under sections 863 and 864, Rev. St. U. S. This agreement is practically to the same effect as the statute regulating the practice in common-law cases in the courts of the state of Texas, as follows: "Objections to the form or manner of taking a deposition cannot be heard unless

such objections are in writing, and notice thereof is given to the opposite counsel before the trial of suit commences." In our opinion, the agreement of counsel should be given no broader effect. The agreement was made to apply to some 15 cases pending in the courts of Galveston, in which cases, and even in this one, there were depositions on file, and the agreement is dated the next day after the alleged paper was filed in the present case; and we are therefore justified in assuming that the agreement was not specially made in reference to the paper in question, even if counsel for defendants knew that such extraordinary document was on the files. The statute of Texas above quoted is construed in the courts of Texas as applying to objections which do not go to the competency of the witnesses or the relevancy of the evidence offered. *Railway Co. v. Van Alstyne*, 56 Tex. 450. A deposition is "the testimony of a witness put or taken down in writing under oath or affirmation, before a commissioner, examiner, or other judicial officer, in answer to interrogatories and cross interrogatories, and usually subscribed by the witness. 3 Bl. Comm. 449; Tidd, Prac. 810, 811." Burrill, Law Dict. verbo "Deposition." "In procedure, 'depositions,' in the most general sense of the word, are the written statements under oath of a witness in a judicial proceeding." Rap. & L. Law Dict. verbo "Deposition." "'Deposition' is a generic expression, embracing all written evidence verified by oath, and thus includes affidavits." *Stimpson v. Brooks*, 3 Blatchf. 456, Fed. Cas. No. 13,454. Definitions and authorities to this purport may be multiplied indefinitely. We conclude that a statement of facts in writing, without date or venue, purporting to have been signed by a witness, but giving neither age nor residence of such witness, which statement is not shown to have been made under oath, nor the oath waived, nor to have been taken on notice or in the presence of parties, nor to have been taken before any official authorized to administer oaths, and which is not accompanied by a certificate of a competent official, from which compliance with any of the requisites for the taking of depositions in judicial proceedings can be inferred, is not a deposition, although so labeled and filed in a suit pending in court.

It follows that, in our opinion, the court erred in admitting the paper in question in evidence over the objections of the defendants. As this necessitates a reversal of the case, the other assignments of error need be considered only to remark that the bills of exception relating to them are informally drawn, and would be dangerous as precedents. The judgment of the circuit court is reversed, and the cause is remanded, with instructions to award a venire de novo.

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UNITED STATES, to Use of MOORE, v. McNEILY et al.  
(Circuit Court of Appeals, Fifth Circuit. February 17, 1896.)

No. 390.

**1. FALSE ARREST—WAIVER—ADMISSION OF IDENTITY.**

One J. M. brought an action on the bond of a United States marshal, for a breach of duty in arresting J. M. under a capias against L. M., issued

upon an indictment against the latter. The marshal pleaded, among other things, that J. M. had entered into a recognizance to answer the indictment, in which he admitted himself to be the person named therein, and also that J. M. had subsequently appeared, pleaded, and been tried and acquitted under the indictment, without disputing his identity. *Held*, that the tort claimed as a breach of the marshal's duty could be waived, and J. M., by entering voluntarily into a recognizance such as was alleged, would be estopped afterwards to deny he was the person indicted.

2. SAME—DURESS.

*Held*, further, that such waiver must be voluntary, and that a replication to the plea of waiver, that the plaintiff was coerced into executing the recognizance by imprisonment or the threat thereof, was sufficient.

3. SAME—RECORD OF TRIAL—OF WHAT EVIDENCE.

*Held*, further, that the plea of appearance and trial under the indictment was not supported by proof of a record showing only an indictment found against L. M., and that "the defendant" appeared in court, was arraigned, pleaded to the indictment, was tried and acquitted; nor did the recognizance taken supply the defect, though included in the transcript of the record, since it properly formed no part of the record, but was matter in pais.

**In Error to the Circuit Court of the United States for the Southern District of Mississippi.**

This suit was brought in the circuit court of Hinds county, state of Mississippi, by the United States, suing for the use of John L. Moore, against John S. McNeily, United States marshal for the Southern district of Mississippi, and the sureties on his official bond, to recover damages for a breach or said bond, in that the said marshal, under an indictment found in the circuit court of the United States for the Southern district of Mississippi against L. L. L. Moore for a violation of the revenue laws of the United States, and a *capias* issued therein, falsely arrested the said John L. Moore at his home in Leake county, in said district, against the protest that he was not the person named in and designated thereby, and did unlawfully, forcibly, and willfully take plaintiffs' usee into custody, and force and compel him, by threats and menace, to proceed to Jackson, in said Southern district, the place appointed by law for the holding of said district court, and surrender himself to the said marshal upon the false pretense that said usee was the party intended to be indicted. And the plaintiff further avers that, being so brought to the said city of Jackson, he was thereafter, by said marshal, compelled to be and appear from time to time and term to term before the said district court of the United States, until the — day of November, 1894, when he was discharged, and, in the interim, that the said John L. Moore, plaintiff's usee, was unlawfully imprisoned by the said marshal, and was for a long time, to wit, 11 months, put to great expense and loss of time, and subjected to great shame, humiliation, anxiety, trouble, and distress of mind, as well as brought into disrepute among his neighbors, by reason and because of the false and unlawful arrest and imprisonment above mentioned.

At the January term, 1895, the defendants filed a general demurrer to the declaration, and at the same term, by proper proceeding, removed the cause to the circuit court for the Southern district of Mississippi. At the May term of the circuit court for the Southern district of Mississippi, the demurrer was overruled, and thereupon three several pleas were filed. The first denied the breach of the bonds, and asserted that the marshal did take the body of, and arrest, the said L. L. L. Moore, as required by the *capias*. The second seemed to be a general denial of the facts stated in the declaration, charging that the person now calling himself John L. Moore was, in point of fact, the same identical party named and described, and intended by the grand jury to be named and described, in the indictment set forth in the declaration, and in the *capias* under which said arrest was made, and that the arrest was lawful, etc. The third plea sets forth, in detail: That the said John L. Moore, plaintiffs' usee, appeared pursuant to the arrest, and in custody of the deputy marshal, before a United States commissioner, and there executed a recognizance as follows:



"Be it remembered that on this 22nd day of November, A. D. 1893, before me, a commissioner duly appointed by the circuit court of the United States for the said Southern district of Mississippi, personally came Jno. L. Moore (indicted under name of L. L. L. Moore), as principal, and J. D. Moore and W. D. McMillan, as sureties, and jointly and severally acknowledged themselves to owe to the United States of America the sum of \$500, to be levied on their goods and chattels, lands and tenements, if default be made in the condition following, to wit: The condition of this recognizance is such that, if the said Jno. L. Moore shall personally appear before the district court of the United States, in and for the district aforesaid, at Jackson, Mississippi, on the first day of the next regular term thereof, then and there to answer the charge of having, on or about the — day of September, 1893, within said district, in violation of section — of the Revised Statutes of the United States, unlawfully engaged in the business of illicit distilling, and then and there abide the judgment of said court, and not depart without leave thereof, then this request to be void; otherwise, to remain in full force and virtue.

"[Seal.]

John L. Moore.

"[Seal.]

his  
J. D. X Moore.

"[Seal.]

mark.  
W. D. McMillan.'

—"Which said recognizance was duly executed in conformity to law, and filed amongst the papers of said cause, constituting a part of the record thereof."

And that afterwards the said plaintiffs' usee did again appear before the said commissioner, and execute a further recognizance for appearance as follows:

"Be it remembered that on this 14th day of May, A. D. 1894, before me, a commissioner duly appointed by the circuit court of the United States for the said Southern district of Mississippi, personally came L. L. L. Moore, principal, and Eli N. Moore, surety, and jointly and severally acknowledged themselves to owe the United States of America the sum of five hundred dollars, to be levied on their goods and chattels, lands and tenements, if default be made in the condition following, to wit: The condition of this recognizance is such that, if the said L. L. L. Moore shall personally appear before the district court of the United States, in and for the district aforesaid, at Jackson, on the 8th day of the regular term thereof, and then and there to answer the charge of having, on or about the — day of September, 1893, within said district, in violation of section — of the Revised Statutes of the United States, unlawfully engaged in the business of illicit distilling, and then and there abide the judgment of the said court, and not depart, without leave thereof, then this recognizance to be void; otherwise, to remain in full force and virtue.

"Jno. L. Moore.

"E. N. Moore.'

—"Which recognizance was duly executed, and was filed among the papers of said cause, and became a part of the record thereof."

That afterwards, to wit, on the 8th day of November, 1894, the said plaintiffs' usee appeared in said court in the presence of the district attorney and the judge, in open court, and, a jury being impaneled, the said plaintiffs' usee was then and there arraigned on the said indictment by the name of L. L. L. Moore, and did then and there plead not guilty, and go to trial on the merits of said cause, the said trial resulting in a verdict of not guilty.

Demurrers were filed to the foregoing pleas, which, upon hearing, were sustained as to the second plea, but overruled as to the first and third. And thereupon the plaintiffs took issue on the first plea, and replied to the third plea by admitting that, as therein charged, said John L. Moore executed the recognizances before the commissioner for his appearances, but charged that, at the time and place, he, said John L. Moore, protested that he was not the said L. L. L. Moore, and declined and refused to sign the said bonds otherwise than by his name John L. Moore, and was induced to sign and coerced to sign said bonds, under threat of imprisonment and actual imprisonment, as the condition for the restoration of his liberty, whereof he had been unlawfully deprived; the said marshal of the United States then and there pretending and

claiming that said usee was L. L. L. Moore, and the party intended to be indicted, and the said United States commissioner then and there yielding to and being governed and controlled by said contention. And the said plaintiffs further averred that it was not true, as alleged in said third plea, that the said John L. Moore was ever arraigned and tried as therein alleged; but, on the contrary, no such proceedings were ever had, nor was said John L. Moore ever arraigned, nor afforded opportunity to plead in any way, and the said cause was disposed of by the district attorney, in the absence of, and without the knowledge of, said usee, and by instructing the jury to find and return a verdict of "not guilty," without arraignment or trial of any kind on the merits of the controversy, all of which was done to conclude plaintiffs' usee from asserting his right to compensation and damages as in the declaration alleged.

To the replication to the third plea the defendants demurred as insufficient, and as contradicting, by parol, the records of the court, and as being scandalous and impertinent, which demurrer was sustained, with leave to plaintiffs to reply further to said third plea; and thereupon a plea of nul tiel record was entered to the third plea. Upon this last plea the cause was submitted to the court in advance of the trial of the cause on other issues joined, whereupon the court found that the third plea was true, and, in fact, that the said record does exist, and thereupon dismissed the defendants without day. The plaintiffs sued out this writ of error, assigning errors as follows:

"(1) The court erred in overruling the demurrer of the plaintiffs' usee, etc., to the first and third pleas of the defendants. (2) The court erred in sustaining defendants' demurrer to the replication of plaintiffs' usee, etc., to defendants' third plea. (3) The court erred in adjudging, upon the replication of nul tiel record to defendants' third plea, that there was such record, and in nonsuiting the plaintiffs' usee, etc., and rendering judgment that defendants go hence without day, etc. The record in the case of the United States v. L. L. L. Moore was not evidence establishing or tending to establish the allegation of the plea,—the recognizances were no part thereof, and were void and without effect on the plaintiffs' demurrer."

W. L. Nugent, for plaintiffs in error.

E. Mays, for defendants in error.

Before PARDEE and McCORMICK, Circuit Judges, and BOARMAN, District Judge.

PARDEE, Circuit Judge (after stating the facts as above). There was no error in overruling the motion to strike out the defendants' first plea. As we read the said plea, it is neither more nor less than the general issue.

The third plea alleges a waiver by, and an estoppel against, John L. Moore, substantially, in that the said John L. Moore, after his arrest under a capias commanding the arrest of L. L. L. Moore, appeared before a commissioner of the circuit court of the United States, and entered into a recognizance, with sureties, for his appearance to answer certain criminal charges before the United States district court for the Southern district of Mississippi, and in said recognizances admitted that he was indicted under the name of L. L. L. Moore, and thereafter again appeared before the same commissioner, and entered into another recognizance, with surety, for his appearance before the said district court to answer, etc., therein and thereby admitting that he was L. L. L. Moore; and that thereafter the said John L. Moore appeared in the district court of the United States for the Southern district of Mississippi, and was there arraigned on an indictment by the name of L. L. L. Moore, and there, in the presence of the district attorney and the judge of the court, in open court, and a jury impaneled, the said John L. Moore

did then and there plead not guilty, and go to trial on the merits of said cause. the said trial resulting in a verdict of not guilty,—all of which defendants offer to verify by the record.

There is no doubt that a tort like a false arrest may be waived. See 3 Wait, Act. & Def. 327, 328. And if it be true, in fact, that John L. Moore was arrested by the marshal, under a *capias* commanding the arrest of L. L. L. Moore, and thereafter the said John L. Moore voluntarily admitted that he was the person named in the indictment, and entered into a recognizance for his appearance, and thereafter was brought before the court in which the indictment against L. L. L. Moore was found, and there was arraigned as the identical L. L. L. Moore, and made no objection thereto, then it would seem that the said John L. Moore ought to be thereafter precluded from contending that he was not the person named in the indictment and *capias*.

The plaintiffs' usee met the third plea by a general demurrer, which, we are of opinion, was properly overruled. Perhaps, if the objections urged against the first plea had been urged against the third, the result would have been more satisfactory to the plaintiffs. The demurrer being overruled, the plaintiffs' usee replied to the third plea, substantially, that he entered into both recognizances under duress, protesting that he was not the said L. L. L. Moore, and refused to sign the said bonds otherwise than by his name of John L. Moore, and was induced and coerced to sign the same under threats of imprisonment and actual imprisonment; and as to that part of the plea alleging a trial before the district court for the Southern district of Mississippi, he denied that he was ever arraigned and tried, as alleged in said plea, that such proceedings were ever had, or that said John L. Moore was ever arraigned, or afforded opportunity to plead in any way, and he averred that the said cause was disposed of by the district attorney in the absence of, and without the knowledge of, said John L. Moore, and by instructing the jury to find and return a verdict of not guilty, without arraignment or trial of any kind on the merits of the controversy. Conceding that a tort, like a false arrest, may be waived, we are clear that the waiver must be voluntary. So far as any waiver can be claimed as to the giving of the recognizances before the United States commissioner, which were matters in pais and not of record (*Inglee v. Coolidge*, 2 Wheat. 363; *U. S. v. Taylor*, 147 U. S. 703, 13 Sup. Ct. 479), we think it is sufficient reply to say that the said recognizances were given involuntarily and under duress of imprisonment, and for the purpose of securing liberty.

The waiver or estoppel claimed as resulting from the proceedings in the district court, as set forth in the plea and denied by the replication, presents a more difficult matter. The plea charges that the appearance, arraignment, trial, and discharge on a plea of not guilty, of John L. Moore, under the name of L. L. L. Moore, before the United States district court for the Southern district of Mississippi, appears by the record. The record of that court imports verity, and, if it shows the matters charged in the plea, then such matters are to be taken as indisputably true. If the replication to this part

of the plea can be taken as, in substance, a plea of nul tiel record, then it seems clear that the replication to the third plea, which we have been considering, was in all respects sufficient. The court below, however, sustained a demurrer to said replication, setting up that it was insufficient in law, assuming to contradict, modify, and correct by parol the records of the court, and scandalous and impertinent. This ruling is assigned as error, but the view we take of the next assignment dispenses with a ruling thereon. Driven to again attempt to answer the third plea, the plaintiffs' usee filed an answer denying there was any such record. Upon hearing the issue made by this answer, the court below, upon inspection of the record, found that the third plea was true in fact, and that such record existed. The record exhibited found in the bill of exceptions shows an indictment against L. L. L. Moore, duly found, and this entry:

"And on the 8th day of November, 1894, there was entered in said case a verdict and judgment in the words and figures following, to wit:

"United States vs. L. L. L. Moore. B. L. D. 1,830.

"Came the United States attorney and also the defendant in open court, who, being arraigned, pleaded not guilty as charged in the indictment. Thereupon came a jury of good and lawful men, to wit, N. W. Bankston and eleven others, who being elected, impaneled, charged, and sworn upon their oaths say, 'We, the jury, find the defendant not guilty.' Thereupon the defendants were discharged."

H. C. Niles, Judge, etc."

Inserted in the alleged record, and claimed to be a part thereof, appear the proceedings had in which the said John L. Moore entered into certain recognizances before a commissioner of the circuit court, as set forth in the said third plea. As remarked before herein, said recognizances were matters in pais, and in our opinion form no part of the record in the case; but, whether they do or do not, we are clearly of opinion that the finding of the court that the plea was supported by the record is erroneous. The gist of the plea is that John L. Moore, under the name of L. L. L. Moore, appeared in the United States district court for the Southern district of Mississippi, and was there arraigned, and pleaded not guilty, and was tried on the merits. The record shows that L. L. L. Moore appeared, was arraigned, tried, and discharged. The whole theory of the plaintiffs in the court below was based on the fact that L. L. L. Moore was indicted, that a capias issued against said L. L. L. Moore, and that thereunder the marshal falsely arrested said John L. Moore. A record which shows that L. L. L. Moore was indicted, arraigned, tried, and acquitted has no bearing whatever upon the question whether John L. Moore was arrested and imprisoned under a capias commanding the arrest of L. L. L. Moore. If we eliminate from the alleged record the matter inserted, and which properly forms no part thereof, then we have a record in which John L. Moore, plaintiffs' usee, is not even mentioned.

The judgment of the circuit court is reversed, and the case remanded, with instructions to enter a judgment for the plaintiffs on the answer of nul tiel record to the defendants' third plea, and thereafter proceed in said cause according to law and the views expressed in this opinion.

## WALRATH v. CHAMPION MIN. CO.

(Circuit Court of Appeals, Ninth Circuit. February 3, 1896.)

No. 243.

## MINES AND MINING—EXTRALATERAL RIGHTS—END LINES.

Under the act of 1872 (Rev. St. § 2322), which gives to persons who had previously procured a patent to a surface location, as incident to one vein only, a right to all other veins, throughout their depth, which have their apex within the surface lines, the extralateral rights of the patentee in respect to any such additional veins extend to the vertical plane of the end lines, prolonged in their own direction, and cannot be limited by the vertical plane of any side line. 63 Fed. 552, modified.

Appeal from the Circuit Court of the United States for the Northern District of California.

This was a bill by Austin Walrath against the Champion Mining Company to define and enforce his rights in a certain vein whose apex lay in the surface lines of his patented location. The circuit court rendered a decree granting him, in part only, the relief prayed. See 63 Fed. 552, where a full statement of the case will be found. Complainant appealed. The property in controversy is shown by the following map.

Smith & Murasky, for appellant.

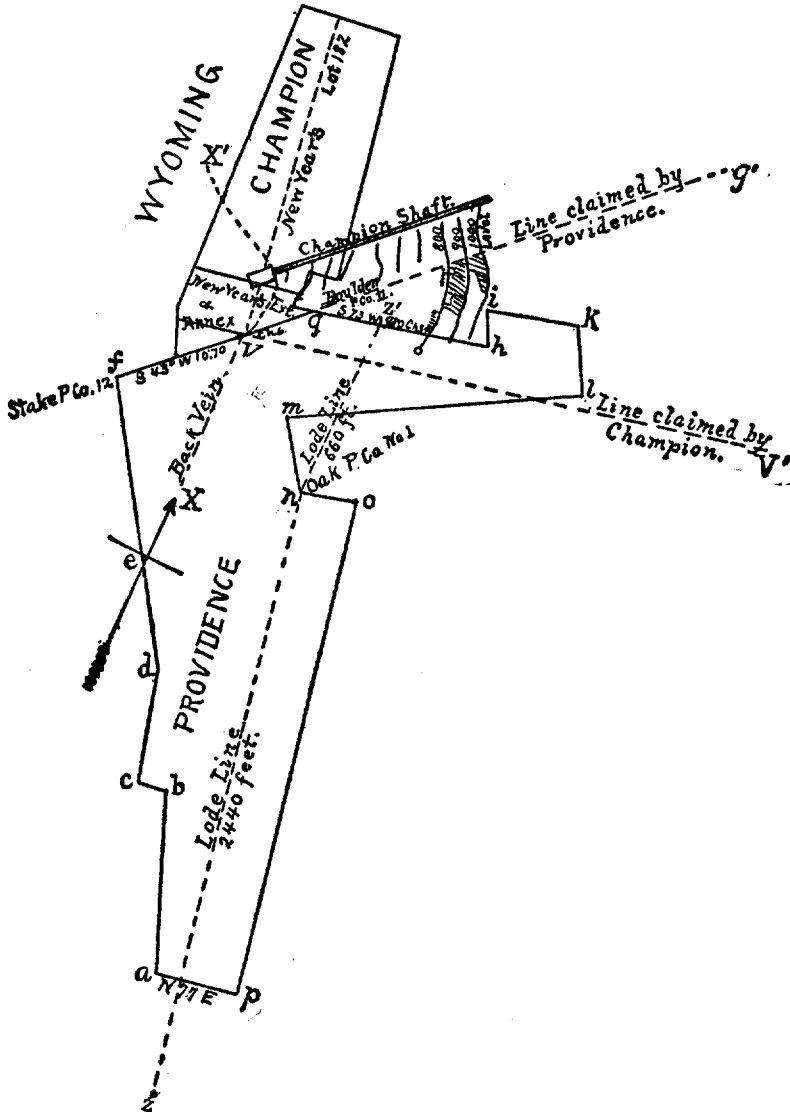
Curtis H. Lindley, for appellee.

Before GILBERT and ROSS, Circuit Judges, and MORROW, District Judge.

ROSS, Circuit Judge. In so far as the decree appealed from limits the extralateral right of the complainant to follow the vein called, in the record, the "back" or "contact" vein, in its downward course, by the line f, g, running south, 43 degrees west, extended vertically downward, it is erroneous, and should be modified. The court below correctly found and adjudged the end lines of the Providence claim, under which the complainant claims, to be the lines a, p, and g, h; and, further, that they are the true and only end lines of each and every vein, lode, or ledge found within the surface location of the Providence claim.

It is conceded that whatever right the complainant has in or to the ledge in controversy is derived from the act of congress of May 10, 1872, embodied in the Revised Statutes as section 2322. Unless that ledge has its top or apex within the lines of the surface location of the Providence claim, the complainant has no extralateral right in respect to that ledge at all; but that it does have its top or apex within those surface lines is an uncontroverted fact, and was so found and adjudged by the court below. The complainant, therefore, has the exact extralateral right in respect thereto that is defined by the statute already cited, which is, the right to follow the dip of the ledge in its course downward, outside of the vertical side lines of the surface location of the Providence claim, wherever it goes, until it comes to vertical planes drawn downward through the end lines of the location, continued

## EXHIBIT 3.



indefinitely in their own direction. Beyond those points of intersection, the extralateral right does not go. But, where the right exists at all, it is confined only by the vertical planes drawn downward through the end lines of the location extended in their own direction, and is subject to the condition, declared in the statute, that the possession of such extralateral right does not confer upon the possessor the right to enter upon the surface of a claim owned

or possessed by another. In no case is the extralateral right of a first locator, in respect to a vein, lode, or ledge having its top or apex within the lines of his surface location, bounded by any side line of the surface location, extended downward or otherwise. To the extent, therefore, that the extralateral right of the complainant to the back or contact ledge here in controversy was bounded by the court below by the side line f, g, running south, 43 degrees west, extended vertically downward, it is erroneous. It should be bounded by vertical planes drawn downward through the end line g, h, running south, 73 degrees west, and through the end line a, p, extended indefinitely in their own direction, subject to the condition that the complainant has no right to enter upon the surface of the respondent's claims.

There is no other error prejudicial to the appellant. Cause remanded, with directions to the court below to modify the decree in accordance with this opinion, and, as so modified, it is affirmed.

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#### MUTUAL LIFE INS. CO. OF NEW YORK v. SELBY.

(Circuit Court of Appeals, Ninth Circuit. February 3, 1896.)

1. APPEAL—HARMLESS ERROR.

An alleged error in admitting in evidence a policy of insurance, without requiring plaintiff to offer therewith the application on which the policy was based, and which formed part of the contract, *held* no ground for reversal, where the application was afterwards admitted, and went before the jury, on defendant's own offer.

2. LIFE INSURANCE—APPLICATION—EVIDENCE.

Affidavits of insured's neighbors in support of his application for a pension, containing statements as to his health, are properly excluded in an action on a policy subsequently applied for and obtained, when it does not appear that insured himself procured the affidavits, or knew their contents.

3. SAME—REPORT OF PENSION-EXAMINING PHYSICIANS.

The report of physicians who examined a person on his application for a pension is not admissible, as tending to show the falsity of statements afterwards made by him in an application for life insurance, where it does not appear that he knew of the report or its contents.

4. SAME—DECLARATIONS AND ADMISSIONS.

Statements made to a third party, by one applying for a pension, as to his physical condition at that time, are inadmissible in a suit upon a policy of life insurance afterwards applied for and obtained by the pensioner.

5. SAME—STATEMENTS TO ATTORNEY—PRIVILEGED COMMUNICATIONS.

Statements made by an applicant for a pension, to one acting as his attorney in the matter, are privileged communications, and cannot be proved in an action upon a policy of life insurance subsequently applied for and obtained by the pensioner.

6. SAME—PAROL EVIDENCE.

An applicant for life insurance stated, in answer to a question, that he was on the United States invalid pension roll, under the pension laws of 1890, "for general disability," and "not for any acute or chronic disease." In a suit on the policy, plaintiff was allowed to show that the answers in the application were written by the examining physician of the insurance company; that, in answer to the question whether the applicant was on the invalid pension roll, the latter answered that he was there for general disability; that the physician then asked if he had any acute or chronic disease, to which he answered, "No;" and that the physician himself then

added the statement, "Not for any acute or chronic disease." *Held*, that this evidence did not alter or diminish the terms of the written warranty, so as to render the admission of the evidence erroneous under the rule relating to parol evidence.

7. SAME—QUALIFIED REPRESENTATIONS.

An applicant for life insurance, on his medical examination, stated, in answer to a question, that he was on the United States invalid pension roll, under the act of 1890, "for general disability," and "not for any acute or chronic disease." It appeared, however, from a footnote of the medical examiner, that the insured proceeded to say that his pension was obtained at the solicitation of a pension lawyer about three years before, and that he could give no further particulars. *Held*, that this was a declaration that he answered so far as his memory served; that it was then the duty of the company, if it desired to know the particulars, to examine the pension roll; and that, although the pension records showed certain specified diseases, there was no breach of the warranty.

8. SAME—TRIAL—INSTRUCTIONS.

Certain instructions to a jury, containing comments in respect to conditions in fine print upon insurance policies, with a reference to the effect of conditions printed in like manner upon a railroad passenger ticket, *held* justly open to criticism, though not sufficient ground for reversal.

In Error to the Circuit Court of the United States for the Northern Division of the District of Washington.

This was an action by Christine Selby against the Mutual Life Insurance Company of New York to recover upon three policies of life insurance upon the life of William Selby. In the circuit court a verdict was rendered for plaintiff, and judgment was entered accordingly. 67 Fed. 490. Defendant brought error.

E. Lyman Short and Strudwick & Peters, for plaintiff in error.

Fred H. Peterson and L. C. Gilman, for defendant in error.

Before McKENNA, GILBERT, and ROSS, Circuit Judges.

GILBERT, Circuit Judge. The defendant in error was the plaintiff in an action brought in the court below to recover upon three policies of life insurance. The trial resulted in a judgment for the plaintiff for the amount sued for. The plaintiff declared upon policies of life insurance issued by the defendant upon the life of William Selby, amounting in the aggregate to \$10,000, payable to her as the beneficiary. The defendant admitted the issuance of the policies, and the payment of the premiums due therefor, and the death of the insured, but defended against liability on the ground of a breach of the warranties contained in the policies. It alleged that as a part of the contract of insurance, and as a condition precedent to the defendant's liability thereon, the insured made certain warranties concerning the condition of his health, and his freedom from certain diseases named, and the grounds on which he had received a pension, and that the policies were issued and delivered to him in consideration of such warranties, and on the faith of the truth of the same, but that all of said warranties were untrue. These allegations of the answer were denied in the replication. Reference must therefore be had to the application for insurance, and to the policy, to ascertain the terms of the contract. In the application the insured, after answering specific questions propounded by the insurance company, subscribed to the following:



"I also agree that all the foregoing statements and answers, as well as those that I make to the company's medical examiner in continuation of this application, are by me warranted to be true, and are offered to the company as a consideration of the contract."

The policy which was issued upon said application contains the following recital:

"In consideration of the application for this policy, which is hereby made a part of this contract, the Mutual Life Insurance Company of New York promises to pay," etc.

In its answer to the complaint the defendant made no reference to the premiums paid on the policies, amounting in all to \$648, nor did it offer to refund or repay the same. The policy, unlike those ordinarily issued, contains no express provision whatever whereby the contract of insurance shall be deemed null and void if the facts warranted to be true are untrue, nor does it stipulate that in that event the sums that may have been paid, as premiums thereunder, shall be forfeited to the insurance company.

It is assigned as error that the court admitted in evidence the policy of insurance without requiring the plaintiff to offer therewith the application on which the same was based, and which was a part of the insurance contract. The plaintiff in error was not prejudiced by this ruling, for the application was subsequently admitted upon its own offer, and went before the jury. *Edington v. Insurance Co.*, 67 N. Y. 185; *Woodbury v. Hinckley* (Colo. App.) 32 Pac. 860.

It is said that the court erred in excluding from the evidence certain affidavits of neighbors of the insured, which had been obtained and used in support of his application for a pension. In these affidavits it is recited that the pensioner had made certain statements to the affiants concerning the condition of his health. It did not appear that the insured himself procured the affidavits, or knew their contents. There was no ground upon which they were admissible in evidence. *Swift v. Insurance Co.*, 63 N. Y. 186; *Dilleber v. Insurance Co.*, 69 N. Y. 256. The same is true of the ruling of the court concerning an alleged report of physicians who examined the insured on his application for a pension. The report was properly excluded for the same reasons that excluded the affidavits. It did not appear in the bill of exceptions that the insured knew of this report, or its contents. The report contained only the opinion of the physician. It was not admissible in evidence, against the insured or his beneficiary, in an action upon the policy. The most that could be claimed for either the affidavits or the report is that in case the affiants or the physician had appeared as witnesses in the case, and had testified otherwise than as shown therein, they might have been impeached by proof of their previous contradictory statements. *Schwarzbach v. Protective Union*, 25 W. Va. 622; *Swift v. Insurance Co.*, 63 N. Y. 186.

Error is assigned to the ruling of the court excluding the testimony of one James H. Wilson, who was called to testify concerning statements made to him by the insured concerning his physical condition at the time of his application for pension. No

error is found in this ruling. The statements of the insured were clearly incompetent evidence, and not binding upon the plaintiff. *Insurance Co. v. Morris*, 3 Lea, 101; *Insurance Co. v. Cheever*, 36 Ohio St. 201; *Schwarzbach v. Protective Union*, 25 W. Va. 622; *Dilleber v. Insurance Co.*, 69 N. Y. 256. It appeared, also, that the statements were made to the witness while he was acting as attorney for the insured in obtaining his pension. Upon that ground, also, the evidence was properly excluded. *Connecticut Mut. Life Ins. Co. v. Union Trust Co.*, 112 U. S. 250, 5 Sup. Ct. 119; *Insurance Co. v. Schaefer*, 94 U. S. 457; *Liggett v. Glenn*, 2 C. C. A. 286, 51 Fed. 394; *Chirac v. Reinicker*, 11 Wheat. 280; *Edington v. Insurance Co.*, 67 N. Y. 185; *Tramway Co. v. Owens* (Colo. Sup.) 36 Pac. 848.

It is assigned that there was error in the admission of parol evidence tending to show that the answers made by the insured to the questions propounded in the application for insurance were not those that were actually written in the application. The testimony so admitted was offered by the plaintiff to rebut the defendant's evidence in support of its defense of a breach of warranty. The warranty, as alleged in the answer, consisted in the fact that the insured had stated that he was on the United States invalid pension roll, under the pension laws of 1890, for general disability, and not for any acute or chronic disease. The plaintiff had met this allegation of warranty and the breach thereof by a general denial in his reply, and the defendant had submitted in evidence, in proof of the alleged breach of the warranty, a copy of the pension roll, in which it appeared that the insured was "disabled by piles, rheumatism, and naso-pharyngeal catarrh"; but it also appeared that his declaration for pension alleged "permanent disability, not due to vicious habits, from deafness of left ear, catarrh, and general disability, rheumatism." The plaintiff then called as her witness the physician who made the examination of the insured, and wrote his answers concerning his health and physical condition in the application for insurance. He was allowed to testify, over the objection of the defendant, that the insured had made answer to the question whether or not he was on the invalid pension roll by saying that he was, and that he was there for general disability; that the witness then asked him if he had at that time any acute disease, and he answered, "No," and that he then asked him if he had any chronic disease, and that he made the same answer; that the witness then added the statement to the answer of the insured, "not for any acute or chronic disease." It is urged on behalf of the plaintiff in error that this parol evidence was admitted erroneously, for the reason that it was incompetent by such testimony to alter the terms of the written warranty, and that, even if such testimony were admissible, it could only be upon the theory that it was matter in estoppel, and that no foundation was laid in the pleadings for its admission upon that ground. In the view we take of the warranty and the evidence of its breach, the testimony so admitted and excepted to could not have prejudiced the plaintiff in error. The substance of the warranted statement was, that the insured was upon the pension roll for general disability, and not for

any acute or chronic disease. The proof offered to establish the breach was that he was upon the pension roll, not only for general disability, but also for certain named diseases. The parol testimony which was thereafter offered by the plaintiff cannot be said to have tended to vary the written warranty, or to have in any way prejudiced the company's interests. The breach of warranty, if any such breach there were, consisted in the fact that the insured stated that he was on the pension roll for general disability, and not for any acute or chronic disease, when he should have said that he was on the roll for general disability, resulting from piles, rheumatism, and naso-pharyngeal catarrh. It appeared sufficiently from the application itself that the answers to the questions were reduced to writing by the medical examiner. It was immaterial whether the applicant volunteered the statement that he was on the pension roll "not for any acute or chronic disease," or whether he so answered in response to the special questions, as testified by the medical examiner. In either case the statements were the statements of the insured, and their force as such was not in any degree diminished by the parol testimony so introduced.

Nor was there error in the refusal of the court to instruct the jury to find a verdict for the defendant. This instruction was requested on the ground that the insured had warranted that he was upon the United States invalid pension roll for general disability, and not for any acute or chronic disease, whereas in fact he was on said roll for piles, rheumatism, and naso-pharyngeal catarrh, the evidence of which was uncontradicted, and that, since the warranted statements were untrue, the plaintiff could not recover. If any of the statements warranted by the insured to be true were not true, the policy is void, whether the statements were material or not. But the court cannot say, as a conclusion of law, that the warranted statement was untrue. The question propounded to the witness—whether or not he was on the United States pension roll, and, if so, for what disability—had reference to the act of 1890 (26 Stat. 182), which makes provision for a pension to all honorably discharged soldiers, who were in the service of the United States during the late war of the Rebellion, "who are now, or who may hereafter be suffering from a mental or physical disability of a permanent character, not the result of their own vicious habits." The answer of the insured was that he was upon such roll for general disability, and not for any acute or chronic disease. If his answer had rested there, there would be good ground for saying that it was untrue; but it appears from the footnote of the medical examiner (which must be taken as a part of the answer) that the insured proceeded to say that his pension was obtained at the solicitation of a pension lawyer, about three years ago, and that he could give no further particulars. Here was a distinct declaration that he had answered the question so far as his memory served him. Notice was thereby given to the insurance company that it might, on examining the pension roll, discover further particulars concerning its contents. If the company desired to know those particulars, it was its duty to pursue the investigation further. It was evidently satisfied to accept the recollection of the

insured concerning the grounds on which his pension was allowed. He did not warrant that he was on the pension roll for general disability. He warranted that such was his recollection of the facts. The company could only prove a breach of the warranty by showing that at the time he made it the insured remembered or knew more of the particular diseases enumerated in his declaration for a pension than he had stated in his application. *Insurance Co. v. France*, 94 U. S. 561; *National Bank v. Insurance Co.*, 95 U. S. 673; *Fisher v. Insurance Co.*, 33 Fed. 549; *Redman v. Insurance Co.*, 47 Wis. 89, 1 N. W. 393; *Wilkins v. Insurance Co.*, 57 Iowa, 529, 10 N. W. 916.

It is assigned as error that the court, in ruling upon the objection to the admission of parol testimony to vary the terms of the written contract, used the following language:

"I do not know just on what ground it can be justified, but the courts have done it, presumably because they intend to hold that insurance companies do assume some liability, which would be very difficult to maintain if the strict letter of their policy which they issue were enforced to the full extent, and very few insurance policies would bind the companies. Like a passenger ticket issued at a station on a railroad, which is given to a traveler as a contract for transportation, it is filled up with a lot of terms and conditions printed too fine for a person of ordinary eyesight to read, which exempts the carrier from every kind of obligation or liability to carry the passenger anywhere; but the courts nevertheless do enforce the liability."

Exception is taken to these remarks, on the ground that they tended to prejudice the jury against the defendant. The learned judge had referred to the decisions of the United States supreme court permitting oral testimony in such cases, and the language above quoted was used in expressing his view of the difficulty of enforcing the liability of an insurance company if the strict letter of the insurance contract were always observed. He made no comment upon the force of the testimony, or upon the rights of the respective parties to the controversy. While the remarks were perhaps justly open to criticism, we do not think we would be justified in reversing the judgment because of them.

Since we find no error occurring at the trial for which the judgment should be reversed, it is unnecessary to consider the question whether or not the insurance company, by retaining the premiums paid upon the policies, was thereby estopped to allege that the contract was void for breach of warranty. The judgment is affirmed, with costs to the defendant in error.

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#### WADE v. TRAVIS COUNTY.

(Circuit Court, W. D. Texas. March 13, 1896.)

No. 2,284.

#### 1. DISQUALIFICATION OF FEDERAL JUDGE—PECUNIARY INTEREST.

A district judge who is a resident citizen and taxpayer of a county is not disqualified by pecuniary interest from sitting in a case which involves the validity of bonds issued by the county.

#### 2. COUNTY BONDS—VALIDITY—CONSTITUTIONAL LAW—PROVISION FOR SINKING FUND.

The constitution of Texas provides (article 11, § 7) that "no debt for any purpose shall ever be incurred in any manner by any city or county, unless

provision is made at the time of creating the same for levying and collecting a sufficient tax to pay the interest thereon, and to provide at least 2 per cent. as a sinking fund." *Held*, that it is the duty of the county commissioners' court, contemporaneously with the execution of a contract for the building of a bridge to be paid for in county bonds, to levy a tax for a sinking fund and interest, and in default thereof the bonds are void, and that a levy made some six months after the execution of the contract, "to create a sinking fund for bridge bonds," etc., without containing any reference to the bonds provided for by the contract in question, could not be regarded as a fulfillment of the constitutional requirement.

This was an action by Albert Wade against Travis county, Tex., to recover upon interest coupons of certain county bonds. Defendant demurs to the complaint.

West & Cochran, Geo. F. Pendexter, and T. W. Gregory, for plaintiff.

Fiset & Miller, for defendant.

Before McCORMICK, Circuit Judge, and MAXEY, District Judge.

**MAXEY**, District Judge. Suit is brought by the plaintiff, who is a citizen of the state of Illinois, against Travis county, a municipal corporation of the state of Texas, to recover upon interest coupons which have been detached from 47 certain bonds issued by the defendant for the purpose of building an iron bridge across the Colorado river. Defendant demurs to the petition. Plaintiff is the owner and holder of coupons representing the interest due on all of said bonds April 10, 1893, April 10, 1894, and April 10, 1895, for \$60 each; and the suit is brought to recover the amount thereof, with interest. The contract providing for the construction of the bridge, and the issuance of county bonds in payment therefor, was executed by the King Iron Bridge & Manufacturing Company on the one hand, and the duly-constituted county authorities on the other, July 3, 1888. Briefly stated, by the terms of the contract the bridge company agreed to erect the superstructure of an iron bridge over the Colorado river, in a thorough, workmanlike manner; the work to begin on the 3d day of August, 1888, and to be completed on the 15th day of November, following. In consideration of the erection of the bridge the county agreed to pay the bridge company the sum of \$47,000, in bonds payable in 20 years, and bearing 6 per cent. interest, payments to be made as follows: 50 per cent. of the value of the work as the work progressed, and the balance on the final acceptance and completion of the bridge.

Before entering upon the merits of the case, a preliminary question has been suggested by the district judge who is sitting with the circuit judge, touching the disqualification of the former to participate in the decision. That question is as follows: The district judge is a resident and citizen of Travis county, Tex., and a taxpayer thereof. This suit involves the validity of bonds and coupons issued by the county. The question arises, has the district judge such direct pecuniary interest in the result of the suit as disqualifies him from sitting in the case? Authorities examined by the court leave the question in some doubt, and, for the purpose of having it definitely determined by an appellate tribunal, we have concluded to hold that

disqualification on the part of the district judge does not exist. See Rev. St. U. S. § 601; *City of Dallas v. Peacock* (Tex. Sup.) 33 S. W. 220; *City of Austin v. Nalle*, 85 Tex. 520, 22 S. W. 668, 960; *Moses v. Julian*, 45 N. H. 52; *Peck v. Essex Freeholders*, 21 N. J. Law, 656; *Gregory v. Railroad Co.*, 4 Ohio St. 675; *Pearce v. Atwood*, 13 Mass. 324; *Dayton v. Crane*, 36 N. J. Law, 394; *Board v. Fennimore*, 1 N. J. Law, 190. And we suggest to counsel the propriety of reserving proper exceptions, in order that the point may be conclusively settled by the court of appeals.

The merits of the controversy involve interesting though not difficult questions for solution. The demurrers of defendant challenge the plaintiff's right to recover on the ground that, at the date of the execution of the contract between the bridge company and the county, no provision was made to pay the interest on the debt created and provide a sinking fund, as required by the organic law. The petition and accompanying exhibits fail to disclose that the county commissioners' court made special provision, by order or resolution, touching a sinking fund, or interest on the particular bonds in question. But it is insisted by plaintiff that on the 23d day of February, 1888, the contract having been executed on July 3, 1888, the county commissioners' court, at a regular term thereof, levied taxes for the year 1888 on all taxable property of the county, as follows: "An annual ad valorem tax of 20 per cent. for general purposes, and an annual ad valorem tax of 15 per cent. for road and bridge purposes, on each \$100 worth of property situated in said county and taxable by law;" and, further, that on the 13th day of February, 1889, the commissioners' court of the county levied taxes for the year 1889 as follows: "An ad valorem tax of 15 per cent. on each \$100 worth of property for road and bridge purposes; and an ad valorem tax of 5 cents on each \$100 worth of property to create a sinking fund for bridge bonds, and to pay the interest of said bonds." In this connection, it is further alleged in the petition that the defendant delivered to the bridge company, on its contract for erecting the bridge, bonds as follows: On December 6, 1888, 5 bonds; on December 22, 1888, 10 bonds; on February 12, 1889, 10 bonds; and on July 3, 1889, the remaining 22 of said 47 bonds. The contention of the plaintiff is that, in making the general tax levies above set forth, the county intended to provide for a sinking fund and interest on the bonds issued to the bridge company. The defendant, however, insists that, at the date of the execution of the contract for erecting the bridge, the commissioners' court should have made a distinct and specific provision for such interest and sinking fund. The constitutional provision bearing upon the question is the following (section 7, art. 11):

"But no debt for any purpose shall ever be incurred in any manner by any city or county, unless provision is made at the time of creating the same for levying and collecting a sufficient tax to pay the interest thereon, and to provide at least two per cent. as a sinking fund."

The imperative mandate of the constitution is that no debt, for any purpose, shall ever be incurred in any manner by a county, unless provision is made at the time of creating the same for levying and collecting a sufficient tax for the interest and sinking fund above

specified. "The word 'debt,'" says Mr. Justice Denman, "as used in the constitutional provisions above quoted, means any pecuniary obligation imposed by contract, except such as were at the date of the contract within the lawful and reasonable contemplation of the parties, to be satisfied out of the current revenues for the year, or out of some fund then within the immediate control of the corporation." *McNeill v. City of Waco* (Tex. Sup.) 33 S. W. 324, citing authorities. And we think, as intimated in *McNeill v. City of Waco*, that a contract entered into for the construction or erection of any public improvement authorized by law would be the creation or incurring of a debt, within the meaning of the constitution. It follows that contemporaneously with the execution of the contract by the defendant and bridge company, to wit, July 3, 1888, the county commissioners' court should have made provision, by levy of a tax or otherwise, for a sinking fund and the interest on the bonds issued for the erection of the bridge. See *Millsaps v. City of Terrell*, 8 C. C. A. 554, 60 Fed. 193; *Berlin Iron Bridge Co. v. City of San Antonio*, 62 Fed. 882. The levy made by the commissioners' court in February, 1888, could not be held applicable to the bonds in controversy, for the manifest reason that the contract for the erection of the bridge was not then in existence, nor even in contemplation of the parties, so far as the allegations of the petition disclose. The general levy made in February, 1889, cannot be held applicable to the bonds of the bridge company, for two reasons: First, it was made some six months after the execution of the contract; and, second, the order of the commissioners' court authorizing the levy makes no reference whatever to the bonds in controversy, nor to the contract between the county and the bridge company. In other words, no provision was made, by levy of a tax or otherwise, by the county commissioners' court, either contemporaneously with the execution of the contract, or subsequently, for a sinking fund and interest on the bonds issued for the construction of the bridge. See *Bassett v. City of El Paso*, 88 Tex. 169, 30 S. W. 893. Hence we are led to the conclusion that the bonds, and, as a necessary corollary, the coupons detached therefrom, are invalid, and not enforceable as such against the county. The demurrers of the defendant should be sustained, and it is so ordered.

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BANCROFT v. SCRIBNER et al.<sup>1</sup>

(Circuit Court of Appeals, Ninth Circuit. February 24, 1896.)

No. 212.

1. CONTRACTS OF AGENCY—ASSIGNABILITY.

A contract by which a bookseller was constituted the sole and exclusive agent of a publisher, to sell, by subscription only, a certain book, and to collect payment therefor, required the agent to use his best efforts to procure as many subscriptions as possible, to exercise a minute personal supervision over all canvassers, to remit within 30 days after shipment a sum equal to the subscription price, and to remit for 10,000 copies

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<sup>1</sup> Rehearing pending.

within one year after the complete publication of the work. The contracts of subscription were to be directly with the publishers, the agent to have compensation by commissions only, and the publishers required the agent to give them a personal letter stating that he could fulfill all his engagements. *Held*, that this contract was purely one of agency, resting upon confidence in the personal skill, energy, and resources of the agent, and that it was therefore not assignable without the consent of the publishers.

2. SAME—RATIFICATION OF ASSIGNMENT—TRIAL—INSTRUCTIONS.

Where it was claimed that a principal, after refusing to recognize an assignment of a contract of agency, had ratified the assignment by failing to answer certain letters addressed to him by the assignee, and by receiving and retaining for a time certain moneys remitted by him, *held*, that it was sufficient for the court, after explaining these transactions, to charge the jury that, notwithstanding the express refusal to recognize the assignment, they might consider these acts and omissions as a ratification, if they believed them to be such, under all the circumstances.

3. SAME—LIQUIDATED DAMAGES.

A contract of agency for the sale of a book by subscription provided that in case of the agent's failure "to take subscriptions, make requisitions, or remit for the total number of copies herein guaranteed within one year," the agent should pay, as liquidated damages, the contract price, less commissions and the cost of producing the books. In an action for breach of the contract the publishers, not relying solely on the agreed liquidation, gave evidence of their actual damages; proving that by the failure to carry out the contract the books were left on their hands, and became unsalable, because of the decline of public interest in the subject-matter. *Held* that, independently of the question whether the above provision was for liquidated damages, or a penalty, the court would have been justified in instructing the jury that the verdict, if for plaintiff, should be for the full extent of the damages proven.

In Error to the Circuit Court of the United States for the Northern District of California.

Geo. C. Sargent and Fox, Kellogg & Gray, for plaintiff in error.

Chickering, Thomas & Gregory, for defendants in error.

Before GILBERT, Circuit Judge, and KNOWLES and BELLINGER, District Judges.

GILBERT, Circuit Judge. Charles Scribner's Sons, of New York, brought an action against A. L. Bancroft, of San Francisco, to recover moneys claimed to be due, and liquidated damages for the breach of two certain contracts for the sale by subscription of certain books which they had published. The trial resulted in a judgment for the plaintiffs for the recovery of the liquidated damages, in the sum of \$7,734.49.

There are three principal assignments of error. The first is that the court instructed the jury that the contracts were not assignable by Bancroft. From the bill of exceptions, it appears that on January 31, 1890, Bancroft, under his firm name of A. L. Bancroft & Co., wrote to Scribners, soliciting the agency of Stanley's book, "In Darkest Africa," which was about to be published. The letter sets forth in detail the qualifications of the writer's firm; alludes to the fact that that firm are not publishers, and that their whole time and attention are given to the sale of subscription books. It explains their facilities for securing the largest possible sale, and states that they are young, full of energy, and possess ample capital, and a



determination to lead all others in the sale of subscription books. It closes with these words, "If you seek a guaranty from your general agent, you can reckon us in at the top figure." In a subsequent letter Bancroft refers Scribners to Messrs. Webster for information concerning his responsibility. This reference was found satisfactory. Scribners required that the contract be made by Bancroft individually, and not in his firm name, and that he furnish them a personal letter stating whether or not he could fulfill all his engagements, and whether they could rely upon him, and whether his wife would sign the guaranty clause as surety. When the contract was finally executed, Scribners wrote Bancroft that they had signed it upon the strength of his assurances. Later in the same year a similar contract was entered into concerning the sale of another book published by Scribners. The features of the first contract that are pertinent to the question under consideration are that, by its terms, Bancroft is made the sole and exclusive agent, to solicit subscriptions, deliver books, and collect payments; that he agrees to use his best efforts to procure as many subscriptions as possible, to advertise the book thoroughly and sell by subscription only, to confine his operations exclusively to his own territory, to remit within 30 days after shipment of books a sum equal to the subscription price of all books consigned to him, to exercise a minute supervision over all canvassers, and to remit for 10,000 copies within 1 year after the complete publication of the work. The contract contains numerous specifications of the method in which Bancroft shall deal with and supervise all sub-agents and canvassers, and it provides for the execution of contracts of subscription directly between the subscribers and the publishers. Bancroft subsequently assigned his interest in both contracts to one Stuart. The terms of the assignment are not stated. The inference from the language used in the correspondence is that it was an absolute transfer, whereby Stuart took the place of Bancroft, and the latter severed his connection with the agency. Bancroft announced to Scribners that he had made a sale of his entire subscription book business. Scribners refused to recognize the transfer, or to accept Stuart in lieu of Bancroft.

From a consideration of all the correspondence, and the circumstances connected therewith, it is apparent that the contract was purely one of agency, and that it rested upon personal considerations. The agent was selected with great care. Both parties to the contract evidently believed that the success of the publication, and the extent of its sale, depended upon the experience, skill, and energy, as well as the resources and the facilities, of the general agent; that upon his integrity and responsibility depended the pecuniary profit of the investment. It was not in any sense a contract for the sale of goods. Bancroft was not a purchaser of the books. The books remained the property of the publishers until they passed into the possession of the subscribers. At no time did a title in them vest in the agent. His interest was a commission upon the subscription money,—upon the purchase price received from the subscribers. Bancroft had proceeded under the contract until June 1, 1891. At that time he was indebted to Scribners in more than

\$2,000, and he was behind in his contract to the extent of 3,000 orders. In May, Stuart had written that he was negotiating with Bancroft for the purchase of his entire subscription book department. Scribners at that time were pressing Bancroft for payment. On May 11, 1891, Stuart telegraphed them, "Before completing purchase, wish to ascertain whether you will grant extension Stanley delivery four or six months," to which he received this answer: "Our contract is with Bancroft. Might extend it six months." Two days later, Scribners wrote Bancroft, "We now beg to add that we do not know Stuart, and that we naturally look to you to complete your contract, and are anxiously awaiting your remittance and explanation." The contract with Bancroft provided for a 30-days credit to him in making his remittances. Stuart assumed that this feature of the contract was also assignable to him. He even requested that the credit time be extended to 60 days. Subsequently, indeed, and after the expiration of both the contracts, he wrote to Scribners, offering to send the money in advance, and before the shipment of the goods, if he might have satisfactory assurances that they would fill his orders promptly. But he never did, in fact, send money for any such payment in advance. In the case of a contract such as is here disclosed, it is a presumption of the law that the trust is exclusively personal, and that it cannot be transferred or delegated by the agent without his principal's consent. *Machine Co. v. Rosensteel*, 24 Fed. 583; *Warner v. Martin*, 11 How. 209; *McCormick v. Bush*, 38 Tex. 315; *Burger v. Rice*, 3 Ind. 125; *Flanders v. Lamphear*, 9 N. H. 201; *Titus v. Railroad Co.*, 46 N. J. Law, 393.

It is urged that conceding the contract of credit to have been one of confidence and trust, and therefore not assignable, so as to release Bancroft from his obligation, nevertheless he might transfer his interest to another, and thereafter sustain the relation of surety for that other. To this it may be said that the only information afforded in the bill of exceptions concerning the nature of the transfer is that it was an absolute one. There was nothing to indicate that Bancroft remained surety for Stuart, and, if he were such surety, it is impossible to see how that fact would alter the relations between Scribners and their general agent. Scribners, throughout the correspondence, refused to recognize Stuart, and they undoubtedly had the right to hold their agent to a compliance with his contract, or, in default thereof, to disregard the transfer to any other.

Error is assigned to the refusal of the court to charge, in substance, that the delegation by an agent of the authority conferred upon him may in any case be ratified by the principal, and that such ratification may be shown by words or acts, or by acts in spite of words to the contrary, or by proof of the acceptance of the benefits of the transaction concerning which the authority was delegated, and that the ratification of a part of an indivisible contract is the ratification of the whole. The only facts in the case which tended to prove ratification by Scribners of the transfer to Stuart was the fact that Scribners failed to answer certain letters which Stuart wrote them, and the fact that on October 1, 1891, they received from him a remittance of \$2,413.75, which they passed to Bancroft's credit.

Their explanation of this latter transaction, as given at the trial, was that they supposed the money to have come from Bancroft in response to demands made upon him by their attorneys in San Francisco. Soon after this money was received, however, Stuart protested against the same being placed to the credit of Bancroft's account, and he threatened Scribners with a suit for its recovery. Scribners thereupon refunded the money to Stuart. The court charged the jury fully concerning both these subjects, and submitted to it the question whether there was ratification by Scribners of the transfer and assignment to Stuart. There was no occasion to add to the charge that was given upon this branch of the case. It is complained that the instruction, as given, fell short of saying to the jury that the acts of Scribners in ratification of the transfer were more to be regarded than their words in repudiation of the same. But the charge clearly implied this. The jury had before them the evidence of the words whereby the publishers made their objection to the assignment. The court, in effect, informed them that, notwithstanding these words, they might consider the failure of Scribners to answer Stuart's letters, and they might consider the acceptance and retention of the money so sent by Stuart acts of ratification of the assignment, if they believed them to be such, under all the circumstances.

The third assignment is that the court erred in instructing the jury in regard to the contract for damages. The contracts provided that "in case of his failure to take subscriptions, make requisitions, or remit for the total number of copies herein guarantied within one year" Bancroft should pay, as liquidated damages, the contract price, less the cost to Scribners of the production, and the amount of his commissions. In other words, the parties liquidated the damages to be paid by Bancroft in case of breach of his contract, and fixed as the measure thereof the amount of the profits which would thereby be lost to the publishers. It will not be necessary in this case to enter into a consideration of the question whether this clause of the contract provides for liquidated damages, or for a penalty. The defendants in error did not rely solely upon the agreed liquidation of their damages, but upon the trial they introduced evidence of the actual damages they had sustained. They proved that, by the failure of the plaintiff in error to carry out his contract, they were left with the books upon their hands, and that the books were by that time unsalable, owing to the decline of the public interest in the Stanley expedition, and that they could not be sold at the cost of their manufacture. The plaintiff in error made no effort to rebut or contradict this evidence, and introduced no proof whatever upon the subject. Under this state of the evidence, the court would have been justified in instructing the jury that, in case they found a verdict for the plaintiffs in the action, the amount thereof should be the full extent of the damages so proven. The judgment will be affirmed, with costs to the defendants in error.

## QUINN v. DIMOND et al.

(Circuit Court of Appeals, Ninth Circuit. February 24, 1896.)

No. 247.

## 1. APPEAL—TRIAL WITHOUT JURY—SPECIAL AND GENERAL FINDINGS.

In an action involving the question whether plaintiffs were wholesale liquor dealers, within the meaning of the internal revenue laws, a trial was had to the court without a jury. The court made special findings of fact, detailing the manner in which plaintiffs, as commission merchants, had purchased liquors to fill the orders of certain foreign correspondents, and then added a general finding that, "in executing such orders in the manner already stated, the plaintiffs were not engaged in the business of wholesale liquor dealers, nor did they at any time sell or offer for sale foreign or domestic distilled spirits or wines in quantities of not less than five wine gallons at the same time." *Held*, that this was only the court's interpretation of the facts specially found, and did not preclude the appellate court from considering those facts, and determining therefrom whether the judgment was erroneous. Morrow, District Judge, dissenting.

## 2. INTERNAL REVENUE—WHO ARE WHOLESALE LIQUOR DEALERS.

Commission merchants who, at the request of foreign correspondents, occasionally purchase liquors in quantity, and take charge of shipping the same, and either charge the costs and their commissions upon their books to the account of such correspondents, or draw upon them for the full amount of the purchase price with costs and commissions, are "wholesale liquor dealers," within the meaning of Rev. St. § 3244, and liable, as such, to the special tax. Morrow, District Judge, dissenting.

In Error to the Circuit Court of the United States for the Northern District of California.

This was an action at law by W. H. Dimond and others against John C. Quinn, collector of internal revenue, to recover money paid, under protest, as an assessment under the internal revenue laws. The case was tried to the court without a jury, and the court after making findings of fact and of law, rendered judgment for plaintiffs. Defendant brings error.

H. S. Foote and Samuel Knight, for plaintiff in error.

Page & Eells and Chickering, Thomas & Gregory, for defendants in error.

Before GILBERT and ROSS, Circuit Judges, and MORROW, District Judge.

GILBERT, Circuit Judge. The defendants in error were the plaintiffs in an action brought against John C. Quinn, collector of internal revenue for the First district of California, to recover the sum of \$300, paid, under protest, upon an assessment made against them by the commissioner of internal revenue, under the internal revenue laws of the United States, upon the ground that the said plaintiffs were wholesale liquor dealers. The plaintiffs, in their complaint, set forth the transactions which were held to render them liable to the tax, and stated that, during the period for which they had been so assessed, they were commission merchants, and that, as the agents of certain principals, residing in Mexico and the states of Central America, they had purchased, from time to time, from wholesale liquor dealers in San Francisco, for shipment

to their principals, wines and liquors in quantities of not less than five gallons, as ordered by their principals, and they alleged:

"That such purchases were uniformly made at the lowest obtainable market prices for the account of such principals, and not for the account of plaintiffs; that such purchases were invoiced and charged to plaintiffs by the vendors thereof, in the ordinary course of trade, and for the sole reason that the principals of said plaintiffs were unknown to said vendors, and had no established credit with them; that the said wines and liquors, so purchased, were thereafter received, and at once shipped by plaintiffs to their foreign principals, and a usual mercantile commission charged to such principal for the services of plaintiffs in acting as purchasing agents."

It was the judgment of the circuit court that the plaintiffs were not subject to the tax.

The sole question presented on the writ of error is whether or not, under the facts, the defendants in error were wholesale liquor dealers, within the meaning of section 3244 of the Revised Statutes, which provides as follows:

"Wholesale liquor dealers shall pay \$100. Every person who sells or offers for sale foreign or domestic distilled spirits or wines, in quantities of not less than five wine gallons at the same time, shall be regarded as a wholesale liquor dealer."

Section 3242 denounces a penalty against every person who carries on the business of a rectifier, wholesale liquor dealer, etc., without having paid the special tax provided in the foregoing section. The facts as found by the trial court were, that the defendants in error—

"Did occasionally purchase, from wholesale dealers, at the request of foreign correspondents, such quantities of wine or liquor as might be specifically named in such request, in quantities frequently being not less than five wine gallons at the same time. Such orders were carried out by them as follows: On receipt thereof the plaintiffs purchased the specific amount called for by such orders from the wholesale liquor dealers, who thereupon prepared the package for shipment to the foreign country, marking the same with the foreign merchant's mark and address, as furnished by the plaintiffs. The liquor dealer thereupon delivered the package to the ship at plaintiffs' request, and obtained its receipt therefor, and delivered the same to the plaintiffs, who thereupon attended to the shipment thereof, and caused bills of lading to be issued therefor in the name of the foreign customer as consignee, provided that such customer had, at the time, sufficient funds in the plaintiffs' hands to pay the costs and charges of the same, including a commission on such purchase, hereinafter stated, or credit, the equivalent thereof with the plaintiffs. In all other cases in which plaintiffs undertook to execute the foreign order the bills of lading were taken 'to order.' The plaintiffs thereupon attached a draft by themselves upon their foreign correspondent for the amount of the consignment, charges, and said commission, and sold the draft to such bank in San Francisco as would pay the best rate for it. The amount thus realized paid for the consignment and the charges accruing thereon, including such commissions. The consignment was sometimes insured by declarations on open policies held by the foreign correspondent, and at other times by policies taken out by the plaintiffs and made payable to their order, and indorsed by them to the bank which bought the draft. On making the purchase, the plaintiffs made up an account and invoice for the foreign purchaser, charging him with the precise amount charged by the liquor dealer, including expenses of shipment and a commission of from 2½ to 5 per cent., according to the amount of the order, for their own services in executing the commission of purchase, and crediting the foreign purchaser with all discounts received. The wholesale liquor dealer from whom the purchase was made charged the plaintiffs with the amount of the purchase, and rendered his account to them,

by whom he was paid. This was done because he did not know, and would not give credit to, the foreign correspondent. The plaintiffs were not purchasers for their own use in such cases, and did not at any time claim or assert title to the purchases made under orders from the foreign correspondent. They did not carry any liquors in stock, nor would they sell liquor, or offer to obtain liquors for any person applying to them for such purpose. Except under the circumstances hereinbefore stated,—that is, upon the request of a foreign correspondent,—the plaintiffs had nothing to do with the purchase or handling of liquors."

These findings are in the nature of a special verdict, and they must control the general finding which recites that:

"In executing such orders in the manner already stated, the plaintiffs were not engaged in the business of wholesale liquor dealers, nor did they at any time sell or offer for sale foreign or domestic distilled spirits, or wines, in quantities of not less than five wine gallons at the same time."

This general and concluding finding can only be regarded as the expression of the court's interpretation of the facts previously and specially found. It does not preclude this court from considering the facts stated in the special findings, and determining whether or not, under those facts, the judgment was erroneous. It is obvious, moreover, that if there were no special findings, and if the case were now presented upon a record showing only the general finding, the court would still be required to consider the same state of facts that is contained in the special findings, for those facts are all specially pleaded in the complaint, and the defendants in error must abide by their own statement of the facts which they have declared upon in their complaint, and upon which they predicate their right to recover.

It is clear, from these facts, that the defendants in error were commission merchants, in the matter of purchasing and shipping liquors, as in other transactions. They purchased the goods in their own names, and acquired the title thereto. The vendors looked to them for payment, and could not have held the foreign correspondents therefor. So, also, in shipping the goods to the consignees, the defendants in error dealt therewith as the owners thereof. They either charged the costs and their commissions upon their books to the account of the foreign correspondents, or they drew upon them for the full amount of the purchase price, together with the costs incurred and their commission or profit in the transaction. There was no privity between the original vendor and the foreign consignee. In short, the defendants in error carried on the business of liquor dealers by going out and buying from others the goods that were needed to fill the orders that they received. They bought the goods, and sold them at a profit. One who thus buys for the purpose of filling a special order is to all intents as truly a dealer as one who carries a stock of goods for the same purpose, and it is unimportant that his profit is received in the form of a percentage upon the cost of the goods to him, or that it is called a "commission." *Slack v. Tucker & Co.*, 23 Wall. 321; *Bank v. Logan*, 74 N. Y. 568; *U. S. v. Kallstrom*, 30 Fed. 184; *U. S. v. Rose*, 28 Int. Rev. Rec. 274.

In *Slack v. Tucker & Co.* the question arose whether commission

merchants were wholesale dealers under the internal revenue act of 1864. The court said that, though the persons there seeking to avoid the tax imposed on wholesale dealers—

"Did not keep the goods at their store, and though, as sales were made, the goods, by their direction, were put up at the mill, and directed to the purchasers, yet they were sent to and received by the plaintiffs, who delivered them if the purchasers were in Boston, or shipped them if the purchasers resided elsewhere. The goods passed through their hands before the purchasers received them. They came into their possession as soon as it was necessary to enable them to fulfill their contracts of sale. In our opinion, therefore, the plaintiffs were commission merchants, and chargeable, as such, with the tax in question as 'wholesale dealers.' The difference between a factor or commission merchant and a broker is stated by all the books to be this: A factor may buy and sell in his own name, and he has the goods in his possession; while a broker, as such, cannot, ordinarily, buy or sell in his own name, and has no possession of the goods sold. The plaintiffs made the sales themselves, in their own names, at their own store, and on commission, and had possession of the goods as soon as the sales were made, and delivered or shipped them to their customers. This course of business clearly constituted them commission merchants, as contradistinguished from mere brokers or agents."

This is substantially what was done by the defendants in error, according to the allegations of their complaint, as well as the specific findings of the court below.

The defendants in error rely upon *U. S. v. Howell*, 20 Fed. 718; *U. S. v. Bonham*, 31 Fed. 808; *U. S. v. Allen*, 38 Fed. 736; and *U. S. v. Vinson*, 8 Fed. 507. In *U. S. v. Howell*, the defendant was a grocer. Upon the order of one B., who wrote him a letter requesting him to purchase for B. a barrel of whisky of a certain brand and quality, for a fixed price, and to send it to him, he purchased a barrel of whisky from a wholesale liquor dealer, and had it forwarded from the liquor dealer directly to B. This he did solely as a matter of accommodation, and he made no charge for his services. He made an entry in his books against B. for the purchase price of the whisky, and the liquor dealer charged the defendant in his books in the same amount. The court said:

"The defendant was a special agent to purchase the barrel of whisky for B., under special instructions as to the price and quality. The barrel went directly from the store of C., the liquor dealer, to B., and it was not at any time or in any way the goods of defendant."

The facts in the case differ materially from those in the case at bar. The defendants in error in the case before the court were not agents purchasing goods for others, in a single transaction, purely for accommodation, and without profit. By their course of dealing, they held themselves out to be engaged in the business of purchasing, upon special orders, liquors for foreign consignees. They paid for the goods with their own funds, and received the possession thereof. They looked to their consignees for the direct payment to them of their outlays and costs and compensation.

Nor is the decision in *U. S. v. Bonham* applicable to the case before the court. In that case it was held that, to constitute the offense of carrying on the business of a retail liquor dealer without having paid the special tax, the accused must have procured the liquor with intent to retail it, and that it was not enough

that, having the liquor on hand for his own use, he let others have it as a matter of kindness or neighborly feeling, although he took money from them for the accommodation. In *U. S. v. Allen* the defendant was engaged in procuring and furnishing, to any one who would patronize him, liquors in quantities less than five gallons. He testified that he received orders, and that he required those who made the orders to pay the cost price in advance, and upon the delivery of the liquor to pay an additional price per bottle as remuneration for his services in going into a neighboring state to procure it. It did not appear that he bought specific quantities of liquor to correspond with special orders. The court, without intimating what would be its ruling had the evidence shown that the liquors were bought in specific quantities to meet special orders, held the defendant to be a dealer within the meaning of section 3242 of the Revised Statutes, and said:

"The word 'dealer' is not confined to one who sells his own property only. If one opens out a place of business for the purpose of furnishing, to all who may patronize him, liquors, malt or spirituous, in quantities less than five gallons, he is engaged in the business of a retail liquor dealer, irrespective of the question of the manner or mode in which he acquires or procures the liquors from the manufacturers. The fact that he procures, from the manufacturer or wholesaler, the liquor in quantities, and disposes of the same for profit to any one who may call upon him, certainly makes him a dealer."

In *U. S. v. Vinson* it was held that employers who buy tobacco and deal it out to their employes at cost, charging them with its cash cost, are subject to the special tax required to be paid, under section 3244 of the Revised Statutes, by those whose business it is to sell or offer for sale manufactured tobacco. The court said:

"In construing doubtful cases of this kind, the possible consequences to the government and to individuals ought to be borne in mind. The law being one for the raising of revenue, it ought to be construed liberally in favor of the government."

The judgment is reversed, with costs to the plaintiff in error, and the cause is remanded to the court below with instructions to enter a judgment for the defendant in the action.

MORROW, District Judge (dissenting). In the title of the Revised Statutes of the United States, relating to internal revenue, special taxes are required to be paid by persons engaged in or carrying on certain specified occupations. Section 3232 provides that:

"No persons shall be engaged in or carry on any trade or business hereinafter mentioned until he has paid a special tax therefor in the manner hereinafter provided."

The fourth subdivision of section 3244, as amended by section 18 of the act of February 8, 1875, and as further amended by section 4 of the act of March 1, 1879, provides that:

"Wholesale liquor dealers shall each pay one hundred dollars. Every person who sells or offers for sale foreign or domestic distilled spirits, wines, or malt liquors, otherwise than is hereinafter provided, in quantities of not less than five wine gallons at the same time, shall be regarded as a wholesale liquor dealer."



Section 3242, as amended by section 16 of the act of February 8, 1875, provides:

"That any person who shall carry on the business of a \* \* \* wholesale liquor dealer, \* \* \* without having paid the special tax as required by law, \* \* \* shall, for every such offense, be fined," etc.

Williams, Dimond & Co. are shipping and commission merchants, doing business in San Francisco. On the 17th day of October, 1892, the commissioner of internal revenue assessed a special tax against the firm, amounting to \$200, together with a penalty of 50 per cent. amounting to \$100, making a total assessment of \$300. The assessment was made on the ground that the firm had been carrying on the business of wholesale liquor dealers during the two years ending June 30, 1893; and the question, in the circuit court, was whether, under the provisions of the Revised Statutes, the firm of Williams, Dimond & Co. had been so engaged in and carrying on the business of wholesale liquor dealers during the period mentioned. The case was tried by the court without a jury, and the findings of fact and conclusions of law were separately stated. The court found specifically, as a fact, that the defendants in error had not been engaged in the business of wholesale liquor dealers in the following findings:

"(4) The plaintiffs were not, during any portion of the term comprised in the said assessment of tax, engaged in the wholesale liquor business, nor did they carry on such business, or sell or offer for sale foreign or domestic distilled spirits or wines in quantities of less than five wine gallons at the same time, nor did they, during any portion of said time, contemplate so doing. \* \* \*

"(9) In executing such orders in the manner already stated, the plaintiffs were not engaged in the business of wholesale liquor dealers, nor did they at any time sell or offer for sale foreign or domestic distilled spirits or wines in quantities of not less than five wine gallons at the same time."

The orders, referred to in the last finding, were orders to purchase wines or liquors, received by Williams, Dimond & Co. from foreign correspondents, and executed by them, as agents or brokers, through regular wholesale liquor dealers. The court further found, in the seventh finding, that:

"The plaintiffs were not purchasers for their own use in such cases, and did not at any time claim or assert title to the purchases made under orders from the foreign correspondents. They did not carry any liquor in stock, nor would they sell liquor, or offer to obtain liquors for any person applying to them for such purpose. Except under the circumstances hereinbefore stated,—that is, upon the request of a foreign correspondent,—the plaintiffs had nothing to do with the purchase or handling of liquors."

The court found, as a conclusion of law, that the tax complained of was unlawfully assessed, and that the plaintiffs were entitled to a judgment.

Where a case is tried by the court without a jury, its findings upon questions of fact are conclusive, and this court can consider only the rulings of the lower court on matters of law, properly presented in a bill of exceptions, and the further question, where the findings are special, whether the facts found are sufficient to sustain the judgment rendered. *Tyng v. Grinnell*, 92 U. S. 467, 469; *Stanley v. Supervisors*, 121 U. S. 535, 547, 7 Sup. Ct. 1234;

Smith v. Gale, 144 U. S. 509, 525, 12 Sup. Ct. 674. The findings in this case to which I have referred are clearly sufficient to support the judgment, and, in my opinion, no inferences can be drawn from the other findings of the court, relating to the purchases made by the defendants in error as agents of foreign correspondents, that will overcome or contradict the specific findings that they did not carry on the business of selling or offering for sale foreign or domestic distilled spirits, wines, or malt liquors. But, assuming that findings Nos. 4 and 9 should be properly treated as conclusions of law, rather than as findings of fact, I am still of the opinion that the defendants in error are not within the provisions of the statute. It is alleged in the complaint, and admitted in the answer, that they were, at all times mentioned, copartners, doing business as shippers and commission merchants. They had no store or place where distilled spirits, or wines, or malt liquors were kept for sale or in stock. They did not, in the language of the statute, "engage in or carry on the business" of selling or offering for sale distilled spirits, wines, or liquors. The provision and penalty were intended to apply, in my opinion, to liquor dealers who sell as a business; that is to say, to those who distinctively engage in the business of selling and offering for sale spirits, wines, or liquors, and not to a person or firm who, while engaged in another and entirely different commercial pursuit, occasionally, and as a matter of convenience to their foreign correspondents, act as their agents or brokers in the purchase from regular dealers of wines and liquors for shipment to such foreign correspondents. In 5 Am. & Eng. Enc. Law, p. 123, a "dealer" is defined as "one who makes a business of buying and selling; he is the middleman between the producer and consumer of a commodity." A single act of buying and selling is not sufficient. *Overall v. Bezeau*, 37 Mich. 506. The mere fact that the transaction, as between the defendants in error and the foreign correspondents for whom they bought, was, practically, a purchase, and that the profit to the defendants consisted in the commission which they charged their customers for this transaction, loses its force, so far as the applicability of the section of the statute is concerned, when it is noticed that the original vendors charged the defendants with the amount of the purchase, and were paid by them, because they did not know, and would not give credit to, the foreign correspondents. In *Slack v. Tucker & Co.*, 23 Wall. 321, a firm of commission merchants sold by samples, and the sales were their own. The goods came into their possession as soon as it was necessary to fulfill these contracts of sale. The court, distinguishing between a factor who had possession of the goods and a broker who had not, held that the merchants in that case were wholesale dealers. Applying this distinction in the present case, the defendants in error would not be liable to the tax.

## ULMAN et al. v. RITTER.

(Circuit Court, D. West Virginia. March 12, 1896.)

## 1. VIOLATION OF INJUNCTION—ACTUAL NOTICE—CONTEMPT.

Actual notice of a perfected injunction is binding on the party enjoined, before actual service, and disregard of it constitutes contempt of court.

## 2. SAME—ADVICE OF COUNSEL.

The fact that the defendant's counsel advised him that an injunction was not binding on him until service of the same does not relieve him of the contempt, but may be considered by the court as a matter of mitigation, in fixing the punishment.

## 3. INJUNCTION—PREVENTION OF WASTE PENDING LITIGATION.

A court of equity will restrain the commission of waste pending litigation, and, when it is sought to protect timber standing on land in controversy, the court will preserve the status quo of the land until the end of litigation.

## 4. SAME—MODIFICATION.

A modification of an injunction will be generally refused when the order of modification would change the status quo of the property in litigation.

Rule against William L. Ritter to show cause why he should not be punished for contempt in violating an injunction.

James H. Ferguson and Couch, Flournoy & Price, for complainants.

Brown, Jackson & Knight and W. P. Rucker, for defendant.

JACKSON, District Judge. On the 22d day of July, last, Ulman & Jaeger presented their bill to me, at chambers, praying for an injunction to restrain the Elkhorn & Sandy River Land Trust from cutting and removing timber from the lands set out and described in the bill, and claimed by complainants. On the same day the injunction was allowed as prayed for; restraining the defendants, their agents and servants, from the further cutting and removing of timber from the land claimed by complainants, upon their entering into bond, with good security, to pay all damages and costs awarded against them in the event of its dissolution. The bond required was given, and notice of the injunction was served on the defendants on the 22d, 24th, and 26th days of August, 1895. To this bill the defendant Ritter was not made a party. Subsequently, on the 30th day of December, the same plaintiffs filed another bill against William L. Ritter, the defendant in this action, who claims title to the timber on 3,000 acres of land purchased from the Elkhorn & Sandy River Land Trust, the defendants in the first bill referred to in these proceedings, which land is claimed by the plaintiffs, and for recovery of which they have instituted actions of ejectment against the defendants. The usual order was allowed, restraining the defendant Ritter from cutting and removing timber from the disputed premises. Upon the 28th day of January, last, counsel for the plaintiffs moved the court for a rule against the defendant Ritter, requiring him to appear and show cause why he should not be fined and attached for the violation of the order of injunction, and filed a number of affidavits in support of said motion. The rule was awarded, whereupon the defendant,

by his counsel, appeared, waiving service of process, and pleaded not guilty, filing at the same time his answer denying the allegation that he had violated the injunction. Upon this state of the pleadings, evidence was introduced both in support of the motion to make the rule absolute, as well as to discharge the defendant.

From the evidence I find that the defendant entered into a written contract with the Elkhorn & Sandy River Land Trust on the 31st day of July, 1894, whereby he purchased, and became the claimant of, the timber on the 3,000 acres of land claimed by the plaintiffs; that, both prior to and shortly after the date of the contract, he was engaged in the cutting and removing of the timber from the disputed land. It also appears that there was more or less discussion and talk among the people of the county, and in the neighborhood of defendant's operations, as to the title of the lands from which the timber has been taken. It also appears that Iaeger had previously published and continued a notice, in a newspaper printed in the county, forbidding the cutting and removing of timber from his lands, and had also served a written notice on the defendant to the same effect, which should have had the effect of not only putting the defendant, but the public in general, upon inquiry as to his title to the lands, which was duly recorded as provided by law. It further appears that actions of ejectment have been brought by Iaeger against the Elkhorn & Sandy River Land Trust, under whom the defendant Ritter claimed. In this connection it is to be observed that these lands are chiefly, if not altogether, in a state of nature, mostly unoccupied, and known as "timber lands," and subject to the incursive depredations of parties who have little or no respect for the legal rights of the rightful owner. It is a well-known fact that the demand for timber lands in this state, within the past few years, has greatly increased, which fact has stimulated the grasping desire of dealers in them to such an extent as often boldly to appropriate what does not legally belong to them. I think I may say, without fear of successful contradiction, that this condition of things is the result of inconsiderate legislation, which has been the fruitful source of much litigation. The sales of lands, both by the sheriffs and the school commissioners, for taxes, are nearly always irregular, and their action has given rise to much litigation. It is to be greatly regretted that so many sales by the school commissioners have been attacked for fraud, and in some instances with very strong grounds on which to base the charge. It might possibly be wise legislative action if our legislature would ascertain in some way what amount of money is realized from the sale of lands by school commissioners, and what amount of funds so realized is turned into the treasury of the state, and whether any of our school commissioners, who hold the relation of public officers to our state, are guilty of speculation, either directly or indirectly, by purchase in the lands they sell.

I have departed to some extent from the consideration of the facts bearing directly on the controversy in this case, for the reason that the lands in controversy have more or less a history of the same character; hence this litigation.

Before I discuss the facts pertinent to the issue in this cause, let us determine what the law is, governing the action of courts in cases of this character. The first position of the defendant is that he was not bound to respect the injunction until he was duly served with a copy of the order, and that he was so advised by his counsel. This position is not well taken, but, even if it were, the proof in this case clearly establishes the fact that cutting was going on nearly, if not fully, 24 hours after the service of the order of injunction by the deputy marshal, who testified that he served Ritter with a copy of the order on Monday, the 13th day of January, 1896, shortly after 3 o'clock of the afternoon of that day. This is the time fixed by the marshal when actual service and notice was had. Ritter knew that John Green, one of his employés, with his force of axmen, was cutting on the left-hand fork of Elkhorn when he was served with the order; yet, without taking prompt measures to stop him, he cut timber during the entire day on the 14th, or 24 hours after the service of the order of injunction. Another witness, an employé of Ritter, proved that he cut logs on Tuesday, which were hauled to the mill and converted into lumber. The evidence of other witnesses tends to show that the cutting and removing of timber continued up to the evening of the 14th, which establishes the fact that there was a seeming indifference upon the part of the defendant in respecting the order of the court, if in fact there was not a willful violation of its order. But it is not necessary to rest the conclusion of the court upon the fact that the order of injunction was violated after the actual service of it upon the defendant. The evidence shows that the marshal was in search of Ritter on Friday, the 10th of January, to serve him with a copy of the order; that, about 3 o'clock of that day, Rucker and Hamill, the counsel of Ritter, and who were his retained attorneys, and had been for three years, read the order of injunction in the hands of the marshal. Ritter admits he heard of it the same evening; that Mr. Beevers had informed him that the marshal had it and was looking for him. It is unnecessary to notice the fact at this time that he and his counsel went to Charleston to confer with the counsel of Jaeger, which exhausted three days, during which time the order of injunction was utterly disregarded. The counsel for defendant seek to relieve him from the responsibility of his conduct in this respect, contending that knowledge thus acquired, of the existence of the injunction, had no legal and binding effect upon him. I cannot agree with them in their position, and I am unable to find, either in the text-books or adjudicated cases, any authority to sustain such a position. If such a position could be maintained, it would destroy, to a great extent, the effect of the restraining powers of courts of equity, and their usefulness would be greatly impaired. I hold the unquestioned law to be that an injunction becomes operative from the time the order was made, and effective upon the party from the time he has notice of its existence. It is a matter of no moment how the defendant acquired the information of its existence. When once he has been apprised of the fact, he is legally bound to desist from

doing what he is restrained and inhibited from doing. If this were not the rule, often great injury could be inflicted, in numberless cases, though the mandate of the court was in existence. Mr. High states the law to be "that any means of information whereby notice of the order is actually brought to the knowledge of the parties enjoined is sufficient." And this position is well sustained by the great weight of authority. A sporadic case may occasionally be found where there is an effort upon the part of the court to distinguish the case under consideration from what is accepted as being the rule of law. Cases of this character stand alone, and only rule the law in the case decided, and are, by the great weight of authority, overruled. It therefore follows from what I have said that, if the defendant Ritter became informed and was aware of the existence of the order, it was his duty at once to take the necessary steps to comply with its mandate, for the reason that it became operative upon him from the moment he acquired such information. Not to do so is a contempt of the order of the court, for which he must answer. The suggestion that the defendant was acting under the advice of counsel furnishes no excuse for his conduct, but courts, in determining the degree of any punishment they will inflict for the violation of their orders, always give weight to that fact, when they are assured that such advice was given in good faith. In view of what has been said, I reach the conclusion that orders of courts must be respected as long as they have a legal existence. No one has a right to determine for himself whether he will respect or disregard an order of court, and if he does so, of his own volition, or in pursuance of legal advice, he merely takes the law into his own hands, and must answer for his conduct, whether the order of the court was right or wrong. Having reached the conclusion that the defendant Ritter was guilty of a violation of the order of injunction issued by the court, it remains for the court to determine the degree of punishment to be inflicted for such violation of its order. I am unable to find from the facts that the defendant willfully disregarded the court's mandate, but acting under the advice of counsel, as well as making an effort to adjust the differences between him and the plaintiff Iaeger, he did not promptly take the steps he should have taken, for at least three days, to comply with the mandate of the court. Under all the circumstances of this case, I have reached the conclusion to impose only a fine of \$100, and costs; and, if not promptly paid, execution will issue at once.

In this case the defendant also asks for a modification of the order of injunction, based mainly on the ground of delay upon the part of the plaintiffs in the assertion of their rights, which he claims was equivalent to acquiescence on their part. The defendant Ritter admits that he purchased a timber right of the Elkhorn & Sandy River Land Trust on the 31st day of July, 1894. He also admits that the agent of the plaintiffs served a notice upon him July 27, 1894, four days before he executed the contract for the purchase of the timber right, which notice informed him of Iaeger's right. In addition to this there was printed in a newspaper of

general circulation in the county a notice by Iaeger warning all parties against cutting timber or committing waste upon his lands. The defendant admits that he knew of this publication, but seeks to shelter himself behind the fact that he did not know where the lines of Iaeger's survey run. In this connection, it is apparent from the evidence that the lines of these surveys was the subject of more or less discussion, not only in the neighborhood of defendant's operations, but in the county generally. It is true that Iaeger did not promptly institute legal proceedings against the defendant, who had a pocket contract with the Elkhorn & Sandy River Land Trust. This, to some extent, is accounted for by the absence of Ulman, who was a joint owner of the land with Iaeger, and who for a long time was absent from this country, in foreign lands. It appears that it was necessary to have his co-operation, arising out of the fact that there was some friction and dispute between Iaeger and Ulman as to their respective interests in the land, and that Iaeger was advised by counsel that he could not well proceed without the consent of Ulman, which, to some extent, accounts for the delay complained of in bringing suits. Ritter's contract was executed, as we have seen, on the 31st day of July, 1894. On the 18th day of July an injunction was obtained by the plaintiffs against the vendors of Ritter, their agents and assigns, to stop the commission of waste on the land in dispute. The plaintiffs allege that at the time they sued out that injunction they had no knowledge of Ritter's contract with the defendants, which was in his pocket and not recorded, and for this reason they did not make him a defendant in the first bill of injunction. This injunction was obtained less than one year after Ritter had executed his contract under which he was operating. It is fair to presume that, when Ritter's vendors were served with the injunction, they must have informed Ritter, their vendee, of that fact. On the 18th day of September, 1895, the plaintiff brought suit against the defendant and his vendor to assert his title to the lands in controversy. Can it be said that notice given to Ritter just after he commenced work on the land before his contract was executed, and with injunction served on his vendors within a year, and an action of ejectment brought against him and his vendors in a little over a year, that there was such delay as to justify the court in modifying the order of injunction? I think not. He had notice of the plaintiffs' rights at once. In fact, this notice was given before his large mill was placed on the land; for it is shown that, for some reason, he delayed for some time the placing of this mill on the disputed land, leaving it on the side track of the railroad. He knew before he placed it on the disputed land that Iaeger and Ulman claimed the land, and he was evidently waiting to determine his action after he had the notice served upon him. Such action on his part is in accord with the common history of the owners and claimants of the timber lands in our state. They pay but little, if any, attention to each other's rights. Independent of the facts to which we refer, I think there was no such unusual delay in this case—admitting there was a delay of 18 months, as claimed by the defendant—

as amounted to an acquiescence in defendant's acts. The injunction in this case is not embraced in that class of cases where orders are obtained simply for harassing and annoying the defendants. Here are actions of ejectment pending to try the title. This injunction is ancillary to that proceeding to preserve the status quo of the land in controversy. I held in the case of *King v. Buskirk*,<sup>1</sup> that an injunction for that purpose was proper; that the rights of all parties might be preserved during the litigation. This position was most vigorously contested, but it was sustained by the appellate court, and is universal law. It is laid down as law by Mr. High that, "when a state of things connected with the property touching which an injunction is sought has remained undisturbed for a long period of years," a preliminary injunction will not be granted. There is no such state of things in this case. The suits were all commenced inside of two years, and even the delay in commencing suits for that period of time is, as we have seen, accounted for. There is no such long acquiescence on the part of the plaintiffs as the law contemplates, which would justify the court in modifying the order of injunction in this case. This is a case somewhat different from the class of cases where courts modify injunctions. It is not an unusual thing for courts to modify an injunction when the order does not disturb the status of the property. But when the order modifying the original order would have that effect, as in this case, courts rarely do so.

The contention that the plaintiffs, by their silence after the notice given by them to the defendant, acquiesced in his conduct, is not supported by the facts. But suppose they relied on their notice, and took no legal steps after it was given; would they be estopped by what he presumed was an apparent acquiescence? I think not. Their title was of record in the county in which the greater portion—if not, in fact, all—of the land lies; and they had a right to presume that, after prompt notice of their claim of title, the defendant would not persist in the commission of waste without some effort on his part to fully inform himself as to the rights of the different claimants to the land in controversy. But it does not appear that he made any such effort. On the contrary, seemingly contented, and resting on his supposed rights, he ignored the notice the plaintiffs had served upon him, and continued his operations, apparently without regard to consequences. I hold that these plaintiffs have a right to preserve every tree standing on the disputed land until the court holds their title is not good as against the defendants. In contemplation of law, and for the purposes of this injunction, the land belongs to them, and every stick of timber standing on it belongs to them. I ought not to enter an order which operates to coerce these plaintiffs to sell their timber against their will, under the conditions that exist in this case. Courts may and do enforce contracts, but they never make them, between parties. To grant the motion in this case, modifying this injunction, would, in effect, be a contract between the court

<sup>1</sup> No opinion filed.



and the defendant for the sale of this timber, depriving the plaintiffs of their legal right to participate in making the contract. I cannot lend my sanction to such legal proceedings, and, for the reasons assigned, decline to modify the order of injunction heretofore made. An order will be prepared continuing the injunction until the further order of the court.

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In re CHAVEZ.

(Circuit Court, S. D. California. March 2, 1896.)

**HABEAS CORPUS—IMPRISONED CONVICT—LOCATION OF PENITENTIARY.**

The fact that a penitentiary over which the territory of Arizona claims and exercises jurisdiction is alleged to be beyond its boundary, and in the state of California, is no ground for issuing a writ of habeas corpus to release one imprisoned therein under sentence of an Arizona court. A boundary dispute cannot be created or determined in this manner, especially as territories are authorized by statute (Act June 16, 1880) to provide for maintaining their convicts in the prisons of other states or territories.

This was an application by Calvert Wilson for a writ of habeas corpus for Avaristo Chavez.

Calvert Wilson, for petitioner.

ROSS, Circuit Judge. It is provided by section 754 of the Revised Statutes of the United States that such an application "shall be made to the court, or justice, or judge authorized to issue the same, by complaint in writing, signed by the person for whose relief it is intended, setting forth the facts concerning the detention of the party restrained, in whose custody he is detained, and by virtue of what claim, or authority, if known. The facts set forth in the complaint shall be verified by the oath of the person making the application." In the petition it is stated that Chavez is unable, by reason of his imprisonment, to make the application, and that it is therefore made by the petitioner on his behalf, and by his express authority. It is provided by section 755 of the Revised Statutes that the court or justice or judge to whom an application for such a writ is presented "shall forthwith award a writ of habeas corpus, unless it appears from the petition itself that the party is not entitled thereto." Assuming that the facts stated sufficiently excuse the absence of the signature and verification of the prisoner, I am of the opinion that it appears from the petition itself that the writ should not be awarded. The petition shows upon its face that Chavez was regularly convicted in the Fourth judicial district of the territory of Arizona of a violation of section 2139 of the Revised Statutes of the United States, upon which conviction he was duly sentenced by that court to 13 months' imprisonment in "the territorial prison at Yuma, Arizona territory," and "that he pay a fine amounting to the sum of one hundred dollars, and to stand committed until the amount of said fine shall have been fully paid, or said defendant's authorized dis-

charge according to law," and "that the said [United States] marshal transport the said Avaristo Chavez to the said territorial prison, and deliver him, the said Chavez, to the keeper of said territorial prison, and that the said keeper detain the said Avaristo Chavez according to this sentence." It further appears from the petition that Thomas Gates, whom the petition alleges unlawfully restrains Chavez of his liberty, is the superintendent of the territorial prison of Arizona, at Yuma, and that that prison was established by section 2417 of the statutes of Arizona in the town of Yuma, county of Yuma, territory of Arizona, and that it is the only territorial prison of Arizona territory. The petition alleges that as a matter of fact the prison was built and stands about 500 feet outside of the Arizona boundary, and within the state of California, and that alleged fact constitutes the real ground of the alleged illegality of Chavez's imprisonment. It thus appears from the petition itself that the territory of Arizona claims and exercises jurisdiction over the ground upon which the prison is located, and no adverse claim thereto upon the part of the state of California is made to appear. I think it very clear that a dispute in respect to the true boundary between the state of California and the territory of Arizona cannot be created or determined upon a petition for a writ of habeas corpus on behalf of one duly convicted and sentenced and imprisoned by the government establishing and maintaining the prison. It will be time enough to consider whether the prison in question is, as a matter of fact, within the limits of the state of California, when that state asserts some right to it, and when the question is presented in an appropriate proceeding. Besides, it is not true that persons convicted and sentenced to imprisonment by the courts of Arizona must necessarily be imprisoned in that territory; for it is provided in paragraph 10 of the act of congress entitled "An act making appropriations for the sundry civil expenses of the government for the fiscal year ending June 30, 1881, and for other purposes," approved June 16, 1880, "that the legislative assemblies of the several territories of the United States may make such provision for the care and custody of such persons as may be convicted of crime under the laws of such territory as they shall deem proper, and for that purpose may authorize and contract for the care and custody of such convicts in any other territory or state, and provide that such person or persons may be sentenced to confinement accordingly in such other territory or state; and all existing legislative enactments of any of the territories for that purpose are hereby legalized." 1 Supp. Rev. St. p. 299. Writ denied.

## UNITED STATES v. MURPHY et al.

(Circuit Court of Appeals, Second Circuit. March 17, 1896.)

## 1. CUSTOMS DUTIES—CLASSIFICATION—WORSTED DRESS GOODS—WHEN WILSON LAW TOOK EFFECT.

The provision in the tariff act of August 27, 1894, that the reduction of duties therein made on "manufactures of wool" was not to take effect until January 1, 1895, did not apply to manufactures of worsted. Hence women's and children's dress goods of worsted imported in the meantime should have been classified under paragraph 283 of that act, and not under paragraph 395 of the act of October 1, 1890. 68 Fed. 908, affirmed.

## 2. SAME.

The act of May 9, 1890, known as the "Dingley Act," which required the secretary of the treasury to classify all worsted cloths as woolens, was not a mere administrative regulation, but an amendment to the existing tariff law (Act 1883), changing the duty on worsteds (U. S. v. Ballin, 12 Sup. Ct. 507, 144 U. S. 1), and hence was superseded by the McKinley act of October 1, 1890, which covered the entire field of wool and worsted manufactures.

This is an appeal from a decision of the circuit court, Southern district of New York (68 Fed. 908), reversing a decision of the board of general appraisers, which affirmed the action of the collector of the port of New York in the classification for customs duties of certain merchandise imported by the appellees, Alexander Murphy & Co.

Wallace Macfarlane, for the United States.

Wm. Wickham Smith, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The articles in question were entered from the steamship Waesland, August 29-30, 1894. The board of appraisers found them to be women's and children's dress goods, composed of worsted, and the correctness of that finding is conceded. The importers claimed they were dutiable under the Wilson tariff, then in force, being the act of August 27, 1894. Paragraph 283 of that act provides as follows:

"283. On women's and children's dress goods, coat linings, Italian cloth, bunting, or goods of similar description or character, and on all manufactures, composed wholly or in part of wool, worsted, the hair of the camel, goat, alpaca or other animals, \* \* \* valued at not over fifty cents per pound, forty per centum ad valorem; valued at more than fifty cents per pound, fifty per centum ad valorem."

The collector assessed them for duty under paragraph 395 of the McKinley tariff, being the act of October 1, 1890, which paragraph reads as follows:

"395. On women's and children's dress goods, coat linings, Italian cloth, bunting, and goods of similar description or character, composed wholly or in part of wool, worsted, the hair of the camel, goat, alpaca, or other animals, and not specially provided for in this act, the duty shall be twelve cents per square yard, and in addition thereto fifty per centum ad valorem."

The collector claimed to find authority for classifying these worsted dress goods under the act of 1890, instead of under the act of 1894, in paragraph 297 of the latter act, which reads as follows:

"297. The reduction of the rates of duty herein provided for manufactures of wool shall take effect January first, 1895."

On behalf of the government it is contended that the words "manufactures of wool," as used in that paragraph, are to be given the broadest construction, and to be held to include "manufactures of worsted," although it is apparent from paragraph 283, above quoted, that the framers of that act evidently understood that "manufactures of wool," "manufactures of worsted," "manufactures of camel hair," and "manufactures of goat hair," were different articles. It is unnecessary to discuss this contention. We entirely concur in the opinion of the judge who heard the case in the circuit court, which opinion will be found reported 68 Fed. 908.

An additional argument is presented here which does not seem to have been pressed upon the circuit court. On May 9, 1890, while the tariff of 1883 was in force, congress passed what is known as the "Dingley Act" (chapter 200, Laws 1890; 26 Stat. 105). It reads as follows:

"An act providing for the classification of worsted cloths as woollens.

"That the secretary of the treasury be, and he hereby is, authorized and directed to classify as woollen cloths all imports of worsted cloths, whether known under the name of worsted cloth or under the names of worsteds or diagonals or otherwise."

Counsel for the government contends that this act was intended to abrogate the old rule of construction based on commercial designations; that worsteds were thereafter to be classified as woollens; and that, therefore, it was a permanent instruction to be followed by customs officers, until expressly repealed, irrespective of whatever changes might subsequently be made in rates of duty on woollen or on worsted cloth. If the Dingley act were given the construction approved by the circuit court in the Southern district of New York in *Re Ballin*, 45 Fed. 170, there might be force in this contention. It was held in that case that this statute was purely administrative, regulating a special method of classification, to be carried out by official action of the secretary of the treasury, and with nothing on its face to indicate that it was intended to repeal or in any way alter any act imposing customs duties. If it were a mere administrative regulation, it might fairly be urged that it would remain in force until some other administrative statute prescribed some different method of classification. But the difficulty here is that this decision of the circuit court was reversed by the supreme court. *U. S. v. Ballin*, 144 U. S. 1, 12 Sup. Ct. 507. That court held that it was a self-executing act, providing for a rate of duty on worsted cloths. In other words, its effect was to amend the tariff of 1883 by inserting therein a provision for worsted cloths, laying upon such cloths the same rate of duty as that tariff prescribed for woollen cloths. Subsequently, the McKinley act, of October 1, 1890, was passed. It contains paragraphs covering the entire field of wool and worsted manufactures, including woollen cloths and worsted cloths, and, of course, superseded the earlier tariff act of 1883 and the Dingley act, which, as construed by the supreme court, was simply an amendment of that act. In *re Straus*, 46 Fed. 522; *Kent v. U. S.*, 68 Fed. 536. The Dingley act, therefore, is no longer in force.

The decision of the circuit court is affirmed.

## DADIRRIAN v. YACUBIAN et al.

(Circuit Court, N. D. Illinois. March 25, 1896.)

## TRADE-MARK—FOREIGN NAME OF ARTICLE—MATZOON.

The word "Matzoon," having been in use in Armenia for centuries to designate an article of food made of fermented milk, cannot be appropriated as a trade-mark by the manufacturer who first introduced both the name and the article into the United States. Nor, on the theory that the word has become in a special or secondary sense a mark of origin for complainant's goods, can defendants be enjoined from the use of the word on a label which, by a distinctive mark and accompanying printed explanations, plainly indicates the product bearing such label to be that of defendants and not that of complainant.

In Equity. On motion.

Suit for injunction by Margar G. Dadirrian against Meshack M. Yacubian and Elia Tekirian. Complainant moves for a preliminary injunction.

Betts, Hyde & Betts and W. B. Whitney, for complainant.

A. P. Brown and Dupee, Judah, Williard & Wolf, for defendants.

SHOWALTER, Circuit Judge. Complainant, Dr. Dadirrian, is a physician. He is a native of Cesaria, in Turkish Asia Minor, and since August, 1884, has been, and now is, a resident and citizen of this country. Commencing in 1885, he has manufactured, and from July of that year has sold in New York, Chicago, and other cities a liquid or semiliquid preparation, which from the first he has called, and named on his bottles, "Matzoon," or "Dr. Dadirrian's Matzoon." He now moves for an injunction to stop defendants—natives of Armenia, but naturalized in this country—from using the name "Matzoon" in connection with a like product manufactured and sold by them in this country from a time, it would seem, prior to 1894. In Armenia and Oriental countries other than China and Japan, a familiar and common article of food or diet is, and for centuries has been, made from sterilized and fermented milk. This product varies in consistency from a jelly to a liquid or semiliquid form; the latter being especially appropriate, also, as a diet for the sick. In Armenia the common, ancient, and familiar name of this product is a word which, by transliteration into English letters, becomes "Madzoon" or "Matzoon." In connection with the sworn pleadings and a very large number of affidavits, two books of Oriental travel, written in English, and published in this country in 1868,—one in Boston and the other in New York,—were produced at the hearing. In these books the word "Madzoon" repeatedly appears, the reference being to the article of food or diet already mentioned. As written in Armenian characters, the name which these authors thus reproduced in English letters is not intelligible to persons unacquainted with the Armenian tongue. The writers referred to either used a transliteration which had previously come under their notice, or spontaneously adopted what seemed to them the appropriate letters to indicate in English the name as sounded by the people who habitually spoke of the food product in question. It is insisted by com-

plainant that "Matzoon," as used by him, is not a transliteration—at least, not the correct transliteration—of the Armenian word. The point is not very material, but I cannot hold, on the testimony here, that "Matzoon," rather than "Madzoon," is not, under the rules which comparative philologists would apply to the case, the accurate and correct transliteration.

Complainant contends, also, that the liquid or semiliquid form of the food has a distinctive name in Turkish, and is properly called "Taan," and not "Matzoon," even in Armenia. In his older circulars, Dr. Dadirrian said:

"Fermented milk, as an article of food, and as a refreshing beverage, both for invalids and persons in health, has been known and used in Oriental countries since the earliest date. The inhabitants of these countries, during the season of intense heat, both within doors and under the sun, resort to it to allay their burning thirst, instead of using beer, soda water, and the like, and obtain great refreshment therefrom. During a practice of fifteen years in Asia Minor and Constantinople, Dr. Dadirrian found Matzoon the best adapted preparation of fermented milk to supply nourishment to the sick room. Since its introduction into this country, uniform excellence and recognized efficacy of Matzoon has gained the absolute confidence and esteem of every physician," etc. " \* \* \* As a preventive of Asiatic cholera, cholera morbus, summer complaints of infants, and all diarrheal disturbances, and as the only food in these diseases, Matzoon is used extensively in Asia and America. \* \* \* Matzoon is a fermented milk, such as is used extensively in the Orient as a refreshing beverage, and as invalids' food. \* \* \* This preparation of milk, as made in the Oriental countries, is materially different from, and believed to be greatly superior to, any other in use in this country."

The two English writers already spoken of, in their use of the word "Madzoon," refer to the liquid or semiliquid form of the article in question. The record contains other and conflicting testimony on the point. But, on the entire showing, I am hardly at liberty to hold that the preparation made and sold by Dr. Dadirrian is not in fact "Matzoon," as so called in Armenia, and familiarly and commonly made, used, and dealt in, in that and other Oriental countries.

Apart from the word "Matzoon," the device noted on complainant's label as his trade-mark is a pictorial representation of Mt. Ararat, with the ark and dove at the summit. Defendants, on their label, place above the word "Matzoon," conspicuously displayed in red, the capitals "Y" and "T" intertwined; being the initial letters of their names, Yacubian and Tekirian. They call their product "Y. T. Matzoon." In other respects their label is not an imitation of complainant's. Their right to use the word "Matzoon" is therefore the matter in controversy. They say on their label:

"Y. T. Matzoon is made from the best and purest sterilized milk. Matzoon has been in use in all parts of the Orient for thousands of years as a food for invalids, and persons in health, to allay thirst during fevers," etc. "Matzoon has the advantage over milk in being more easily digested, and because it does not curdle, and can be retained in the stomach when any other form of food would be rejected. Y. T. Matzoon and Matzoon used in the Orient are the same preparation, the additional initials denoting our brand."

Matzoon had been brought to this country, and had been made, used, and probably sold here, by Armenians resident here, long prior to 1884. But it had no currency or established place in trade in this country until Dr. Dadirrian commenced his manufacturing busi-

ness. To him is largely due the introduction of Matzoon as an article of trade in America. It is doubtless true that his success, and the currency given to this article with the trading public by him, was a condition carefully noted by these defendants, and determinative of their policy in entering the field as competitors with him in trade. It is possibly true, also, that his profits would be greater if defendants' business should be stopped, or if, being permitted to go on, they should be stopped from calling their product "Matzoon," and should be obliged to use the Turkish name, or to coin, and familiarize the trading public with, a name for the same other than "Matzoon." It may be law that whoever produces a manufactured article which is new may also coin a name for the same, and use that name as a trade symbol to indicate, as against persons who may choose to manufacture and sell a similar product, the origin of the article as made by himself, and that so long as such name continues to have the function of identifying his goods,—that is to say, until it shall have passed into the vocabulary of common speech as a generic name for goods of the same kind, and thus shall have in fact ceased to indicate the origin of goods made by said pioneer manufacturer,—a competitor cannot use such name as a mark of origin for his product. See section 220, Browne, Trade-Marks. Again, a manufacturer of an article of a class well known, and designated by a name in common use, may coin or select an arbitrary or fanciful word as a trade symbol to indicate the article as made by him. He may possibly select from a foreign language a word which, to the people who speak that language, indicates the same product, and be protected in his monopoly of said foreign word as a trade symbol for his own product. But I cannot hold, on the showing here, that this complainant originated either a manufactured product or a name. The article which he in July, 1885, commenced to manufacture and sell, was no less new and strange to the trading public in this country than was the name which belonged to it. If the thing called "Matzoon" had been old and familiar in the American markets with a name likewise old and familiar in the vocabulary of trade and custom in this country, it may be that complainant might have used the strange and unfamiliar combination of letters "Matzoon" as a mark for the goods made by himself. But no competitor could, even then, have been prevented from instructing or informing the public that the product made by himself, and all similar products, belonged to the class of goods used from time immemorial by Oriental peoples, and called in Armenia, or elsewhere in the Orient, "Matzoon." Under the circumstances supposed, the word might, perhaps, to a degree, have performed the function of a trade-mark, but its use in good faith as a medium of information concerning the food product in question could not have been inhibited.

When Dr. Dadirrian commenced business, in 1885, the liberty of importing or of making and selling Matzoon, and of calling it by its name, and of informing the trading public by advertisements or labels what Matzoon was, and of the long and familiar use which had been made of it in Eastern countries, belonged to any one. I know of no rule in the law of trade-marks or good will, nor does any way

of thinking about the subject occur to me, whereby that liberty could be taken away, or in any manner abridged, as the result of what has been done by Dr. Dadirrian. The semblance of right in him arises out of the circumstance that he, in effect, long monopolized the trade in Matzoon in this country, and out of the further circumstance that he, by his skill and industry, has, in effect, introduced Matzoon to the trading public here. As long as there was no competition, he had no need of a trade-mark; that is to say, the word "Matzoon" could not have had any function as distinguishing his goods from the goods of another. But, as will be seen from his circulars already quoted, he did not, in his relations with the trading public, even seek to use the word "Matzoon" as a trade-mark. It was more profitable, as well as more honest, for him to inform his patrons and the public that what he was offering them had stood the test of time and use among the peoples of the East. He therefore called the product by a name which the immemorial usage of a people familiar with the same had given it.

Neither, on the other hand, do these defendants, as will be seen from their label, use "Matzoon" as a mark of origin for their goods. This word, with them, is the generic name. The intertwined letters "Y. T." is their mark of origin. They had no more right to make and sell their product than to inform the public what Matzoon is, how long and how universally it has been used in the East, what are its specific virtues, and that they are making it and selling it in this country.

It is said that, because the word here in question would be entirely unrecognizable to the ordinary English-speaking person, if seen in Armenian characters, the transliteration "Matzoon" may be monopolized in this country as a trade symbol. I am cited to certain prior litigations instituted by Dr. Dadirrian, in which this view has apparently prevailed. A word is a combination of articulate sounds by which men communicate with each other. To say that the Armenian characters whereby the sound "Matzoon" is indicated are unknown to a person who does not know them is a proposition which carries with it no information. The impulses by which a word extends itself from the usage of one people to that of another, the laws of comparative philology by which a transliteration—when the elemental sounds of one language are signified by written signs unknown in the other—is explained and held to be accurate, and the arrangement of English letters which reproduce the word, are subject to the exclusive dominion of no man. In the vocabulary of a person unacquainted with the letters or characters in which any language is written, but who knows the article here in question, made from sterilized and fermented milk, as "Matzoon," that word has a place. By such person such word will be spontaneously used as a means of communication. A word must exist in speech before it can be signified in letters or characters. I am not able to see how the legal aspects of the case would be different if the name "Matzoon" were written in the same characters in Armenian as in English. A declaration by these defendants, whether written or spoken, that the article made and offered for sale by them is Matzoon, is



true, equally with the like written or spoken declaration by complainant as to the article made and offered for sale by him. Let it be assumed that these defendants are taking advantage of a popularity and knowledge of "Matzoon" on the part of the trading public which Dr. Dadirrian has been the chief instrument in bringing about; how, in view of their labels, and of the facts shown on this hearing, can it be fairly declared that they are trying to pass off or sell their product as having been manufactured by him? The strong contention is that Dr. Dadirrian introduced into this country a product which was unknown here, and by a name which was equally unknown, and that, since the name has become identified here with the article as made by him, his property in the name should be recognized. But, as already said, the product was in fact old, as was also the name. The ignorance of people in this country touching it, its uses and its name, cannot be treated as property, and be, in a manner, capitalized as an element in the good will of this complainant. This would be the case if no other dealer were permitted to tell what Matzoon is, and what a considerable portion of the human race has found it useful for, after an experience with it under that name which, according to the record, dates back some eight centuries.

In the English case, *Davis v. Stribolt*, 59 Law T. (N. S.) 854, both plaintiff and defendant were importing from Norway, and selling in England, a kind of beer made in Norway, and there known as "Boköl." Both the article and the name were new in England, and, because the name "Boköl" was unknown in that country, it was urged in that case, as in this, that plaintiff could make it the subject of exclusive appropriation as a trade symbol. But the court (Chitty, J.) said:

"If the argument were well founded, the importer into this country of any foreign article not previously known in this country could restrain any one else from using the name by which it was called in the country in which it was produced."

And also:

"The complainant's position amounts to this: that, although they cannot stop the sale of the article here, they can prevent anybody else from selling the article under its only appropriate name."

In *Canal Co. v. Clark*, 13 Wall. 311, complainant had for more than 20 years been the sole producer of coal from a certain region in Pennsylvania. This coal complainant marketed under the name "Lackawanna Coal," and by that name complainant's product was known to the trade. In course of time other and cheaper coals from the same region became known as "Pittson" and "Scranton" coals. The defendant was advertising and selling these latter coals as Lackawanna coals, and complainant sought to have him enjoined. It appeared that all coals from that region had come to be classed in statistics, and not infrequently spoken of in the trade, as "Lackawanna Coal." The injunction was denied. The supreme court of the United States said:

"The office of a trade-mark is to point out distinctively the origin or ownership of the article to which it is affixed, or, in other words, to give notice who

was the producer. \* \* \* Where rights to the exclusive use of a trade-mark are invaded, it is invariably held that the essence of the wrong consists in the sale of the goods of one manufacturer or vendor as those of another, and that it is only when this false representation is directly or indirectly made that the party who appeals to a court of equity can have relief. \* \* \* No one can claim protection for the exclusive use of a trade-mark or trade-name which would practically give him a monopoly in the sale of any goods other than those produced or made by himself. \* \* \* It is only when the adoption or imitation of what is claimed to be a trade-mark amounts to a false representation, express or implied, designed or incidental, that there is any title to relief against it. True, it may be that the use by a second producer, in describing truthfully his product, of a name or a combination of words already in use by another, may have the effect of causing the public to mistake as to the origin or ownership of the product; but if it is just as true in its application to his goods as it is to those of another who first applied it, and who therefore claims an exclusive right to use it, there is no legal or moral wrong done. Purchasers may be mistaken, but they are not deceived by false representations, and equity will not enjoin against telling the truth. We are therefore of opinion that the defendant has invaded no right to which the plaintiffs can maintain a claim. By advertising and selling coal brought from the Lackawanna Valley as 'Lackawanna Coal,' he has made no false representation, and we see no evidence that he has attempted to sell his coal as and for the coal of the plaintiffs. If the public are led into mistake, it is by the truth, not by any false pretense. If the complainants' sales are diminished, it is because they are not the only producers of Lackawanna coal, and not because of any fraud of the defendant."

In the same opinion the following is quoted with approval:

"The owner of an original trade-mark has an undoubted right to be protected in the exclusive use of all the marks, forms, or symbols that were appropriated as designating the true origin or ownership of the article or fabric to which they are affixed; but he has no right to the exclusive use of any words, letters, figures, or symbols which have no relation to the origin or ownership of the goods, but are only meant to indicate their names or quality. He has no right to appropriate a sign or a symbol which, from the nature of the fact it is used to signify, others may employ with equal truth, and therefore have an equal right to employ for the same purpose."

The last sentence is again quoted in *Corbin v. Gould*, 133 U. S. 314, 10 Sup. Ct. 312.

I understand that the showing made here differs somewhat from that made in the prior litigations wherein Dr. Dadirrian's contention has been sustained. I understand, also, that, on substantially the same state of facts as shown here, the circuit court of the United States for the district of Massachusetts denied the application of Dr. Dadirrian for an injunction. The circumstance that these defendants might have used, instead of the name "Matzoon," the Turkish name,—for complainant insists that there is a Turkish name for the product,—can hardly be construed as indicating unfair competition. These defendants are themselves Armenians, and the capital fact insisted on by them is that, whatever may be the name in Turkish or Arabic, it is "Matzoon" in Armenian. Moreover, the article is now, to some extent, known in this country, and, so far as known, it is Matzoon. That Dr. Dadirrian was instrumental in imparting this knowledge is not material. It would seem to be not only truthful and appropriate, but due to that portion of the trading public which has been made acquainted with the article as "Matzoon," that another manufacturer of the same thing should call it by that name. *Browne, Trade-Marks*, § 220. By the inter-

twined letters and the printed matter on their label these defendants clearly distinguish their product from that of complainant. If it can be said that Matzoon, being a name or descriptive word, has acquired a secondary sense as indicating the manufacture of complainant, still the label of these defendants is not a false representation—for such secondary sense is plainly excluded in their use of the word. On the present showing the application for the injunction is denied.

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THOMSON-HOUSTON ELECTRIC CO. v. KELSEY ELECTRIC RAILWAY SPECIALTY CO.

SAME v. BILLINGS & SPENCER CO.

(Circuit Court, D. Connecticut. March 2, 1896.)

Nos. 868 and 869.

1. PATENTS—CONTRIBUTORY INFRINGEMENT.

Contributory infringement is the intentional aiding of one person by another in the unlawful making or selling or using of the patented invention.

2. SAME.

It is contributory infringement to make and sell a substantial and durable element of a patented combination, not merely for purposes of repair, but with knowledge that the same will be used by others so as to infringe the patent.

These were two bills in equity brought by the Thomson-Houston Electric Company against the Kelsey Electric Railway Specialty Company and the Billings & Spencer Company, respectively, for alleged infringement of a patent. The case was heard upon complainant's motion for a preliminary injunction.

Frederick H. Betts, for complainant.

Charles R. Ingersoll and E. H. Rogers, for defendants.

TOWNSEND, District Judge. This hearing was had upon a motion for a preliminary injunction restraining defendants from infringing certain claims of patent No. 495,443, granted April 11, 1893, to the Thomson-Houston Electric Company, assignees of the administrators of Charles J. Van Depoele, the validity of which have been sustained in this court, upon final hearing, in Thomson-Houston Electric Co. v. Winchester Ave. R. Co., 71 Fed. 192. The affidavits show that the defendants, respectively, make and sell certain trolley stands, adapted to be used with the pole and wheel of the overhead, underrunning, trolley system; that they have advertised the same for sale to the general public, and have sold them to jobbers in the open market. In some instances, defendants have sold said stands to repair or replace other stands purchased from the General Electric Company, which is alleged to control this complainant; and in the case of the Norwalk Street-Railway Company, equipped by said General Electric Company and this complainant, defendants sold their trolley stands, by reason of certain advantages in their construction, to replace those of the General Electric Company. It further appears that defendants have

used a trolley pole, in connection with their stands, in their show room; and that they sold to one Hammer, representing himself to be an electrical contractor, one of said stands, equipped with a pole, harp, and wheels, which they had theretofore used in their experiments in their shop. The following facts, also shown, have a bearing upon the questions to be hereafter discussed: The entrance of defendants into the field as dealers in this class of electrical apparatus is recent, and with notice of the claims of said patent. Said trolley stands are adapted only for electric railways, and can only be used to effectuate the construction covered by the patent in suit. The advertisements thereof contained no limitation to sales for repairs, or to persons having the right to use said invention, and it may fairly be inferred from the affidavits that sales have been made to persons not having such right. The trolley stand is probably the most substantial, if not the chief, element in the patented combination. It does not appear that it wears out quickly, or breaks frequently, as do poles, wheels, and harps,—other elements in said combination.

The bill charges defendants with actual infringement and threats to infringe. Such infringement, if any, is contributory only, inasmuch as defendants only deal in a part of the patented combination. Contributory infringement has been well defined as "the intentional aiding of one person by another in the unlawful making or selling or using of the patented invention." *Howson, Contrib. Infringe. Pat. p. 1.* Counsel for defendants rightly claim that the burden of proof is on complainant to show an intention on the part of defendants to aid others in such infringement. *Coolidge v. McCone*, 1 Ban. & A. 78, Fed. Cas. No. 3,186; *Saxe v. Hammond*, 1 Ban. & A. 629, Fed. Cas. No. 12,411; *Snyder v. Bunnell*, 29 Fed. 47. The question, however, as to what evidence is sufficient to prove such intention, has been considered in several cases where the facts were somewhat similar to those herein presented. Thus, in *Wallace v. Holmes*, 9 Blatchf. 65, Fed. Cas. No. 17,100, the court said:

"The complainants having a patent for an improved burner in combination with a chimney, the defendants have manufactured extensively the burner; leaving the purchasers to supply the chimney, without which such burner is useless. They have done this for the express purpose of assisting, and making profit by assisting, in a gross infringement of the complainants' patent. They have exhibited their burner furnished with a chimney, using it in their sales rooms to recommend it to customers and prove its superiority, and therefore as a means of inducing the unlawful use of the complainants' invention."

In *Richardson v. Noyes*, 2 Ban. & A. 398, Fed. Cas. No. 11,792, it is said that the defendants

"Make only the standards for children's carriages; but it is admitted that they are made and sold to the carriage builders for the express use to which they are put,—that is, for children's carriages,—and it is not denied that this makes them, in law, infringers, if their standards, when combined with the carriages in the mode in which they are designed to be combined, infringe the patent."

To the same effect is *Renwick v. Pond*, 10 Blatchf. 39, Fed. Cas. No. 11,702, where Judge Blatchford held that the defendant would

be an infringer if he sold an arm capable of being, and designed to be, used to effect the result of the patent by the means specified in its claims. It seems to me that this case falls within the rule as stated by Judge Wallace in *Travers v. Beyer*, 26 Fed. 450, where the court said:

"Defendants cannot escape liability for infringement. They are making, and putting upon the market, an article which, of necessity, to their knowledge, is to be used for the purpose of infringing the complainant's patent. They thereby concert with those to whom they sell the blocks to invade the complainant's rights. They are intentional promoters of the ultimate act of infringement."

In this latter case the defendants were manufacturers of blocks, and not makers of the hammocks, and merely sold the blocks to dealers in hammocks, who resold the blocks with or without the hammocks, at the option of the purchasers.

Defendants further contend that the right to replace these stands was a part of the invention transferred to the purchaser when he bought the equipment. This argument might be applied to the wheels, the life of which continues only about four weeks, because, as was said by Mr. Justice Brown in *Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co.*, 152 U. S. 425, 14 Sup. Ct. 627:

"The right of the assignee to replace the cutter knives is not because they are perishable materials, but because the inventor of the machine has so arranged them, as a part of his combination, that the machine could not be continued in use without a succession of knives at short intervals. Unless they were replaced, the invention would have been of little use to the inventor or to others."

But, for reasons already shown, it would not apply to said trolley stands.

Defendants further suggest that their trolley stand is capable of a lawful as well as an unlawful use, by way of reparation or restoration of a patented device, and that the presumption must be that this is the purpose for which it is to be used. As already shown, it does not appear, by advertisements or sales, that its use is to be confined to such purpose. Inasmuch as the defendants make and thus sell stands which are useful only for the purpose of performing functions involved in the operation of the patent, it raises a presumption that they intend their stands should be so used. A suit for infringement cannot be defeated by merely showing that such devices could be used for some other purposes. *Walk. Pat. (3d Ed.) 331.*

In view of these considerations, it seems to me that the complainant has sustained the burden of proof, and that, as was said by Judge Woodruff in *Wallace v. Holmes*, *supra*, "the actual concert with others is a certain inference from the nature of the case."

It is further claimed that to enjoin the sale of a single element only of the combination would give the patent a scope not covered by its claims. But, as was said by Judge Putnam in *Davis Electrical Works v. Edison Electric Light Co.*, 8 C. C. A. 615, 60 Fed. 276:

"Nor is the course of the law to be turned aside because the practical result may be to give a patentee, for the time being, more than the patent office contemplated; nor is the patentee to be deprived of his just rights because, under some circumstances, he gets incidental advantages beyond what he expressly bargained for."

Counsel for defendants laid much stress upon the sale to said Norwalk Street-Railway Company of an improvement upon the original trolley stands, as lawful, within the reasoning of the court in *Chaffee v. Boston Belting Co.*, 22 How. 217, and other cases. In this regard, however, defendants do not seem to have met the contention of complainant that such a sale, under such circumstances, amounts to reconstruction, and not repair. *Davis Electrical Works v. Edison Electric Light Co.*, *supra*; *St. Louis Car-Coupler Co. v. Shickle, Harrison & Howard Iron Co.*, 70 Fed. 783. Here there is no such temporary relation between the trolley-stand element and the whole combination as to raise a presumption that it was the intention of the inventor that it should be frequently replaced, as in *Wilson v. Simpson*, 9 How. 109, and *Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co.*, *supra*. The case is clearly analogous to that of *St. Louis Car-Coupler Co. v. Shickle, Harrison & Howard Iron Co.*, *supra*. There defendants claimed the right to replace a knuckle,—a single substantial element of a patented combination. The court said:

"This knuckle is not an ordinary tool or piece of mechanism, which can be procured at any general hardware store, but is unique, and can be used only in connection with the balance of complainant's device. There can be no doubt, therefore, that the defendant intended to manufacture and sell the knuckle to be used in, and as forming an important and essential part of, the complainant's patented device. If the defendant can do this with impunity, it, or any other person, can certainly manufacture and sell the other less important parts, and thereby the value of complainant's monopoly will be limited to the first sales made by it. This cannot be the law."

The motion is granted.

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## THE BELLE OF THE COAST.

AIKEN et al. v. WOODWARD et al

(Circuit Court of Appeals, Fifth Circuit. February 17, 1896.)

No. 413.

### MARITIME LIENS—SUPPLIES TO DOMESTIC VESSELS—STATE STATUTES.

Where, pursuant to a written agreement with the agent of a packet company, life preservers were furnished in the home port, where all the parties resided, to vessels operated under a charter by that company, the furnishers having no knowledge as to the solvency or credit of the company, and the only inquiries made being to ascertain for what vessels the supplies were needed, *held*, that there was a lien on one of the vessels for the goods furnished and delivered to it, under the Louisiana statute giving a privilege on all vessels for supplies furnished to them. Rev. Civ. Code, art. 3237.

Appeal from the District Court of the United States for the Eastern District of Louisiana.

Geo. Denegre, for appellants.

O. B. Sansum, for appellees.

Before PARDEE and McCORMICK, Circuit Judges, and BOARMAN, District Judge.

McCORMICK, Circuit Judge. In the early summer of 1893, Capt. John F. Aiken, the owner and master of the steamboat Belle of the Coast, united with Capt. E. J. Comeaux, the master and principal owner of the steamboat Mabel Comeaux, in forming the Comeaux-Aiken Packet Company, with the purpose of running an excursion line between New Orleans and some pleasure grounds a few miles up the river from the city. The two steamboats named were chartered by the new company. One other steamer was purchased, and two others were employed for one or more trips. To equip the boats for this work, it became necessary to furnish them with a large number of life preservers, for obtaining which negotiations were opened by the new company with the appellees, Woodward, Wight & Co., Limited, resulting in the following written agreement:

"Memorandum of agreement made and entered into on this 29th day of May, A. D. 1893, by and between the firm of Woodward, Wight & Co., Limited, of the first part, and Captain E. J. Comeaux, representing the Comeaux-Aiken Packet Company, of the second part: Witnesseth, the said Woodward, Wight & Co., Limited, have agreed to rent to the said Comeaux-Aiken Packet Co. three thousand life preservers, for a period of three months, at twelve and one-half cents (12½c.) each per month. At the expiration of the above three months, should the above named Comeaux-Aiken Packet Company decide to purchase the three thousand life preservers, they are to have the same at seventy-five cents (75c.) each; the 37½c. rental each for the three months they paid to be applied to the purchase price, they only paying the balance of 37½c. each. It is further agreed that these life preservers are to be kept in the same perfect condition as when delivered to the above-named Comeaux-Aiken Packet Co.; they, the said Comeaux-Aiken Packet Co., keeping them insured for the benefit of Woodward, Wight & Co., L't'd, and assuming all responsibility or risk for loss or damage to the aforesaid three thousand life preservers. Should the Comeaux-Aiken Packet Co. decide not to keep the above-named life preservers for the period of three months, as above stipulated, they are to pay the full rental of 37½c. each, or take the life preservers at seventy-five cents (75c.) each, as above specified."

On this agreement the appellees furnished the Belle of the Coast, at different times, life preservers to the number of 1,505. There is a conflict in the testimony as to the number received by the Belle of the Coast, but the clear preponderance of the proof supports the charge in the libel as to the number furnished. The rest of the 3,000 contracted for were delivered to other boats of the Comeaux-Aiken Company line. The boats were domestic vessels, whose home port was New Orleans, where all the parties reside, and the transactions were had, but the local statute gives a privilege on all vessels for such supplies furnished the vessel. Rev. Civ. Code, art. 3237. The appellants claim that these supplies were not furnished the steamboat by the appellees, but were delivered to the Comeaux-Aiken Company, on its credit, in accordance with the contract above set out. It is claimed that the corporation then newly formed, as before stated, was amply solvent at that time; that when the bills for the life preservers were presented, and appeared to be made against the vessels, the proper officer of the corporation demanded that they should be changed, and rendered against the corporation,

which was done. The corporation became insolvent in a few months, and before making any considerable payment on the appellees' bills. As we view the proof, no part of it tends to show that Woodward, Wight & Co., Limited, had any knowledge as to the solvency and credit of the Comeaux-Aiken Packet Company at the time of the opening of the negotiations for the life preservers. The inquiries then made were clearly to ascertain for what vessels the supplies were needed. The supplies, as furnished, were charged to the vessel to which delivery was made. It was immaterial to appellees how they were afterwards distributed to or interchanged among the different packets of the line, and how the managing corporation kept its accounts with the different boats, or the form in which its vouchers from supply men were stated. We are of the opinion that the proof amply sustains the decree of the district court, and it is affirmed.

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THE HENRY CLAY.

THE LINDA.

THE UNDERWRITER.

(District Court, E. D. Pennsylvania. March 27, 1896.)

Nos. 125 and 126.

**COLLISION—STEAMER WITH TOW—NARROW CHANNEL—PRESUMPTION.**

A steamer which, while going down the Delaware river in the narrow and frequented channel near Wilmington, decided to cross from the western to the eastern side for the purpose of anchoring, and in so doing ran down the hindmost of two barges in tow of an ascending tug, *held* to have the burden of showing that she exercised great care in executing the maneuver, which was an extraordinary one; and, it appearing that she was wanting in such care, and that her lookout was negligent, *held*, that she was solely in fault, no specific fault being shown on the part of the tug or tow.

These were cross libels growing out of a collision in the Delaware river.

John G. Lamb, for the Henry Clay.

J. Parker Kirlin, for the Linda.

Henry R. Edmunds, for the Underwriter.

**BUTLER**, District Judge. As the steam tug Underwriter, with two large unloaded barges in tow, astern, (the hindmost being the Henry Clay) came up the Delaware river, off Wilmington, December 5th, last, near 4 o'clock p. m., she met the steamship Linda going down. The Linda had missed her course higher up, and gone west of the channel. A short distance above the point of meeting she resolved to go eastward across the channel, and anchor,—the western side being unsuited to the purpose. As she passed the Underwriter her course was nearly parallel to that vessel's, and at a safe distance. At or near that point however, she turned eastward, without observing either of the barges and passing very near the foremost of them, ran into the Clay, inflicting serious damage, and



sustaining some herself. The Clay libeled her and the Underwriter; and she libeled the Underwriter and Clay. Each charges the other with numerous faults. The Clay's charges against the Underwriter were not urged on the hearing; and the court was informed that they were preferred only because the "Linda" made and pressed them.

The testimony produced is contradictory,—the witnesses from the Underwriter and Clay agreeing substantially, while those from the Linda deny most of their statements. I will not discuss the evidence; but will simply state my conclusions or findings from it. I may say that I accept the statement of Robert Searson, a witness who saw the approach of the vessels and the collision, from the Wilmington wharf, as a truthful recital of the material facts. He is entirely disinterested, appears to be intelligent and reliable, is familiar with the locality and used to the water, though not a sailor. His statement agrees substantially with that of the witnesses from the Underwriter and the Clay.

Snow was falling, but not sufficient to obscure the vessels three-quarters of a mile off. Earlier in the afternoon more was falling, and the opportunity of seeing was not so good. The tide was ebb, and there was very little wind. The direct cause of the accident was the Linda's change of course across the channel, which at this point is narrow, and much frequented. The maneuver was extraordinary, and required the observance of great care. In executing it she ran the Clay down; and the burden is on her to show that she exercised such care, and that notwithstanding, the accident could not be avoided—by her. The testimony of her own witnesses considered alone, I think disproves that she exercised such care. She did not see the Underwriter, as they say, until within a length of her, nor the foremost barge until almost upon her; for which I cannot find any excuse, whatever. The weather did not prevent seeing these vessels at a safe distance; they were very large of their kind and the barges were light and high in the water, as was the tug also. Searson, from the rearward of the Linda, saw them distinctly at a distance of three-quarters of a mile. The Linda heard a whistle shortly before the collision, and heard it repeated a little later, (no doubt the Underwriter's signals, to which her witnesses testify) and paid no heed to it—supposing as her pilot says that it came from a vessel at anchor, or to her rear. From her own testimony the conclusion seems fully justifiable that her lookout was negligent, and that she was generally wanting in the care which the circumstances required. In the light of the testimony of Searson, and the witnesses from the Underwriter and Clay the conclusion is unavoidable.

Having found the Linda guilty of fault sufficient of itself to account for the collision, contributory fault should not be attributed to others without ample proof to warrant it. I do not find such proof, respecting either vessel charged. The Underwriter appears to have had a vigilant look-out, and to have seen the Linda as early as she should, and at an entirely safe distance. She properly kept her course, because, if the Linda did the same, as was to be expected,

there was no reason to apprehend danger. She gave all necessary signals, and all that are customary under similar circumstances; her tow was in plain view and she could not anticipate that it would not be seen. There is no reason to believe that other additional signals would have received more attention than those she sounded; which her pilot says were not heeded for the reason stated. The weather was not such as to forbid running at the time; other vessels were running, and the Linda herself had continued to run, to that point. I do not see any evidence that her speed was too great; I doubt whether it was greater than the Linda's; notwithstanding, with the tide against her, her command over her movements was greater than the Linda's was over hers. The make-up of the tow was not uncommon, and cannot be complained of. Had the hawsers been shorter it is not certain that the result would not have been worse.

I do not find anything to justify the charges against the Clay. She followed the tug, as was her duty, until in danger, and then sought to escape by change of course. It is probable the change was wise; if it was not, however, she is not responsible for a mistake made under such circumstances. Her charges against the Underwriter do not stand in the way of her claim to full damages from the Linda; nor are they available as evidence for the Linda against the Underwriter.

The Clay's libel must be sustained against the Linda, and dismissed as respects the Underwriter. The Linda's libel must be dismissed.

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#### GRAVES et al. v. SALINE COUNTY.

(Circuit Court of Appeals, Seventh Circuit. December 14, 1894.)

Appeal from the Circuit Court of the United States for the Southern District of Illinois.

Questions of law certified to supreme court. For decision of supreme court, see 16 Sup. Ct. 523.

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#### CENTRAL R. CO. OF NEW JERSEY v. KEEGAN.

(Circuit Court of Appeals, Second Circuit. April 26, 1894.)

Error to the District Court of the United States for the Eastern District of New York.

Questions of law certified to supreme court. For decision of the supreme court thereon, see 16 Sup. Ct. 269.